

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No: HC-MD-CIV-ACT-CON-2021/03440

In the matter between:

DEVELOPMENT BANK OF NAMIBIA

PLAINTIFF

and

**KUMWE PROFESSIONAL SERVICES AND
PRODUCTS CC**

1ST DEFENDANT

CATHERINE HELENE CUPIDO

2ND DEFENDANT

JOHN ADAM METTLER

3RD DEFENDANT

**KUMWE PROFESSIONAL SERVICES AND
PRODUCTS (PTY) LIMITED**

4TH DEFENDANT

Neutral Citation: *Development Bank of Namibia v Kumwe Professional Services and Products CC* (HC-MD-CIV-ACT-CON-2021/3440) [2023] NAHCMD 708 (7 November 2023)

Coram: MASUKU J

Heard: 17 October 2023

Delivered: 7 November 2023

Flynote: Civil Practice – Summary judgment – Rule 60 of the High Court Rules – Considerations taken into account in granting summary judgment – Whether a prayer for rectification renders particulars of claim excipiable in summary judgment applications.

Summary: The plaintiff instituted an action against the defendants jointly and severally for payment of N\$4 746 713,96, interest and costs. The plaintiff further sought orders declaring certain immovable property specially executable in terms of rule 108. The defendants defended the claim, culminating in the plaintiff moving a summary judgment application against them. It would appear that at some stage, the first defendant, Kumwe Professional Services and Products CC, was converted from a close corporation to a limited liability company, cited as the fourth defendant, namely, Kumwe Professional Services and Products (Pty) Ltd. In addition to the relief stated above, the plaintiff sought rectification of the three addenda to the agreement signed with the first defendant. The defendants submitted that the plaintiff was not entitled to summary judgment because the rectification does not fall within the purview of rule 60.

Held: Summary judgment is a stringent remedy that is granted where the plaintiff has an unanswerable case.

Held that: For a defendant to successfully avoid summary judgment, the said defendant must fully disclose the nature and grounds of its defence and the material facts on which it is based. Furthermore, the defendant must satisfy the court that on the facts so disclosed, it has a *bona fide* defence to the claim, or part thereof.

Held further that: Although rectification does fall outside the confines of rule 60, it is not, in the true sense, a claim but a procedure by which a plaintiff seeks to convey what it claims is the true agreement between or among the parties.

Held: That in the instant case, the relief sought in the rectification ie the addenda to the main agreement, did not properly record the conversion of the first defendant into a limited liability company, requires the court to make a finding whether or not the conversion did in fact take place and consequently, decide whether it was the first or the fourth defendant that must be held liable to the plaintiff. That exercise is one, which would require the adduction of oral evidence, which places the case outside the proper confines of a summary judgment application.

Summary judgment refused with costs.

ORDER

1. The plaintiff's application for summary judgment is refused.
2. The plaintiff is ordered to pay the costs of the application subject to the provisions of rule 32(11).
3. The plaintiff is ordered to pay the costs of the application for condonation of its failure to timeously file its application for summary judgment, subject to rule 32(11).
4. The parties are ordered to file a joint case plan and a proposed case planning order on or before **20 November 2023**.
5. The matter is postponed to **23 November 2023** at **08h30**, for a further case planning conference.

RULING

MASUKU J:

Introduction

[1] This is an opposed application for summary judgment. The plaintiff claims payment in the amount of N\$4 746 713,96, interest on that said

amount, at the prime rate, calculated daily and compounded monthly from date of judgment to date of payment and costs. The plaintiff further prays for an order declaring certain immovable property specially executable, in terms of rule 108 of this court's rules.

The parties

[2] The plaintiff is the Development Bank of Namibia, a public company with limited liability duly registered and incorporated in terms of the company laws of this Republic. It is also registered in terms of the Development Bank of Namibia Act 8 of 2002. Its place of business is located at No 12 Daniel Munamava Street, Windhoek, Republic of Namibia.

[3] The first defendant is Kumwe Professional Services and Products CC, a close corporation duly registered and incorporated in terms of the applicable law. Its registered address is No 4735 Hans Dietrich Genscher Street, Khomasdal, Windhoek Republic of Namibia.

[4] The third defendant is Ms Catherine Helene Cupido, an adult female with her *domicilium citandi executandi* located at Erf 380 Omeya Golf Course Estate. The third defendant is Mr John Adam Mettler, a male adult whose *domicilium citandi executandi* is recorded as Erf 61 Maansteen Road, Khomasdal, Windhoek.

