

summary judgment application.

4. The matter is postponed to **30 November 2023** at **08h30** for further directions on the further conduct of the matter.
5. The parties are ordered to file a proposed draft order regarding the further conduct of the matter, on or before **27 November 2023**.

Reasons for the order:

MASUKU, J

Introduction

[1] This is an opposed application for summary judgment. The parties shall be referred to as 'the plaintiff' and 'the defendants', respectively.

[2] The plaintiff claims payment of an amount of N\$870 000 from the defendants on the strength of an acknowledgement of debt, duly signed by the defendants on 21 September 2022, in Windhoek.

[3] In their affidavit resisting summary judgment, the defendants deny that they owe the amount claimed by the plaintiff. It is common cause that the acknowledgment of debt was for payment of N\$1 000 000, of which the plaintiff avers, a portion was paid by the defendants, resulting in the amount of N\$870 000, remaining outstanding.

[4] The defendants, as I have stated, deny the amount claimed and they state that they paid much more than the amount attributed to them by the plaintiff. In argument, they stated that they do have in their possession proof of payment, which they did not attach to their affidavit. They accordingly request the court to allow them to place such information before court. The question is, should they be allowed to do so?

[5] It must be recalled that rule 60, which governs summary judgment applications, in subrule (4), requires a defendant, who opposes the granting of a summary judgment

applications, to either furnish security to the plaintiff, which is satisfactory to the registrar or to satisfy the court by affidavit that he or she has a *bona fide* defence to the action. Such affidavit 'must disclose fully the nature and the grounds of the defence and the material facts relied on.'¹

[6] In the instant case, the defendants deny that the amount claimed is correct as they allege they in fact paid more. What they did not do, in this regard, was to file documents together with the affidavit, verifying their version that they paid more. The question is whether they should be allowed to do so at this stage, having filed the only mandatory affidavit, which should have encompassed everything, including the proof of the assertion that they paid more than the amount conceded by the plaintiff.

[7] I am alive to the fact that a defendant, in summary judgment proceedings is not entitled to a second bite at the cherry, as it were. I do, however, consider that the defendants in this matter, are not legally represented and may not have considered the critical importance of attaching the documents they claim they have in their possession, which prove their assertion of indebtedness lower than that alleged by the plaintiff.

[8] I consider that summary judgment, as has often been stated, is a stringent remedy, that will often be granted in the absence of a full trial. In the instant case, it would not be just to inveigle the defendants to their papers when as they state, they do have in their possession documents that show that they paid more money than the plaintiff claims. In my considered view, on the facts before me, it would be a just exercise of the court's discretion, to allow the defendants to file a supplementary affidavit, whose purpose must be strictly confined to attaching proof of the payments they allege they have made to the plaintiff.

[9] It must be recalled that the rules are made for the court and not the court for the rules. A possibility that the defendants may be ordered to pay an amount in excess of what they claim they are liable, should be avoided, especially considering, as I have stated, that the defendants are lay persons. There would be nothing unsavoury as the court holding the defendants to pay an amount, which may be incorrect, when an

¹ Rule 60(5)(b) (i).

opportunity to place the necessary documents, may in the court's discretion, be resorted to.

[10] It must accordingly be understood that by resorting to this measure, the court is not extending an invitation to laxity to litigants, including lay litigants, to become chary in placing relevant material before court, resting on the forlorn hope that the court's bowels of mercy may be accessed merely for the asking. This is a special case that must not be taken out of context and cited for the proposition that a defendant may be allowed to file an extra affidavit, in addition to that required in terms of rule 60(5)(b)(i).

[11] I am of the considered view that allowing the defendants, to file the supplementary affidavit would not be complete, in the circumstances, without allowing the plaintiff to file an affidavit that will be confined solely to dealing with the receipts or other proof of payment that the defendants have undertaken to file.

[12] Mr Avila, for the plaintiff, stated emphatically that his instructions were strictly to object to the defendants being granted a further opportunity to file the supplementary affidavit in the matter, as that is not contemplated by the rules. He did, however, and as an officer of the court, admit that if the court is of the view that justice calls for the defendants, in view of their being unlettered in law, to be allowed the opportunity to file, he would not be averse but would leave that matter in the hands of the court.

[13] I am of the view, regard had to the brief discussion above, that this is a proper case for the court to exercise its discretion in the defendants' favour. I will accordingly place timelines for the filing of the affidavits in the order below.

Order

[14] The order that is issued is the following:

1. The defendants are to file a supplementary affidavit confined to attaching the proof of payments they made in reduction of the amount claimed in the application for summary judgment on or before **16 November 2023**.
2. The plaintiff is ordered, if so advised, to file his affidavit in response to the

defendants' supplementary affidavit, on or before **23 November 2023**.

3. The costs of this application shall be determined together with the costs of the summary judgment application.
4. The matter is postponed to **30 November 2023** at **08h30** for further directions on the further conduct of the matter.
5. The parties are ordered to file a proposed draft order regarding the further conduct of the matter, on or before **27 November 2023**.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff R. Avila Metcalf Beukes Attorney, Windhoek	Defendants T. Mbakile A. Mbakile The defendants In Person