

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

RULING

PRACTICE DIRECTION 61

Case Title: CATERPILLAR FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD PLAINTIFF and JOTO INVESTMENTS CC DEFENDANT	Case No: HC-MD-CIV-ACT-CON-2023/04551 Division of Court: HIGH COURT (MAIN DIVISION)
Coram: HONOURABLE JUSTICE UEITELE	Date of hearing: Determined on the papers Delivered on: 18 June 2024
Neutral citation: <i>Caterpillar Financial Services South Africa Proprietary Limited v Joto Investments CC</i> (HC-MD-CIV-ACT-CON-2023/04551) [2024] NAHCMD 327 (18 June 2024)	
The order: 1. The plaintiff's cancellation of the Master Instalment Sale Agreement that it concluded with the defendant, is confirmed. 2. The defendant must, forthwith, return the Caterpillar Motor Grader 140GC, with VIN number W9200601 to the plaintiff, but in any event, not later than 7 court days from date of this order. 3. If the defendant fails to return the Caterpillar Motor Grader 140GC, with VIN number	

W9200601, as ordered in paragraph 2 of this order, then and in that event the Deputy Sheriff of any District, in which the Caterpillar Motor Grader 140GC is found, must take possession of the Caterpillar Motor Grader 140GC, with VIN number W9200601 and return it to the plaintiff at the defendant's costs.

4. The defendant must, subject to rule 32(11), pay the plaintiff's costs in the summary judgment application.
5. The matter is regarded as finalised and is removed from the roll.

REASONS FOR ORDERS

UEITELE J:

Introduction and background

[1] This is an opposed summary judgment application brought in terms of Tule 60 of the Rules of Court. The applicant is a public company with limited liability duly incorporated in accordance with the company laws of South Africa (with South Africa registration number 2017/486709/07) and the plaintiff in the main action. The respondent is a close corporation incorporated in accordance with the laws of Namibia (with registration number CC/2008/3840) and the defendant in the main action. I will, for sake of convenience, refer to the applicant as the plaintiff and the respondent as the defendant.

[2] In the particulars of claim, the plaintiff predicated its case on a written Master Instalment Sale Agreement (the agreement) that has been concluded between the plaintiff and the defendant, in terms of which the plaintiff sold to the defendant a Caterpillar Motor Grader 140GC, with VIN number W 9200601 (the Caterpillar). The purchase price of the Caterpillar was N\$3 359 000, which the defendant agreed to pay in 48 monthly instalments of N\$86 002.56.

[3] According to the plaintiff, the defendant defaulted in its contractual obligations in that it failed to pay its monthly instalments. As a result, the plaintiff avers that the defendant is in breach of the agreement and seeks, amongst others, an order confirming the termination or cancellation of

the agreement and an order directing the defendant to return the Caterpillar to the plaintiff within a period of 7 court days from date of such order, failure of which, an order directing the Deputy Sheriff to attach and return the Caterpillar to the plaintiff.

[4] A certain Hlulani Ira-Jesse Shihlomule, who alleges that he is a director of the plaintiff and that he is authorised and capable to depose to the affidavit in support of the application for summary judgment, on behalf of the plaintiff. He furthermore alleges that the facts contained in the supporting affidavit fall within his personal knowledge, except where he indicates otherwise and that the facts are to the best of his knowledge and belief both true and correct.

[5] Mr Shihlomule further deposed that he can and do swear positively to the facts verifying that the defendant is indebted to the plaintiff in the amount of N\$955 220,84 on the grounds set out in the plaintiff's summons and particulars of claim. He further makes the allegation that the defendant has no valid or *bona fide* defence to the plaintiff's claim and that the notice to defend was filed solely for the purposes of delay.

[6] Mr Jonas Amupolo deposed to the defendant's affidavit resisting the application for summary judgment. Mr Amupolo in his opposing affidavit sets out the economic hardship or change in economic circumstances that were caused by the COVID-19 pandemic. He, however, does not deny the existence of the Master Instalment Agreement nor does he deny that he breached the agreement in that he has not been making his monthly instalment repayments. He furthermore stated that if he is granted leave to defend the matter he will be able to prove that this Court does not have jurisdiction to hear the plaintiff's claim. Mr Amupolo furthermore deposes that the defendant has made several settlement offers to the plaintiff, which plaintiff refused.

[7] Before, I proceed to consider this matter I pause here to indicate, on 30 April 2024 this Court determined that it has jurisdiction to hear the plaintiff's application for summary judgment.¹ The question of the court's jurisdiction is therefore no longer a live issue which has to engage this court.

