

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case No: HC-MD-CIV-ACT-CON-2021/03376

In the matter between:

FIRST NATIONAL BANK OF NAMIBIA LIMITED

APPLICANT

and

NAMAZILA BESEL SINVULA

RESPONDENT

Neutral Citation: *First National Bank of Namibia Limited v Sinvula* (HC-MD-CIV-ACT-CON-2021/03376) [2024] NAHCMD 67 (22 February 2024)

CORAM: MASUKU J

Heard: 14 February 2024

Delivered: 22 February 2024

Flynote: Civil Procedure – Rules of Court – Summary judgment – Requisites to be satisfied by applicant – Settlement agreements – Their effect on proceedings instituted.

Summary: The applicant sued the respondent for payment of money arising from two contractual claims. The defendant entered an appearance to defend.

The matter was thereafter referred to mediation where it was settled. The parties entered into a settlement agreement in terms whereof the applicant was entitled to proceed and to apply for summary judgment in the event that the respondent failed to abide by the terms of the settlement agreement.

Held: That an applicant for summary judgment is required, amongst other things, to allege in the affidavit filed in support of summary judgment that the respondent has no *bona fide* defence to the claim and has filed the notice to defend for purposes of delay. Failure to make that necessary allegation renders the summary judgment application defective.

Held that: The clause in the agreement stating that the applicant could proceed to apply for summary judgment in the event the respondent failed to comply with the settlement agreement, was in violation of settled law to the effect that a settlement agreement brings the *lis* to an end. That clause was thus ineffectual as it sought to bring the extinguished proceedings to life yet again.

Summary judgment refused with costs.

ORDER

1. The application for summary judgment is refused.
2. The applicant is ordered to pay the respondent's costs.
3. The parties are ordered to file a status report on or before 11 March 2024, regarding how they intend to conduct the matter henceforth.
4. The matter is postponed to **14 March 2024** at **08h30** for a status hearing.

RULING

MASUKU J:Introduction

[1] Presently submitted for determination is an application for summary judgment. Because it has a rather convoluted history, it is necessary, for purposes of context, to narrate the relevant history in the succeeding paragraphs of this ruling.

The parties

[2] The applicant is First National Bank of Namibia, Limited, a financial institution duly registered as such in terms of the relevant banking legislation in Namibia. The applicant is also registered as a company, with limited liability, in terms of the company laws of Namibia. It's registered place of business is at Parkside 130, Independence Avenue, 3rd Floor, First National Bank Head Office Building, Windhoek.

[3] The respondent is Ms Namazila Besel Sinvula, an adult Namibian female, who resides in Choto Compound, Katima Mulilo.

[4] The applicant, was represented by Ms K Angula, whereas the respondent, was represented by Ms Amupolo standing in for Ms Mainga. Both counsel performed their duties to the court admirably. The court is indebted to them for their industry and assistance rendered.

Background

[5] The events giving rise to this ruling are fairly straightforward and do not appear to generate much controversy. They can be summarised in the following fashion: The applicant and the respondent entered into two written

agreements. The applicant was represented by its employees, whose names are disclosed in the succeeding paragraphs of this ruling.

[6] The first agreement, was entered into on 1 December 2015, in Katima Mulilo and in terms of which the applicant, represented by Ms Elsoline Hendricks, and the respondent in person, lent and advanced monies to the respondent on her credit card, in the amount of N\$12 460. This amount was payable in monthly instalments of N\$793, 28.

[7] The second agreement, was entered into on 31 May 2019 in Katima Mulilo. The applicant, was represented by Mr Johannes Sakaria, whereas the respondent represented herself. In terms of this agreement, the applicant advanced monies to the respondent, to the maximum of N\$102 682, 02. This amount was payable in 42 monthly instalments of N\$2 444, 81.

[8] The applicant claims that the respondent failed to live to her undertakings in relation to both agreements. As a result, it issued a combined summons claiming payment of N\$54 227,65 in relation to the first claim and an amount of N\$15 897,79, in relation to the second claim. Both amounts include a claim for interest and costs on the attorney and own client scale.

