

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case No: HC-NLD-CIV-ACT-CON-2020/00091

In the matter between:

JOHN WALENGA

PLAINTIFF

and

ANDRE NANGOLO

FIRST DEFENDANT

ROYAL ASN INVESTMENTS CC

SECOND DEFENDANT

Neutral Citation: *Walenga v Nangolo* (HC-NLD-CIV-ACT-CON-2020/00091) [2020] NAHCNLD 122 (31 August 2020)

CORAM: **MASUKU J**

Heard: 19 August 2020

Delivered: **31 August 2020**

Flynote: Summary Judgment-Rule 60 (2)-No *bona fide* defence-Must show that the defence was merely a delay tactic-The respondent appears to have a defence which is *bona fide* and good in law-Condonation applications not subjected to strict compliance with Rule 32 (9) and (10). Summary Judgement is dismissed.

Summary: The plaintiff alleges in his particulars of claim that he and the first defendant entered into an oral agreement in which the plaintiff appointed the first defendant as his agent to purchase a salvaged vehicle, repair same and had to hand it over to the plaintiff in a working condition. Plaintiff now alleges that the first defendant is in breach of the agreement and seeks a cancellation of the agreement and re-payment in the amount N\$ 109 038.06.

The defendants filed a condonation application for filing their answering affidavit two court days late. The plaintiff did not formally oppose the said application however he raised points of law from the bar. The court *held* that Rule 32 (9) and (10) has no strict appliance when it comes to condonation applications.

Summary judgment – The court is satisfied that the first defendant in his affidavit disclosed a defence that appears both *bona fide* and good in law and which if raised during the trial, has the prospect of succeeding in deflecting the plaintiff's claim. The application for summary judgment is dismissed with costs.

ORDER

1. The application for condonation of the late filing of the answering affidavit by the Respondents is hereby granted.
 2. The application for summary judgment is hereby dismissed with costs.
 3. The parties are to file a revised joint case plan within a period of ten days from the date of this order.
 4. The matter is postponed 14 September 2020 at 10H00 for a case planning conference.
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JUDGMENT

MASUKU J:

Introduction

[1] Presently serving before court is an opposed application for summary judgment. The primary task of the court at this juncture, is to determine whether the plaintiff has made out a case for the relief he seeks. In order for the court to come to a determination of whether or not a case has been made, it is necessary to consider the papers filed by the parties of record.

Background

[2] The plaintiff in this matter is Mr. John Walenga, an adult male Namibian, who resides in Ondangwa, in this Republic. He has sued two persons. The first is a natural person, Mr. Andre Nangolo, a resident of Ongwediva, within the Republic. The second is a legal person, namely Royal ASN Investment CC, a legal entity incorporated in terms of the relevant laws applicable to Close Corporations in this Republic.

[3] For ease of reference, I will refer to the parties in this judgment as follows: Mr. Walenga will be referred to as 'the plaintiff'. Mr. Nangolo will be referred to as 'the defendant'. To the extent to which it may be necessary to refer to the Royal ASN Investments CC, it will be referred to as 'the second defendant'.

[4] In his particulars of claim, the plaintiff claims payment of an amount N\$ 109 038.06, interest and costs from the defendants jointly and severally, the one paying and the other being absolved. The plaintiff avers that in November 2019 and at Ondangwa, he, acting in person and the first defendant, also acting in person, entered into an oral agreement in terms whereof he appointed the first defendant as his agent to purchase a salvaged vehicle, to repair same and to hand it over to the plaintiff in a working condition.

[5] The express, alternatively implied terms of the agreement between the parties were that:

- a) the plaintiff would advance the purchase price of the vehicle to the defendant;
- b) the plaintiff would purchase the vehicle parts necessary to restore it to a working condition;
- c) the defendant would, on receipt of the monies, purchase the vehicle from King Price Insurance on the plaintiff's behalf;
- d) the defendant would effect repairs on the purchased vehicle and restore it to a working vehicle; and
- e) the defendant would thereafter deliver the repaired and functional vehicle to the plaintiff within a reasonable time and would also invoice the plaintiff for the labour costs with regard to the repairs effected.

