

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case No: HC-MD-CIV-ACT-CON-2023/02694

In the matter between:

TIROYAONE SYDNEY MAMPANE

PLAINTIFF

and

ZIBO MBAKILE

1ST DEFENDANT

ARCHIE NGILICHI MBAKILE

2ND

DEFENDANT

Neutral Citation: *Mampane v Mbakile* (HC-MD-CIV-ACT-CON-2023/02694) [2024] NAHCMD 62 (16 February 2024)

Coram: MASUKU J

Heard: 01 February 2024

Delivered: 16 February 2024

Flynote: Civil Procedure – Summary judgment – The overriding objectives of judicial case management applied – Procedure to follow when a defendant raises a dispute of fact in summary judgment proceedings.

Summary: The defendants signed an acknowledgement of debt to the plaintiff in the amount of N\$1 000 000. The plaintiff sued them for payment of that amount, together with ancillary relief. The defendants defended the matter, prompting the plaintiff to move an application for summary judgment. The court, considering that the defendants were unlettered in law and are unrepresented, afforded them an opportunity to file a supplementary affidavit in which they sought to file proof of payment of some of the amount claimed.

Held that: Because a possibility exists that the defendants may be called upon to pay an amount in excess of what they claim is due, it is in the interests of justice that they be afforded an opportunity to file a supplementary affidavit attaching proof of payment.

Held that: The court should, in such cases, considering that the defendants are unlettered in law, adopt a procedure that is in sync with the overriding objectives of rule 1(3), and deal with the matter on the merits.

Held further that: From the affidavits filed by the parties, it is clear that there is a dispute of fact whether the defendants paid the amount of N\$250 000, which is the difference between the reduced amount claimed by the plaintiff and the amount conceded by the defendants.

The matter was referred to trial.

ORDER

1. Summary judgment is entered in the plaintiff's favour in the amount of N\$530 000, together with interest thereon at the rate of 20% *a tempore morae*, calculated from date of judgment to date of payment.
2. The issue of the defendants' liability in the amount of N\$250 000 is referred to trial.

3. In regard to para 2 above, the parties are ordered to file a joint case plan, together with a proposed case planning order, on or before 23 February 2023.
4. Costs of the summary judgment application shall be costs in the cause.
5. The matter is postponed to **28 February 2024** at **08h30**, for a case planning conference.

RULING

MASUKU J:

Introduction

[1] This ruling is a sequel to a ruling delivered in this matter. The applicant sued the defendants jointly and severally, for payment of an amount of N\$1 000 000. The basis of the claim was an acknowledgement of debt signed by the defendants, which is not denied by the defendants.

[2] As the plaintiff was entitled to, considering that the claim was for a liquidated claim, he applied for summary judgment in the reduced amount of N\$780 000. The defendants, who are self-actors and accordingly not represented, filed an answering affidavit in which they acknowledged their indebtedness in some amount. During argument, they implored the court to allow them to file proof of payments they made and which would significantly reduce the amount due to the plaintiff.

[3] Considering the fact that the defendants are acting in person and are not *au fait* with the legal processes, considered *in tandem* with the possibility that they may be ordered to pay an amount which is in excess of what they claim is due from them. This is especially the case considering that the summary nature of summary judgment proceedings does not afford the defendants the leeway to fully canvass their defence, including calling

witnesses. In order to avoid a possible injustice being served on the defendants, I took the unusual step of granting the defendants leave to file a supplementary affidavit in which they would attach proof of the payments they allege they made to the plaintiff. I considered in particular that being the defendants are unrepresented and are unlettered in law.

The defendants' supplementary affidavit

[4] In the supplementary affidavit, the defendants attached some documents and exchanges among the parties on the WhatsApp platform. There is a screen shot of what appears to be an exchange between the second defendant and the plaintiff. The second defendant alleges therein that they paid an amount of N\$250 000 to the plaintiff.

[5] In their affidavit, the defendants claim that the plaintiff was untruthful in claiming the reduced amount of N\$780 000 from them. The defendants claimed that they reimbursed the plaintiff in the amounts of N\$250 000 and N\$220 000. According to their version, the amount rightfully due to the plaintiff, is the amount of N\$530 000, which they have no qualms with the court granting in judgment against them on a summary basis.

The plaintiff's response

[6] The plaintiff takes issue with the fact that the annexures to the supplementary affidavit, have not been initialled and that the court should not have regard to them for that reason. The plaintiff however did acknowledge payment of the sum of approximately N\$100 000 up to 19 October 2021. At para 4 of his affidavit, the plaintiff says the following:

'I am unable to confirm the exact figure at this stage as the method of payments was sporadic and unorthodox. For instance, I recall a time in which the second defendant had posted a bank card for my use to withdraw funds due to myself in return of my investment. I shall deal with this aspect further in these papers.'