[9] The respondent, as she was entitled to, filed a notice to defend the suit. The parties thereafter filed a joint case plan, in terms of which they agreed that the matter be referred to court connected mediation. The court issued a case plan order accordingly. The matter settled at mediation, culminating in the respondent withdrawing her defence. In due course on 19 November 2021, the respondent signed the settlement agreement.

[10] Pertinent to the instant case, are the provisions of clause 3 of the said agreement. They read as follows:

'The parties agree that should the Defendant fail to pay any of the instalments payable in terms of this agreement or take any action or not comply with any terms of this agreement, the Plaintiff will be entitled to apply for application for summary

judgment against the Defendant in the event of breach for the payment of the settlement amount.'

[11] It would appear, and the applicant claims that the respondent is guilty of not complying with the terms of the agreement in that she has not paid the instalments as they fell due in terms of the agreement. In this connection, the applicant, as undertaken in the settlement agreement, moved an application for summary judgment. That is the issue serving before court, as foreshadowed above. I need to mention that the amounts claimed by the applicant, as being due from the respondent remain those recorded above in relation to the particulars of claim.

The respondent's case

[12] Ms Amupolo, for the respondent, raised a point of law *in limine*, to the effect that the application for summary judgment is irregular and must be dismissed with costs. Her contention stems from the argument that the applicant's aforesaid application, does not conform to the relevant provisions of rule 60. On this account, Ms Amupolo submits, the application must be dismissed without further ado. The issue that falls for determination this early, is to decide whether she is correct in her argument. I proceed to decide this very issue below.

Determination

[13] The relevant parts of rule 60, provide as follows regarding the application for summary judgment. I refer, in particular, to rule 60(2) below:

'The plaintiff must deliver notice of the application which must be accompanied by an affidavit made by him or her or by any other person who can swear positively to the facts

- (a) verifying the cause of action and the amount, if any, claimed; and

(b) stating 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.'

[14] Ms Amupolo cries foul and claims that the applicant's affidavit does not contain the necessary averments required in particular, by rule 60(2)(a) and (b). It is important to have regard to the affidavit filed in support of the summary judgment application, in order to decide whether there is merit to Ms Amupolo's argument.

[15] The affidavit is deposed to by Ms Zico Maasdorp, the Manager: Legal Collections and Recoveries of the applicant. In para 3, she states the following:

'I swear to the facts verifying the cause of action as set out in the Particulars of Claim to the Combined Summons dated 7 September 2021 and confirm that the Applicant has a valid claim against the Respondent in respect to the annexures "A" to "E" as per the Particulars of Claim and the prayers are set out as follows . . .'

[16] The deponent proceeds to chronicle the various events that took place between the parties, including the mediation and eventual settlement of the matter between the parties. She continues to allege that the respondent is in breach of the agreement signed by the parties and that the applicant is, in terms of the said agreement entitled to the amount claimed.

[17] In the penultimate paragraph of the said affidavit, the deponent states the following:

'4.4 It is the Applicant's view that the Respondent has no means to repay the outstanding balances owing and due to the Applicant, as the Respondent has once again fallen into default of his obligations and fails to make payment despite demand.'

[18] I should mention that the complaint by the respondent, that the necessary averments are not made by the applicant in the affidavit, are

eminently correct. In paragraph 4 of the affidavit, quoted above, Ms Maasdorp verifies the facts giving rise to the cause of action. Nowhere in the affidavit does she, as mandatorily required, state that in her opinion, the respondent does not have a *bona fide* defence and that the notice to defend was filed solely for purposes of delay.

[19] It must be emphasised that the requirements of summary judgment, considering that it is a stringent remedy that does not ordinarily permit the court to follow the ordinary procedure before granting judgment, must be followed to the letter. In this regard, the plaintiff is, in particular, required to make the necessary allegations. In this regard, the deponent to the said affidavit, must swear positively to the facts and verify the cause of action. Furthermore, the deponent must state that in his or her opinion, the defendant has filed the affidavit in order to delay the case and that he or she does not have a *bona fide* defence to the claim. These pertinent allegations are starkly missing from the affidavit filed by the applicant.