[5] The fourth defendant is Kumwe Professional Services and Products (Pty) Ltd, a company allegedly registered in terms of the company legislation of Namibia. I say allegedly, for the reason that there is a denial that the said entity was properly registered.

Background

[6] The plaintiff avers that in June 2016, the second defendant, acting on behalf of the first defendant, submitted an application for a loan facility from the plaintiff. The plaintiff, duly represented by Mr Johannes Mbango,

in a written agreement duly signed by the parties, lent and advanced an amount of N\$4 601 168, which was repayable over a period of 7 years. A grace period of six months was afforded the first defendant during which it was not required to make repayments of the loan.

[7] The first defendant, in terms of the agreement provided collateral to the plaintiff as security by signing an unlimited suretyship agreement, supported by a cession of life cover to the value of the amount mentioned in the immediately preceding paragraph. The third defendant also signed an unlimited agreement of suretyship, supported by a first continuing mortgage bond of N\$1 850 000, over Erf 61 Maansteen Street, Khomasdal.

[8] It is the plaintiff's case that in or about 10 April 2019, the plaintiff and the first defendant, duly represented, entered into a written addendum to the first agreement. The outstanding loan agreement was recorded as being N\$4 848 926,16, plus interest; the term of the loan was extended to 120 months and the first defendant was granted an additional grace period of 6 months in respect of the capital, to mention but a few of the terms of the addendum. Additional collateral was provided by the first defendant, being a third continuing mortgage bond of N\$1 000 000 over Erf 61 Omeya Golf Estate, Windhoek. Two further addenda were entered into by the parties duly represented and this was on 5 November 2020. I do not find it necessary, for purposes of the issues that arise, to capture the terms of this agreement.

[9] It is the plaintiff's case that it complied with all its obligations in terms of the main agreement and also with the addenda. Correspondingly, so avers the plaintiff, the first defendant did not comply with its obligations in terms of the agreement in that it failed to pay the amounts due on time. It records that as at 31 July 2021, the first defendant was in arrears in the amount of N\$542 262,10. This breach of the agreement entitled the plaintiff to cancel the agreement, which it did.

[10] As a result of the breach of the agreement, the plaintiff claims payment of N\$4 746 713,96 from the first defendant. The plaintiff records further that

the second and third defendants on 8 June 2016, signed suretyship agreements, in terms of which they bound themselves as co-principal debtors with the first defendant for the due, proper and punctual performance by the first defendant of its obligations to the plaintiff entered into in terms of the agreement. It is the plaintiff's case that notwithstanding demand, the second and third defendants, who are married to each other in community of property, did not make good payment as undertaken in the suretyship agreements they signed.

[11] In addition to the amount claimed, the plaintiff also prays for the properties described as Erf 61 Omeya Golf Estate, Windhoek and Erf 61 Maansteen Street, Khomasdal, to be declared specially executable in terms of rule 108.

[12] After the defendants filed their notices of intention to defend the claim against them, the plaintiff filed an application for summary judgment, which is vigorously opposed by the defendants. It is to that application that I now turn, with the primary issue for decision being whether the plaintiff is, in light of the issues raised by the defendants in their opposing affidavits, entitled to the relief it seeks.

[13] In this regard, I will briefly capture the essence of the defences stated to be *bona fide* by each defendant. I will consider the law applicable to summary judgment and at the end determine whether it is, in all the circumstances, appropriate for the court to grant summary judgment as prayed.

[14] The second defendant filed an affidavit resisting summary judgment on behalf of the first and fourth defendants and on her own behalf. First, the second defendant alleges that the loan was repayable over a period of 7 years and that there were no fixed monthly instalments in the agreement, 'but rather variable instalments referenced to progress payment releases by the plaintiff. Payment of instalments, would thus be at the request of the plaintiff.'¹

¹ Para 7 of the opposing affidavit of the 1st, 2nd and 4th defendants.

[15] The said defendants claim that the plaintiff, amongst other things, seeks relief of rectification of the agreement regarding the conversion of the first defendant to the fourth defendant. This relief, it is submitted, rendered the particulars of claim excipiable as it cites the first and fourth defendants and claims that the fourth defendant breached the agreement. At the same time, it seeks to hold the first defendant liable on an alternative basis.