[7] The plaintiff further states that he denies acknowledging payment of the amount of N\$250 000 from the defendants. At para 8 and 9 of his affidavit, he states the following:

'8. I confirm that a bank card was sent to my self by the respondents to withdraw funds for the repayment of my investment. Upon receipt of this bank card, I was notified by the second respondent that a total amount of N\$200 000 had been deposited into the card's account of which I was at liberty to withdraw. When I had attempted to withdraw the funds from the card, it became apparent that the second respondent was not being truthful and an amount of not more than N\$15,000.00 was available on the card. I confirm that I withdrew an amount from the card of approximately N\$10,000.00. Due to charges I was unable to withdraw the full amount. This amount that had been withdrawn is calculated within the figure that I had stated in paragraph 3 above.

9. I deny that my message that I have receipts confirms that I had received N\$250,000.00 from the respondents. The respondents have blatantly failed to provide any proof of payment as alleged and appear to connive their way to misinterpret messages to support the unsubstantiated allegation.'

[8] Accordingly, Mr Avila, for the plaintiff, moved the court to grant judgment in the amount of N\$780 000 and submitted that the defendants have not furnished any admissible proof that they had indeed paid the amount of N\$250 000 as alleged. Mr Mbakile, for his part, submitted that the communication *inter partes*, shows that the amount of N\$250 000 was sent to the plaintiff, who now denies receipt and that the matter should accordingly go to trial to resolve the disputed amount.

[9] Having regard to the papers in this matter, it is clear that the plaintiff no longer insists on the payment of the amount recorded in the acknowledgment of debt and claimed in the combined summons. The amount was reduced to N\$780 000.

[10] As recorded above, the defendants claim that they paid an amount of N\$100 000, which does not appear to be denied by the plaintiff. The dispute, it would seem to me, surrounds the amount of N\$250 000 that the defendants claim they paid to the plaintiff and in this regard, sent a bank card for his use. The plaintiff accepts that he received information that the amount had been loaded on the card but he was unable to withdraw the said amount, save for a paltry amount of approximately N\$10 000.

[11] I intend to first deal with the issue raised by the plaintiff that the court must have no regard to the supplementary affidavit for the reason that the documents attached thereto, have not been initialled. That is eminently correct. I will do, however, for the purpose of practicality, and to move the matter forward, with limited disruption and to avoid escalating costs, overlook the mishap by the defendants. This is not, however, to be regarded as an endorsement by the court that the procedure the defendants followed is correct. I intend to deal with the real issues in dispute with minimal formality and avoiding to incur costs as far as practically possible in the circumstances and in line with rule 1(3).

[12] The defendants have admitted their indebtedness to the plaintiff in the amount of N\$530 000 which I am minded to grant as it is not a contested amount. Mr Avila insisted that the court should grant judgment in his client's favour, in the amount of N\$780 000 as the defendants have not provided any *bona fide* defence thereto. Is that the proper course in the circumstances?

[13] I am of the considered opinion, having regard to all the issues raised above and in consideration of the entire circumstances of this matter, that this is an appropriate case in which to order the defendants to pay the admitted amount of N\$530 000. Regarding the disputed amount of N\$250 000, I am of the considered view that there is a plain dispute of fact as to whether the amount was received or not. The exchanges on whatsapp and the plaintiff's own depositions on affidavit suggest that the plaintiff was informed that the amount had been loaded on a bank card that he received. Messages to that effect are included in the supplementary affidavit.

[14] In the premises, the court is not placed, considering the confined scope of summary judgment, to decide what now appears to be a dispute of fact as to whether the payment of N\$250 000 was received by the plaintiff. As stated, he acknowledges receipt of the message advising of the loading of the said amount into the bank card, which he undoubtedly received and according to his version, he used about N\$10 000 thereof.

[15] In the premises, it is not possible for the court nor appropriate, having due regard to the dispute that has arisen, to grant the plaintiff judgment in the whole amount claimed. The issue of the payment of N\$250 000, alleged by the defendants, cannot be resolved in these proceedings. I am of the considered view that the plaintiff cannot be said to have an unanswerable claim in relation to the entire amount he claims. In the premises, summary judgment must be refused and the matter referred to trial on the balance remaining after the admitted amount of N\$530 000.

Conclusion

[16] Having due regard to the analysis and conclusions reached above, I am of the considered view that the following order is appropriate:

1. Summary judgment is entered in the plaintiff's favour in the amount of N\$530 000, together with interest thereon at the rate of 20% *a tempore morae*, calculated from date of judgment to date of payment.
2. The issue of the defendants' liability in the amount of N\$250 000 is referred to trial.
3. In regard to para 2 above, the parties are ordered to file a joint case plan, together with a proposed case planning order, on or before 23 February 2023.
4. Costs of the summary judgment application shall be costs in the cause.
5. The matter is postponed to **28 February 2024** at **08h30**, for a case planning conference.

T S MASUKU

Judge

APPEARANCES

PLAINTIFF:

R Avila

Of Metcalfe, Beukes Legal Practitioners, Windhoek

DEFENDANTS:

Z Mbakile

The first defendant in person