[20] Ms Amupolo referred the court to the judgment of Geier J in *Magic Builders Centre (Pty) Ltd v Fysal Fresh Produce*,¹ in which she appeared and where the learned judge remarked as follows:

[2] I was thus more than astounded not to find the customary/ standard affidavit – which I expected to find – and which is usually delivered in support of such an application – and – where it is used to be sufficient for the a plaintiff – or another person that can swear positively to the facts – to verify the cause of action and the amount claimed in the summons and particulars of claim and where the plaintiff merely had to state that in his belief/opinion the defendant had no *bona fide* defence to the action that had been instituted and that thus the notice to defend, which had been delivered, was delivered solely for the purpose of delay.

[3] In this instance the plaintiff has deposed to an affidavit which is akin to the type of affidavit which one would have expected to find in motion proceedings, where

¹ *Builders Centre (Pty) Ltd v Fysal Fresh Produce* HC-MD-CIV-ACT-CON-2020/00303 [2021] NAHCMD 49 (31 May 2021).

the affidavits constitute pleadings and evidence – and – with reference to which such application would then have to be determined.

[4] All this is highly irregular, unless the tried and tested practice has changed in the Northern Local Division of this court, which I doubt. Summary judgment proceedings are not determined with reference to the principles pertaining to the resolution of disputes in motion proceedings – i.e. where the court is to determine the outcome, on a comparison of the affidavits filed by the parties, with reference to those principles – but merely and mainly – with reference to the content of the defendant's opposing affidavits – which should disclose a *bona fide* defence and the material facts relied upon therefor, in order to determine whether or not summary judgment is to be granted or refused.'

[21] I am in unqualified agreement with the sentiments expressed by the learned judge. I wish to add in that connection, that the procedure followed in summary judgment has not changed in this division since he authored the judgment above. It must be mentioned that the practice has also not changed in the interregnum in the Northern Local Division, as these are essentially one court located in different parts of the country. They are subject to the same set of rules.

[22] The applicant's unprecedented approach has some pitfalls, especially in cases such as this, where it traverses territory not meant for summary judgment. In this regard, the plaintiff places material which is not strictly required for summary judgment and which the defendant has no opportunity to deal with, regardless of how damaging it may be to his or her case. This additional information deposed to may wittingly or unwittingly influence the court albeit wrongly, in determining whether or not summary judgment should be granted in that particular case.

[23] As I have stated previously, the rule is crafted in peremptory terms regarding the information and averments the plaintiff is required to place before court before summary judgment can be granted or refused. The provisions of rule 60(2)(a) and (b) are mandatory in that regard and they are

prescriptive as to what a plaintiff shall state in the affidavit in support of the application for summary judgment.

[24] What has been excluded by the rule may not be added by the plaintiff, even if this is to be in embellishment of its case. Had a situation been envisaged where more information was required to be placed before the court in relation to summary judgment, the rule-maker would have explicitly provided for those. The principle *unius est exclusio alterius* must always be remembered, namely, the express mention of one thing, excludes the other. As indicated, if the rule-maker wished to grant licence to a plaintiff in a summary judgment application to place additional facts than those required in subrule (2)(a) and (b), that would have been provided for in clear and unambiguous terms.

[25] In view of what I have stated and held above, I am of the considered view that this is not an appropriate case in which summary judgment should be granted. The applicant badly fractured the applicable rules beyond redemption in this case. I cannot, in view of the said fracture, grant the application. It is also rendered unnecessary that I should even consider what the respondent has stated in her defence.

[26] I should mention one issue, before closing the subject though. It is this – the settlement agreement poses problems by entitling the plaintiff to move an application for summary judgment if the respondent is in breach. I say this in the peculiar circumstances of this case, namely, that the respondent no longer any live defence to speak of that remained entered for purposes of delay. Consequently, summary judgment would not be envisaged to take place after the agreement was signed by the parties and allowed to take effect, as it did. The plausible manner of dealing with the issue may have been for the plaintiff to be entitled to judgment, which it could execute, upon satisfying the court on the exact amount outstanding at that particular time.