[16] It is the defendants' further case that the plaintiff's claim is premature and must therefor, be dismissed with costs. This is so for the reason that first defendant has a period of 98 months to repay the loan, calculated from 30 April 2021. It is the said defendants' further case that the agreement does not contain an acceleration clause which renders the full balance outstanding due in cases of default of payment of monthly instalments by the debtor.

[17] The third defendant, for his part claims that when he and the second defendant attended at the plaintiff bank to sign the unlimited surety, the plaintiff's representative did not properly inform and explain to them the consequences or impact of the signing of the unlimited suretyship agreements. Had the full impact of signing the agreement been explained to him, so says the third defendant, he would have reconsidered his position and would not have signed the said suretyship agreement. It is his case that the agreement must be declared void *ab initio* for that very reason.

[18] The third defendant further points out that it would appear that there were some irregularities in the conversion of the Kumwe Professional Services and Products CC to Kumwe Professional Services and Products (Pty) Ltd at the Business and Intellectual Property Authority ('BIPA'). It is the third defendant's case that he wishes to bring an application within the next 14 days in which he seeks the joinder of BIPA regarding the conversion of the entities mentioned above. It is his case that the outcome of that application will have a direct impact on the application for summary judgment.

[19] Regarding the rule 108 application, the third defendant avers that the property described as Erf 61 Maansteen Street, Khomasdal, constitutes the primary residence for him and his wife. They have no other place whereat they can reside should the said house be sold in execution. It is his case that he has worked all his life to secure a residence for him and his spouse where they could retire. Should the property be declared specially executable, he contends, he and his wife will be profoundly affected.

[20] Regarding the less drastic measures that are available in order to avoid the sale of the immovable property, the third respondent states that the parties can canvass an amended and restructured repayment agreement in respect of the debt. Alternatively, he submits, the plaintiff can institute a specific action to attach the second defendant's shares owned in Sanlam and Letshego Namibia.

The law applicable to summary judgment

[21] I can say without fear of contradiction that the parties were *ad idem* regarding the law applicable to summary judgment. What differs is the application of the principles to the facts of the instant case. The *locus classicus* judgment on summary judgment, is that in *Maharaj v Barclays Bank Ltd*² in which Corbett JA stated the applicable law, which has been adopted as correct in Namibia, as follows:

'Accordingly, 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 are 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 the issues or to determine whether or not the probabilities lie 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

² *Maharaj v Barclays Bank Ltd* 1976 (1) SA 418 at 426 A-D.

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 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 evidence relied upon to substantiate them, he must at least disclose his defence with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence.’

[22] It is now my solemn duty to carefully consider the affidavits filed by the defendants and to come to a decision whether they live up to the standards stated above. The question to be determined in this regard, is whether the defendants have, in their respective affidavits, deposed to a defence that is *bona fide* and good in law, either as to the whole or part of the claim. I intend to do so, starting with the third defendant.

The first, second and fourth defendants’ defence

[23] The first issue raised on behalf of the above defendants is that the particulars of claim in this matter are excipiable for the reason that the plaintiff seeks among other relief, rectification. It is contended that when regard is had to rule 60, it is only specific claims that can be pursued by summary judgment,³ namely, a claim on a liquid document; a liquidated amount in money; delivery of specified movable property and ejectment.

[24] It was urged by Mr Comalie, in a spirited address, that the application for summary judgment must, because it includes a claim for rectification, be dismissed. He laid store on *Malcomess Scania (Pty) Ltd v Vermaak and Another*,⁴ a judgment of a single Judge of the Witwatersrand Local Division. The learned judge said, ‘The plaintiff’s counsel correctly conceded that the first claim for rectification cannot be dealt with by way of summary judgment.’

³ *Ibid* p 299 E.

⁴ *Malcomess Scania (Pty) Ltd v Vermaak and Another* 1984 (1) SA 297 (W).

