REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON SUMMARY JUDGMENT APPLICATION

Case Title: WELBERT OCKHUIZEN 1st PLAINTIFF WELBERT OCKHUIZEN N.O. 2nd PLAINTIFF and SHAMROCK HOLDINGS (PTY) LTD DEFENDANT	**Case No:** HC-MD-CIV-ACT-CON-2023/03902
Heard before: Honourable Justice Sibeya	**Division of Court:** High Court (Main Division)
	Heard on: 12 February 2024 **Delivered on:** 4 March 2024
Neutral citation: *Ockhuizen v Shamrock Holdings (Pty) Ltd* (HC-MD-CIV-ACT-CON-2023/03902) [2024] NAHCMD 80 (4 March 2024)	
The order: 1. The summary judgment application is refused. 2. The plaintiffs must pay the defendant's costs of the application on a party-party scale, including the costs of one instructing and one instructed legal practitioner, subject to rule 32(11).	

3. The parties must file a joint case plan on or before 11 March 2024, for the further filing of pleadings.
4. The matter is postponed to 14 March 2024 at 08:30 for a Case Planning Conference hearing.

SIBEYA J

Introduction

[1] Presently submitted to this court for determination is an opposed application for summary judgment. The question primarily requiring the court's answer is whether or not the plaintiffs made out a case for the relief sought.

[2] The defendant defended the action and opposed the application for summary judgment. The defendant then filed an affidavit in opposition of the application for summary judgment. It is the propriety of this application that the court is called upon to determine.

Representation

[3] Mr Lochner appears for the plaintiffs while Mr Boesak appears for the defendant.

The relief sought

[4] The plaintiff, in the main action, sought the following orders:

'1. Payment in the amount of N$1,700,000.00.

2. An order directing the Defendant to pay interest as follows:

(a) At the rate of 20% per annum on the amount of N$2.8 million calculated from 30

November 2020 until 21 December 2020.

(b) At the rate of 20% per annum on the amount of N$2.7 million calculated from 22 December 2020 until 27 December 2020.

(c) At the rate of 20% per annum on the amount of N$2.6 million calculated from 28 December 2020 until 1 March 2021.

(d) At the rate of 20% per annum on the amount of N$2.4 million calculated from 2 March 2021 until 8 April 2021.

(e) At the rate of 20% per annum on the amount of N$2.2 million calculated from 9 April 2021 until 6 May 2021.

(f) At the rate of 20% per annum on the amount of N$2.05 million calculated from 7 May 2021 until 10 August 2021.

(g) At the rate of 20% per annum on the amount of N$1.9 million calculated from 11 August 2021 until 23 September 2021.

(h) At the rate of 20% per annum on the amount of N$1.7 million calculated from 24 September 2021 until date of full payment.

3. Costs of suit.

4. Further and/or alternative relief.'

Background

[5] The parties, on 26 and 27 May 2020, respectively, entered into a deed of sale, wherein the defendant agreed to purchase an immovable property described as Erf 320 Auasblick from the first plaintiff and his wife and for payment in the amount of N$4.3 million to be made. The plaintiffs contend that the defendant still owes an amount of N$1.7 million, as

well as interest on the said amount. It is on that basis that the plaintiffs brought this application.

[6] The plaintiffs filed a very short founding affidavit in support of this application, wherein it is stated that the defendant has no *bona fide* defence and that the defendant filed the notice of intention to defend solely for the purpose of delaying the matter.

[7] As stated hereinabove, the defendant opposed the application for summary judgment. The basis for the opposition is set out in the affidavit deposed to Mr Collin Venaani. Mr Venaani states that he is authorised to depose to the said affidavit on behalf of the defendant. The deponent denied that the defendant did not have a *bona fide* defence and that the notice of intention to defend was only entered to delay the matter.

[8] It was contended by the defendant that the plaintiffs delayed the response to its concern that since payment should have been made for the transfer of the property to the defendant, what undertakings were existence that the property will still be so transferred considering that the first plaintiff's, as the previous owner of the property passed on and her estate was not yet finalised. The defendant further contended that it was not liable for the interest claimed. The defendant further stated that he intended to launch a counterclaim against the plaintiffs.

The agreement and arguments

[9] The salient terms of the agreement are that the purchase price payable by the defendant to the plaintiffs in respect of the property was N$4.3 million, which would be paid as set out in the agreement, of which final payment was to be made on 30 November 2020, against the registration of the property into the name of the defendant.

[10] The defendant made payments towards the first plaintiff in the amount of N$2 610 000, which amount is not in dispute.