[8] I now return to consider the application before me. Rule 60 lays down the requirements that must be met in an affidavit which must accompany the notice required to be given by a plaintiff wishing to apply for summary judgment. These requirements are set out in sub-rule (2),

¹ *Caterpillar Financial Services South Africa Proprietary Limited v Joto Investments CC* (HC-MD-CIV-ACT-CON-2023/04551) [2024] NAHCMD 204 (30 April 2024).

which, as far as relevant now, read as follows:

'The plaintiff must deliver notice of the application, accompanied by an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no bona fide defence to the action and that notice of intention to defend had been delivered solely for the purpose of delay.'

[9] On an ordinary, straight-forward, grammatical interpretation of the words used here, the requirements of the affidavit consists of the following:

- (a) the affidavit must be made by the plaintiff himself or by any other person who can swear positively to the facts;
- (b) that it must be an affidavit verifying the cause of action and the amount, if any, claimed; and
- (c) that it must contain a statement by the deponent that in his or her opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay.

[10] It is now a well-established principle of our law that a Court will have to be satisfied that each of these three requirements has been fulfilled before it can hold that there is an affidavit before it which is in proper compliance with the Rule.

[11] When faced with a summary judgment application, a defendant has two options, of which the second applies in this case. In this regard, rule 60(5) provides as follows:

- (5) On the hearing of an application for summary judgment the defendant may-
- (a) where applicable give security to the plaintiff to the satisfaction of the registrar for any judgment including interest and costs; or
 - (b) satisfy the court by –
 - (i) affidavit, which must be delivered before 12h00 on the court day but one before the day on which the application is to be heard; or
 - (ii) oral evidence, given with the leave of the court, of himself or herself or of any other person

who can swear positively to the fact, that he or she has a bona fide defence to the action and the affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied on.'

[12] The question of what constitutes a sufficient defence to ward off summary judgment has been the subject-matter of many reported cases. In the often quoted case of *Maharaj v Barclays National Bank Ltd*², Corbett JA held that 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 or she has a bona fide defence to the claim. 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.'

[13] I indicated that in the present matter Mr Shihlomule, who deposed to the affidavit on behalf plaintiff, states that he is a director of the plaintiff, I therefore have no doubt that the Mr Shihlomule is a person contemplated in rule 60(2). He has also sworn positively to the facts and has verified the amount claimed by the plaintiff. I am therefore satisfied that the plaintiff has, despite assertions to the contrary by Mr Shapumba in his heads of argument, placed before Court which is in proper compliance with rule 60.

[14] In contrast, the defendant, as I have indicated, has not disclosed 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. The defendant in its affidavit resisting summary judgment do not deny its indebtedness to the plaintiff nor does it deny that it is in arrears with the instalment repayments. The defence of economic hardship or a change in economic circumstances is not a defence in law. I am therefore of the view that there is no merit in any of objections raised by the defendant.

² *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).

[15] In terms of the agreement, the parties agreed that if the defendant defaulted with the payments of the instalment, the plaintiff would be entitled to cancel the agreement, repossess the Caterpillar, and retain the payments already made by the defendant and claim damages from the defendant. Evidently, the requirement of 'delivery of a specified movable property' as set out in rule 60 (1), applies to the present case and the orders sought by the plaintiff is competent in summary judgment

[16] In the circumstances, I make the following order:

1. The plaintiff's cancellation of the Master Instalment Sale Agreement that it concluded with the defendant, is confirmed.
2. The defendant must, forthwith, return the Caterpillar Motor Grader 140GC, with VIN number W9200601 to the plaintiff, but in any event, not later than 7 court days from date of this order.
3. If the defendant fails to return the Caterpillar Motor Grader 140GC, with VIN number W9200601, as ordered in paragraph 2 of this order, then and in that event the Deputy Sheriff of any District, in which the Caterpillar Motor Grader 140GC is found, must take possession of the Caterpillar Motor Grader 140GC, with VIN number W9200601 and return it to the plaintiff at the defendant's costs.
4. The defendant must, subject to rule 32(11), pay the plaintiff's costs in the summary judgment application.
5. The matter is regarded as finalised and is removed from the roll.

Judge's signature:	Note to the parties:
	Not applicable.

Counsel:

Plaintiff	Defendant
C Maritz of Koep & Partners Windhoek	A Shapumba of Shapumba & Associates Incorporated Windhoek