[25] I am, however, persuaded by the reasoning of the Supreme Court of Appeal of South Africa in *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd*.⁵ In that case, Cloete JA remarked as follows regarding the rectification in the context of a summary judgment application:

‘A prayer for rectification does indeed fall outside the provisions of rule 32. It does so not because it is a claim impliedly excluded by that rule, but because it is not, in the true sense, a claim at all. The plaintiff’s claim properly so called is for payment of arrears due in terms of a lease. In order to succeed on that claim at a trial, the plaintiff would have to allege and prove inter alia, that it leased premises to the defendant in terms of an agreement. The written agreement signed by the parties and annexed to the plaintiff’s particulars of claim refers to what the plaintiff alleges were the wrong premises. The plaintiff was therefore obliged to seek rectification of the written agreement in order to be able to lead evidence that what it alleges were the correct premises were let to the defendant – for, in the absence of a rectification, such evidence would be inadmissible both because of the parole evidence rule and the rule that no evidence may be given to alter the clear and unambiguous meaning of a written contract.’

[26] At para [4], the learned Judge of Appeal, dealing with the *Malcomess* case stated as follows:

‘I therefore with respect agree with the judgment of Coetzee J in *Malcomess Scania (Pty) Ltd v Vermaak and Another* to the extent that it holds that a plaintiff who alleges that a written contract should be rectified is confined to what the plaintiff alleges is the true agreement between the parties, and cannot (in the absence of an express indication to the contrary) rely in the alternative upon the terms of the written agreement as they stand; but I am constrained to disagree with that judgment to the extent that summary judgment is incompetent, even where both parties are *ad idem* as to the respects in which their written contract does not correctly reflect the agreement between them’.

[27] I accordingly understand the *PCL* judgment to state that the fact that a party seeks rectification does not always result in a prayer for rectification

⁵ *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68.

being held to be unavailable where summary judgment is sought. The court, as I understand, stated that where the parties are of the same view that the written agreement does not correctly reflect the agreement between or among them, then summary judgment may be applied for notwithstanding that a prayer for rectification is included. I agree with the conclusion on this aspect.

[28] This then leads me to the question - what is sought to be rectified in the instant matter? In the amended particulars of claim, the plaintiff claims rectification of the addenda dated 10 April 2019, 8 December 2019 and 21 December 2019, respectively. The plaintiff alleges that the first defendant was converted into the fourth defendant. What the plaintiff contends further is that when the addenda mentioned immediately above, were entered into, the parties failed to record the fact therein that the first defendant had been converted to a company with limited liability. As a result, the first defendant was recorded on the addendum as a close corporation when it no longer was.

[29] In its relief, as recorded in the particulars of claim, the plaintiff prays as follows, in relation to the rectification:

'WHEREFORE the Plaintiff claims against the Second Defendant, Third Defendant and Fourth Defendant (alternatively the First Defendant in the event the court finds that the First Defendant was not converted to the Fourth Defendant), jointly and severally the one paying the other to be absolved for-:'

1.1 In the event the court finds that the First Defendant was converted into the Fourth Defendant:

1.1.1. Rectification of the addendum dated 10 April 2019 by replacing "*Kumwe Professional Services and Products CC (Registration No. CC/2011/2940)*" with "*Kumwe Professional Services and Products (Pty) Ltd (Registration No. 2017/1323.*"

[30] After considering the above relief, I am of the considered view that what becomes plain, is that there is no certainty in the plaintiff's mind regarding the question whether or not the conversion of the first from a close

corporation to a company with limited liability did in fact take place. As a result, the court is placed in a position, when regard is had to the prayer sought, that it must grant judgment against the fourth defendant in the event it finds that the first defendant was converted into the fourth defendant. In the alternative, that the court must grant judgment against the first defendant in the event it finds that the first defendant was not converted into the fourth defendant.

[31] As indicated earlier, in its application for summary judgment, the applicant repeats this prayer, ie in relation to the rectification of the addenda in question. The relief is recorded word for word in the application for summary judgment as in the amended declaration.

[32] I am of the considered view that when regard is had to the prayer for rectification, it appears to me that the plaintiff, is itself not certain what the effect of the conversion alleged was. Summary judgment is a relief that is granted where a plaintiff has an unanswerable claim. Furthermore, there must be no doubt about the cogency of the plaintiff's claim. Equally, there must be no doubt regarding who the defendant liable to pay is.

[33] In the instant case, the rectification sought is not without consequence. It is not the type that was referred to in the *PCL* judgment. The court is required to grant summary judgment on an alternative basis between either the first or the fourth defendant in the event it finds that the first defendant was not converted to the fourth defendant. The question becomes, in what proceedings will the court have the opportunity to find out whether or not the conversion did or did not take place. Unfortunately, summary judgment is not designed to afford the court the time, opportunity or wherewithal, to determine which of two possible parties is liable for summary judgment.