[11] Mr Lochner argued that the defendant breached the agreement by not paying the amounts as stipulated in clause 1.2 of the agreement, specifically that the defendant failed to settle the full amount of N$4.3 million that was due for payment on 30 November 2020.

[12] Mr Lochner further argued that the claim is liquidated in that the defendant did not deny being indebted to the plaintiff in the amount of N$1.7 million. It was also contended by Mr Lochner that it is not a valid defence that the defendant allegedly stopped paying for the property as he was unsure whether after paying off the full amount, registration of the property to his name would still be possible. It is common cause that one of the previous owners had passed on and the property was part of an estate yet to be dissolved. It was further argued that the executor would transfer the property into the name of the defendant once the defendant settled his contractual obligations as stipulated in the agreement.

[13] Mr Boesak was not to be outshined in his arguments as he submitted that the manner in which the interest sought by the plaintiffs was calculated, was something that he has never seen before. The interest sought was not calculated on an annual basis and in some instances not even on a monthly basis. He further argued that the defendant had a genuine concern on whether the transfer was possible, after it came to light that one of the previous owners passed on. He argued further that the property in question fell within the estate still to be dissolved, thus payments were stopped and enquiries were made to the legal representatives of the plaintiffs via email.

[14] Mr Boesak further contended that the plaintiffs are the ones who caused a variation in the contract, in that after 30 November 2020, the plaintiffs still accepted payment from the defendant for the property for a period of eight months after the due date of the payment. It was further the defendant’s case that it renovated the property and made some additions to the said property and which additions might exceed the N$1.7 million dollars sought by the plaintiffs.

Analysis

[15] The law on summary judgment applications is trite and plentiful and need not be repeated in this ruling. Suffice to say that rule 60 regulates applications for summary judgment where the claim is based on a liquid document; where the claim is for a liquidated amount in money; where the claim is for delivery of specified movable property; and where the claim is for ejectment.

[16] The general approach regarding summary judgments can be surmised as follows as set out by Corbett JA in *Maharaj v Barclays National Bank Ltd:*[1]

'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 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

[1] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A.

sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.'

[17] I align myself with the above legal principles as constituting the correct position of the law regarding applications for summary judgment.

[18] I must begin to state that whenever a deceased estate is involved in whatever dealings one might have, it is not as obvious as day and night that promises may be made which commits the estate to a particular activity that the Master of the High Court will abide. The Master who is the custodian of the deceased estate will always have a say in the administration of the estate, and may approve or disapprove certain activities to be carried out by the deceased estate. In relation to the matter before court, the property at the centre of this litigation is one that is in the realm of what the Master must decide on. It is insufficient, in my view, for the executor to promise a transfer of property that affects the estate of the deceased without getting the green light from the Master.

[19] What should further be taken into account in this present matter is that there are allegations by the defendant that it made payments beyond the agreed due date of 30 November 2020, however, there's nothing before this court showing that those amounts are either included and or excluded from the N$1.7 million claimed. Another aspect to be considered is that the additions made to the property have not been quantified so as to determine whether or not such additions would amount to the defendant overpaying the plaintiffs, and which may be the subject of the intended counterclaim.

[20] Granting summary judgment brings a matter to finality and ends the defendant's chances of airing its voice in defence of the application. With the above having being said, the defendant, in my view, raised a *bona fide* defence to the plaintiffs' claim. It appears, prima facie, that both parties may have a case to answer to each other in order for the court to come to a just and fair conclusion.

Conclusion

[21] In view of the foregoing findings and conclusions arrived at above, I find that the defences raised by the defendant were enough to ward off the plaintiffs' summary judgment application. As a result and in the exercise of my judicial discretion, I find that the application falls to be dismissed.

Costs

[22] It is settled law that costs follow the result, and a contrary view had not been argued before me, neither could I deduce the contrary from the documents filed of record. The defendant will, therefore, be awarded costs.

Order

[23] In the result, judgment is granted in favour of the defendant against the plaintiffs in the following terms:

1. The summary judgment application is refused.
2. The plaintiffs must pay the defendant's costs of the application on a party-party scale, including the costs of one instructing and one instructed legal practitioner, subject to rule 32(11).
3. The parties must file a joint case plan on or before 11 March 2024, for the further filing of pleadings.
4. The matter is postponed to 14 March 2024 at 08:30 for a Case Planning Conference hearing.

Judge's signature:	Note to parties:

O S SIBEYA **JUDGE**	
For the plaintiff: L Lochner, Instructed by Dr Weder Kauta & Hoveka Inc, Windhoek	**For the defendant:** A Boesak, Instructed by Engelbrecht Attorneys, Windhoek