

REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

JUDGMENT

CASE NO.: HC-NLD-CIV-ACT-CON-2017/00253

In the matter between:

ERASTUS UUTONI

PLAINTIFF

and

**FREEDOM SQUARE INVESTMENTS TWENTY FOUR CC
T/A OSHAKATI FISH SHOP**

DEFENDANT

Neutral citation: *Utoni v Freedom Square Investments Twenty Four CC* (HC NLD-CIV-ACT-CON-2017/00253) [2018] NAHCNLD 51 (11 June 2018)

Coram: CHEDA J

Heard: 07 May 2018

Delivered: 11 June 2018

Flynote: A party is entitled to a summary judgment where it is in possession of a liquid document. – Defendant can succeed in opposing the application if it can prove

that it has an arguable case and a *bona fide* defence on the merits. – when both parties are culpable with regards to non-compliance with the rules – no one party can insist that the other party be penalised while it is let to go scot free. Both parties non-compliance should be excused.

Summary: Plaintiff issued out summons against defendant for payment of the sum of N\$170 000 based on the dishonoured cheques issued by the defendant. Plaintiff/applicant applied for summary judgment on the basis of the said dishonoured cheques. Respondent/defendant opposed the application and argued that the said cheques had been made good by certain payments and attached proof of such payment to its opposing affidavit. Application for summary judgment was accordingly dismissed.

ORDER

1. Condonation for the non-compliance with the rules by both parties is granted.
2. Application for summary judgment is dismissed with costs.
3. Matter to proceed under case management and is postponed to the 23rd July 2018 at 09h00.

JUDGMENT

CHEDA J:

[1] Plaintiff, a farmer in Namibia issued summons out of this court against defendant a company operating in Oshakati, Namibia for payment of the sum of N\$170 000 plus interest.

[2] The said amount is based on two cheques of N\$80 000 and N\$90 000 respectively drawn by defendant in favour of “cash” upon presentation by plaintiff at Bank Windhoek.

[3] Plaintiff presented the said cheques for payment on the 6th and 8th July 2016, but, the said cheques were dishonoured by the Bank as defendant had instructed the bank to stop its payment.

[4] The matter was set down for hearing on the 19th March 2018, wherein, it was briefly heard. Ms Angula for applicant sought condonation for her late filing of her papers relating to this application. The reason for her failure was found acceptable by the court and condonation was accordingly granted.

[5] Ms Shailemo for the respondent raised three points in *limine* being the following:

Non-compliance with Rule 32 (9) (10)

[6] The first point was that the applicant did not comply with Rule 32 (9) (10) which provides that:

‘A party who wishes to bring an interlocutory application such as in the present matter, before launching it, should seek an amicable resolution from the opposing party and only after the parties have failed to resolve their dispute may such proceeding be launched.’

[7] Counsel referred the court to various cases, one of which is *First National Bank of Namibia Ltd v Andries Louw*¹.

[8] It was her argument, therefore, that respondent had failed to comply with this rule. Ms Angula who appeared for the respondent was of a different view. Her argument hinged on the steps she took towards a resolution of the dispute relating to the avoidance of the summary judgment application.

¹ (I 1467/2014) [2015] NAHCMD 139 (12 June 2015).

[9] I have considered counsels' respective arguments. I am, however, of the considered view that the introduction of the case management system has placed wide judicial discretionary powers on the Managing Judge in the furtherance of the speedy and inexpensive resolution of cases. In the exercise of my discretion I rule the point in *limine* must be dismissed as applicant's legal practitioner took adequate steps in terms of rule 32(9) and (10)

Failure to apply for condonation

[10] The next point in *limine* was that Ms Angula did not apply for condonation for the late filing of her application for summary judgment.

[11] In consideration of this point the court takes into account that on the 19th March 2018, Ms Angula appeared and informed the court that she could not file her papers in time due to bereavement. The court indeed did take judicial notice of this fact as there was an announcement of the death of a liberation heroine Ms Nora Schimming-Chase by the Namibia Broadcasting Corporation, who was the mother to her friend. This fact cannot be ignored.

[12] It was Ms Angula's submission that she had only filed her application for condonation on that Sunday on e-justice and both Ms Shalemo and the court had not had sight of it as it had been filed late. On the other hand Ms Shalemo argued that she was ready to proceed on that day.

[13] The court found that Ms Angula's failure was reasonably excusable and granted her that application. However, in light of the fact that Ms Shalemo needed to take further instructions regarding Ms Angula's application for condonation and that both the court and herself were not ready. The court accordingly granted condonation.

[14] Ms Shailemo argued that the applicant should pay her client's wasted costs of the day. It however turned out that Ms Shailemo also failed to comply with rules regarding her filing of documents. In view of this the court held the view that it would be just and equitable that each party should bear its own costs.

[15] The second point *in limine* is equally dismissed.

Locus standi

[16] The third point in limine raised was that the applicant lacked *locus standi in judicio*. In support of this point she pointed out that according to the defendant's affidavit, the debt that was being paid by means of cheques was intended for applicant's late mother and therefore applicant lacked *locus standi* to instituting these proceedings.