[34] Furthermore, it would be dangerous for the court to issue judgment in a summary nature in a case where two alternative defendants are identified as being possibly liable to pay the plaintiff. The court will be required to identify the correct defendant for the purpose of granting summary judgment against

him, her or it. It might well be that evidence may have to be adduced to decide the question whether the conversion did in fact take place and if it did or did not take place, the court would then be able to identify the Kumwe entity liable to pay the amount, if proved.

[35] This very question, in my considered view, lays bare the aptness of the third defendant's contention that the issue of the conversion of the first into the fourth defendant, might be an enquiry that may be critical in this matter. By saying this, I do not have to make a finding in that regard. All I can and do say, is that in view of what I have discussed immediately above, this is not a matter that is fit to be decided in summary judgment proceedings. Evidence regarding whether the conversion in fact took place and which Kumwe entity is liable between the first and the fourth defendant, appears to loom large. The manner in which the prayer for rectification, in the manner it is couched, shows ineluctably that there are possibly two parties liable between the first and fourth defendants and this accordingly destroys the summary judgment application and renders this case unsuitable to decide the liability.

[36] That being the case, I am of the considered view that summary judgment is inappropriate and must accordingly be refused as I hereby do. The matter must be referred to trial.

[37] Relying on the *PCL* judgment cited above, I am of the considered view that what the plaintiff sought to do in the rectification, was to include the correct party as there was a *bona fide* mistake, not in the citation of the parties but in the recordal of the fourth defendant in the addendum in question.

[38] Having regard to what has been stated above, I am of the considered view that the application for summary judgment should fail. Where there is no clarity as to which Kumwe entity is liable, that fact, in my considered view, has an effect on the suretyship agreements on the basis of which the second and third defendants have been cited in the proceedings. It would accordingly be proper for the matter to be decided at a fully blown trial, in due course. Not least, is the contention by the third defendant that the conversion in question

was done in an illegal or underhand manner in his opposing affidavit. These are issues which must be determined in a fully blown trial.

Condonation application

[39] It is common cause that the plaintiff failed to file its application for summary judgment within the period stipulated by the court. As a result, the plaintiff filed an application for condonation, which was opposed on a limited basis by the second defendant. The third defendant does not appear to have opposed the application.

[40] I am of the view that the application was well motivated and the reasons for the delay were very sound and convincing. Furthermore, it became clear that there would be no prejudice to any of the parties as a result of the application for condonation being granted. The court, in exercise of its discretion, granted the application. The only outstanding question is whether the costs should be granted to the defendants in respect of the application for condonation?

[41] The general rule, is that a party, which seeks condonation in essence craves an indulgence from the court. For that reason, that party should ordinarily be liable for the costs occasioned in relation to the application for condonation. In my considered view, there is no reason proffered as to why the plaintiff, in the instant case, should not bear the costs occasioned by its application for condonation. I do not agree with the plaintiff's submission that the opposition of the second defendant was *mala fide*. The basis of her opposition, if correctly considered, is the very reason why the application for summary judgment has been refused. Her opposition has thus been vindicated.

[42] In view of the foregoing conclusion, I am of the considered view that the plaintiff is liable to pay the costs occasioned by the application for condonation, subject to the provisions of rule 32(11).

Order

[43] In view of the foregoing, I am of the considered opinion that the following order is justified in the circumstances of this case:

1. The plaintiff's application for summary judgment is refused.
2. The plaintiff is ordered to pay the costs of the application subject to the provisions of rule 32(11).
3. The plaintiff is ordered to pay the costs of the application for condonation of its failure to timeously file its application for summary judgment, subject to rule 32(11).
4. The parties are ordered to file a joint case plan and a proposed case planning order on or before **20 November 2023**.
5. The matter is postponed to **23 November 2023 at 08h30**, for a further case planning conference.

T S Masuku
Judge

APPEARANCES:

PLAINTIFF: C J van Zyl
Instructed by: Francois Erasmus, Windhoek

1st and 2nd DEFENDANTS: J Comalie
Of BD Basson Inc., Windhoek

3rd DEFENDANT: J Von Wielligh
Of Janita Von Wielligh Law Chambers,
Windhoek