[27] It is perhaps opportune that I briefly deal with the effect of a settlement agreement on proceedings. I need not invent the wheel in this respect as a

lot has already been written on the subject. In *Hoff v Hoff*² Weitele J had occasion to consider the effect of a settlement agreement and he quoted quite liberally from *PL v YL*³ where the following appears:

‘The suggestion that besides legislative support the encouragement of a negotiated settlement also requires judicial support is in my view not something which is inconsistent with the policies underlying our law. The settlement of matters in dispute in litigation without recourse to adjudication is generally favoured by our law and courts. The substantive law gives encouragement to parties to settle their disputes by allowing them to enter into a contract of compromise. A compromise is placed on an equal footing with a judgement. It puts an end to a lawsuit and renders the dispute between the parties *res judicata*. It encourages the parties to resolve their disputes than to litigate. As Huber puts it:

“A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits.”

[28] In *Karson v Minister of Public Works*⁴, the following was stated on the subject:

‘It is well settled that the agreement of compromise, also known as *transactio*, is an agreement between the parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something, either by diminishing his claim or by increasing his liability . . . It is thus the very essence of a compromise that the parties thereto, by mutual assent, agree to the settlement of previously disputed or uncertain obligations...

[17] A Canadian court has considered the effect of a settlement agreement and the following was stated in *George v 1008810 Ontario Ltd* 2004 CanLii (ON LRB) in para 23:

² *Hoff v Hoff* HC-MD-CIV-ACT-CON-2018/04966) [2021] NAHCMD 555 (30 November 2018), para 30.

³ *PL v YL* 2013 (6) SA 28 (ECG) at 48D-H.

⁴ *Karston v Minister of Public Works* 1996 (1) SA 887, p 893F-H.

At common-law the effect of a settlement was to put an end to the underlying cause of action: Halsbury's Laws of England, 4th ed., vol 37, para 391:

Effect of settlement or compromise. Where the parties settle or compromise pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement between them made for good consideration. Its effects are (1) to put an end to the proceedings, for they are thereby spent and exhausted, (2) to preclude the parties from taking any further steps in the action except where they are provided for liberty to apply to enforce the agreed terms, and (3) to supersede the original cause of action altogether. A judgment or order made by consent is binding unless and until it has been set aside in proceedings instituted for that purpose and it acts, moreover, as an estoppel by record.'

[29] In our jurisdiction, it is plain that settlement agreements form an integral part of the judicial case management system and they are ingrained therein. It is for that reason that in terms of the rules and the practice directives, certain cases must perforce, be submitted to mediation. The instant case is one of those and it is clear that it settled at mediation. Settlement of disputes is a practice that is encouraged as it frees the court's resources and time in order to enable it to deal with other disputed matters. It also serves to unclog the court's roll.

[30] That said, it becomes clear that clause 3 of the settlement agreement goes against the very grain and essence of settlement for the reason that it allowed the applicant, in the event that the respondent did not comply with her undertakings in the agreement, to revert and apply for summary judgment under the settled dispute. Strictly speaking, summary judgment is not available to the plaintiff in this case, even if the respondent does not comply with her undertakings. This is so because the settlement agreement puts the underlying cause action to an end. The plaintiff should, in the premises, seek advice as to what it should do, in the light of the settlement agreement, in order to enable it to enforce the settlement agreement.

Costs

[31] Turning to the issue of costs, the applicable law is fairly settled. Costs should generally follow the event. In the instant case, there is nothing that was submitted or apparent from the record, that would suggest that a departure from that beaten track is necessary. Costs will accordingly follow the event.

Conclusion

[32] In the premises, and based on the reasons stated above, I am of the considered view that the application for summary judgment ought to be dismissed. The applicant failed to follow what are salutary requirements that may entitle a plaintiff to be granted summary judgment at the end of the day. With those glaring omissions in this case, the applicant's case cannot be said to have left the starting blocks. In any event, the applicant, as shown above, does not have the right to revive the cause of action after the compromise.

Order

[33] In view of the conclusion reached above, I am of the considered view that the following order is merited:

1. The application for summary judgment is refused.
2. The applicant is ordered to pay the respondent's costs.
3. The parties are ordered to file a status report on or before 11 March 2024, regarding how they intend to conduct the matter henceforth.
4. The matter is postponed to **14 March 2024** at **08h30** for a status hearing.

T S MASUKU
Judge

APPEARANCES

APPLICANT: K Angula
Of AngulaCo, Windhoek

RESPONDENT: M Amupolo
Instructed by: Inonge Mainga Attorneys, Windhoek