

REPUBLIC OF NAMIBIA



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

<b>Case Title:</b>  Namcor Petroleum Trading and Distribution (Pty) Ltd  and  DJ Truckport Close Corporation Dan-Boy Shonena Ndjadila Julia Ainna Ndjadila	<b>Case No:</b> HC-MD-CIV-ACT-CON-2023/02714  <b>Division of Court:</b> Main Division  <b>Heard on:</b> 09 October 2023
<b>Applicant</b>	<b>1<sup>st</sup> Respondent</b>
<b>2<sup>nd</sup> Respondent</b>	<b>3<sup>rd</sup> Respondent</b>
<b>Heard before:</b> Honourable Lady Justice Rakow	<b>Delivered on:</b> 7 November 2023
<b>Neutral citation:</b> <i>Namcor Petroleum Trading and Distribution (Pty) Ltd v DJ Truckport Close Corporation</i> (HC-MD-CIV-ACT-CON-2023/02714) [2023] NAHCMD 710 (7 November 2023)	
<b>Order:</b>  1. The summary judgment application is dismissed. 2. Costs of the application to be costs in the cause. 3. The parties to file a joint status report on or before 23/11/2023. 4. The matter is postponed to 28/11/2023 for a status hearing.	
<b>Reasons for order:</b>	
RAKOW J:	

## Introduction

[1] On 13 June 2023, the plaintiff (herein the applicant), instituted action against the defendants (herein the respondents) for monies due and owing, firstly under a Retail Dealer's Agreement (RDA) in the amounts of N\$1 459 134.36 and secondly under the Fuel Supply Agreement (FSA) in the amounts of N\$146 212.02. The applicant brought an application for summary judgement in respect of the first claim only, which is the debt due and owing under the Retail Dealer's agreement.

## Background

[2] On 8 June 2020, the applicant, represented by its Managing Director and the first respondent represented by the second respondent concluded the RDA on the terms as contained in annexure A to the particulars of claim. The duration of the RDA was agreed to be 5 years, i.e. from 8 June 2020 to 8 June 2025. In terms of the RDA, the first respondent agreed to pay an amount of N\$45 000 as monthly rental fee for the applicants property; a forecourt of 8 cpl of its margin of the monthly sales volumes of all products based on throughput as well as franchise fees as agreed in terms of clause 9.9 - 9.11 of annexure A.

[3] The first respondent defaulted in the payments and the amounts became due and payable to the applicant. As at 30 September 2021, the first respondent, represented by the second respondent, acknowledged its indebtedness to the applicant in the amount of N\$315 000, in respect of the building rental which it undertook to repay in instalments of N\$52 500 per month and the invoices in respect of subsequent months as from 31 October 2021- 31 March 2022. This acknowledgement of debt is attached as annexure B to the particulars of claim.

[4] Furthermore, the first respondent, duly represented by the second respondent, signed the acknowledgement of indebtedness in the amounts of N\$231 750.22 in respect of the forecourt rental and franchise fees as at 30 September 2021 and all other subsequent invoices until November 2021. The first respondent undertook to repay this amount in monthly instalments of N\$77 250.07. Despite the acknowledgment and repayment plan, the first respondent failed to adhere to the acknowledgement of indebtedness terms under the RDA up until the month of April 2023. As of April 2023, the amount owing in respect of claim one is N\$1 459 134.36.

### Bona fide defense of the defendants.

[5] The deponent to the applicant's application for summary judgment outlines that he is the acting chief executive officer of the applicant. In support of his alleged authority to institute the application, he refers to annexure SN1. Annexure SN1 does not authorize anything. It is a resolution demonstrating that his term of office has been extended.

[6] The applicant sues for claim 1 and in this application for summary judgment, on a written agreement marked annexure A to the particulars of claim. It claims (at par 15 of the POC) that the first respondent breached annexure A in addition to also having breached the AODs (Annexes B and C) on the basis set out in sub-para 15.1 of the particulars of claim. Furthermore, the applicant seeks to hold the second and third respondents liable for the amount of N\$1 459 134.36 on the basis of clause 12 to annexes B and C. The applicant's claim, read with annexure F thereto, plainly demonstrate that applicant does not sue on the Admission of Debts. Clause 12 of the said annexes references the 'principal debt' as the variable amounts circumscribed in clauses 1 thereof. The first respondent says that the applicant unlawfully operates its fuel retail dealer license, and has evicted it from the site. Annexure D to the particulars of claim shows that the applicant operates the site as a dealer.

[7] It is alleged that no cause of action is disclosed against the second and third respondents. Further, that the claim against those two respondents is excipiable on the basis set out hereinafter. Annexure F to the particulars of claim shows that the applicant claims payment for the period, 28 February 2021 – 01 September 2022. The claim is premised upon the Retail Dealer Agreement (annexure A). It is also argued that clause 25 thereof caters for compulsory dispute resolution. The allegation is that averments necessary to sustain a cause of action against second and third respondents are absent. The applicant maintains that it was unlawfully evicted from the leased premises, unlawfully traded with its retail license, and retained its moveable items.

### Legal considerations

[8] The requirements of rule 60(5)(b) which must be satisfied for a successful opposition to a claim for summary judgment was stated as follows in the *locus classicus*, *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A by Corbett JA with regard to the previous rule 32,

dealing with summary judgment applications:

'Accordingly, one of the ways in which the 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/applicant 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 the 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 *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 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.'

### Conclusion

[9] In the current matter, the court is satisfied that the respondents introduced a possible defense and that such a defense or defenses is bona fide and good in law. For that reason, the court is dismissing the application of the applicant and will allow the respondents to proceed with the matter.

[10] In the result, I make the following order:

1. The summary judgment application is dismissed.
2. Costs of the application to be costs in the cause.
3. The parties to file a joint status report on or before 23/11/2023.
4. The matter is postponed to 28/11/2023 for a status hearing.

**Judge's signature**

**Note to the parties:**

E RAKOW Judge	Not applicable
<b>Counsel:</b>	
<b>Applicant:</b>	<b>Respondents:</b>
L N Ambunda-Nashilundo (with her C Kavitjene) Instructed by Kangueehi & Kavendjii Inc., Windhoek	J Diedricks (with him A Jantjies) Instructed by Afrika Jantjies and Associates, Windhoek