[17] In my view the point lacks merit for the reason that the cheques were made payable to "cash" and were therefore bearer's cheques. This means in terms of the law of negotiable instruments that any bearer in possession of such unpaid cheque or instrument has the right to institute an action to enforce payment of such cheque or instrument. The *point in limine* is equally dismissed

Merits considered

[18] The issue which falls for determination is whether or not defendant has made out a *bona fide* defence through its affidavit. If the answer is in the affirmative then the application must fail.

Applicable legal principles to an application for summary judgment

[19] In order for the respondent to successfully prevent applicant from obtaining a summary judgment against, it must:

- a) disclose the grounds upon which he disputes plaintiff's claim with reference to material facts underlying the disputes raised, see, *Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) BPK 1997 (1) SA 244 (T) 249 F-G*.
- b) be an arguable defence; and that
- c) the denial must be meritorious.

[20] It is trite that summary judgment is a drastic civil procedure employed by a creditor for the speedy recovery of what is due to it for a liquidated amount in money. The claim can either be contained in a liquid document and in circumstances where the debtor attempts to frustrate payment by raising a non-meritorious defence. It is both effective and decisive. In light of its decisive nature, it is extremely important for the court to be circumspect in its application.

[21] The court is, therefore, enjoined to play a balancing act between the interest of the applicant/plaintiff and those of the respondent/defendant. Easy and final relief for the plaintiff at the expense of a defendant where the defence is meritorious, is not in accordance with real and substantial justice as defendant would have been completely shut out of the court, thereby, being denied his right to have his day in court.

[22] We have on one hand the legitimate expectation of speedy relief and the merits of a plaintiff's claim against the right of a defendant to a proper adjudication of his defence in an open court. Similar consideration was made in *Coetze v Government of the Republic of South Africa; Matiso & others v Commanding Officer, Port Elizabeth Prison 1995 (4) SA 631(CC)* at 648 H-I where Didcott J ably stated:

'Credit plays an important part in the modern management of commerce. The rights of creditors to recover the debts that are owed to them should command our respect, and the enforcement of such rights is the legitimate business of our law. The granting of credit would otherwise be

discouraged, with unfortunate consequences to society as a whole, including those poorer members who depend on its support for a host of their ordinary requirements. That does not mean, however, that the interests of creditors may be allowed to ride roughshod over the rights of debtors.' (my emphasis)

[23] In short it is the respondent's case that it does not owe applicant any money. To buttress this averment bank statements were attached to the opposing affidavit which indicate transactions and movements of funds to and from an account which is entirely not clear.

[24] On the face of it, plaintiff indeed is in possession of two dishonoured cheques as a result of having been stopped from cashing them by defendant. At that juncture, applicant would have been fully entitled to payment. However, the matter does not end there, the court must determine on a balance of probabilities whether the law favours plaintiff or defendant.

[25] Ms Shailemo, referred the court to *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426 B where *Corbett* stated:

'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 judgement, either wholly or in part, as the case may be. The word "fully", used in the context of the Rule (and its predecessors)' has been the cause of some judicial controversy in the past. It cannot, 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....' (my emphasis)

[26] It is clear that, summary judgment will not be granted on mere exhibition of a liquid document especially where defendant shows that his defence is meritorious. The court is grateful to Ms Shailemo's reference to the above authority. Further in *Namibia Petroleum (Pty) Ltd v Vermaak* 1998 NR 155 (HC) at 158 H-I, it was held that, it was necessary for the court to be appraised of the material facts upon which defendant relies on with sufficient particularity and completeness as to enable the court to make a proper determination.

[27] The determination should be on the understanding that if the statements by defendant are found to be correct, without more, judgment should be given for the defendant. I fully associate myself with the above approach by the courts of our jurisdiction and I adopt the same.

[28] On overall, all the defendant needs to do is to present an arguable case, then it will have passed the test on paper and must, therefore, be given an opportunity to defend. Where an arguable case has been presented then the case must proceed to trial as the defence at that stage will be regarded as meritorious.

[29] In *casu*, indeed plaintiff/applicant is a holder of dishonoured cheques, however, defendant has proffered a reasonable explanation which puts it firmly on a defensive pedestal at this point. Defendant's defence is that although plaintiff/applicant is in possession of dishonoured cheques it had since made good the said cheques by bank transfers of which there are certain entries in some bank statements. These entries show the same amounts rejected on the cheques. It is these entries which defendant should be given an opportunity to explain. The parties are therefore still required to accord the trial court facts in order for the issues to be properly ventilated. There are a lot of explanations to be made by the defendant. Defendant must be given an opportunity to explain its reasons for stopping the cheques and also the circumstances surrounding its alleged payment to plaintiff as it appears on its bank statements.

[30] In light of the above the following is the order:

1. Condonation for the non-compliance with the rules by both parties is granted.
2. Application for summary judgment is dismissed with costs.
3. Matter to proceed under case management and is postponed to the 23rd July 2018 at 09h00.

M Cheda
Judge

APPEARANCES:

FOR THE PLAINTIFF:

E Angula
of AngulaCo Inc., Ongwediva

FOR THE DEFENDANT:

T Shailemo
of Shailemo & Associates, Ongwediva