[6] It is the plaintiff's case that he complied with his undertaking by paying an amount of N\$97 000 into the second defendant's bank account. Proof of the payment is attached. The further averral by the plaintiff is that in December 2019, the defendant requested the plaintiff to effect additional payment in the amount of N\$12 038.06 to an outfit called Motovac, which would supply the parts required to restore the vehicle to its pristine condition. He complied therewith and attached proof of payment in that regard.

[7] It is the plaintiff's case that the defendant breached the agreement in that he failed to purchase the said vehicle and to repair and/or deliver same to the plaintiff within a reasonable time. It is his further case that he issued a letter of demand in April 2020, which also constituted a notice of termination of the agreement.

[8] The defendant, faced with the combined summons, filed a notice of intention to defend. This was swiftly met with an application for summary judgment, with the plaintiff contending that the defendant has no valid or *bona fide* defence to his claim. He alleged that the defendant had filed the notice to defend for no other purpose than to delay the plaintiff in the enjoyment of the fruits of his judgment.

[9] As he was entitled to, the defendant filed an answering affidavit in response to the plaintiff's allegations filed in support of the application for summary judgment. Shorn of all the frills, the main contention by the defendant is that he has not filed the notice to defend for the nefarious purpose of delaying the granting of the judgment. To the contrary, he claims that he has a *bona fide* and valid defence to the plaintiff's claim.

[10] In dealing with the defence to the plaintiff's claim, the defendant states that he was approached by the plaintiff who indicated that his business Eagle FM Radio intended to purchase a motor vehicle through the defendant's employer King Price Insurance. When a suitable vehicle became available, the defendant advised the plaintiff accordingly and the latter thereupon caused an amount of N\$97 000 to be transferred from the account of Omalaeti (Pty) Ltd into the account of the second defendant, of which he is the sole member.

[11] It is the defendant's case that he purchased the vehicle from Grootfontein and had it transported to Ongwediva. At the plaintiff's further request, the defendant deposes that he sought a quotation for the repair of the vehicle. He obtained this from Motovac, who demanded an amount of N\$12 083.06, which the plaintiff paid directly to the said Motovac.

[12] After parts had been obtained from Motovac, it is the defendant's case that he did not obtain instructions from the plaintiff as to where the vehicle had to be taken for repairs. With the plaintiff not responding, the defendant states that he then decided to advise the plaintiff that since the matter was taking too long, he was of the view that the vehicle should be taken back. The plaintiff then sent him an email suggesting that they must 'cancel the deal'.

[13] The defendant denies liability for the amount of N\$12 038.06 because this amount was paid by the plaintiff, not to him but to Motovac directly. In this regard, he deposes, he did not go to collect parts from Motovac and cannot thus be liable personally for loss the plaintiff claims he may have suffered at the hands of Motovac.

[14] In relation to the claim for N\$97 000, the defendant claims that the plaintiff is seeking this money in his personal capacity, yet it is clear from the proof of payment that the money was not personally paid by the plaintiff but by an outfit called Omalaeti Foods (Pty) Ltd. It is his case that the said amount was not paid into the defendant's personal account but into that of the second defendant. For that reason, it would seem that the defendant claims that the plaintiff is barking the wrong tree, as it were.

[15] The defendant further denies the allegations made regarding the terms of the agreement as recited by the plaintiff. He deposes on oath that he never agreed that he would serve as an agent of the plaintiff. Rather, he deposes, he agreed to assist the plaintiff as a friend and whom he had known for a period in the excess of 20 years. In this regard, he states that he is not a motor mechanic and does not know how to fix or repair motor vehicles.

[16] As a parting shot, the defendant states further on oath that he informed the plaintiff before the issuance of summons that the vehicle purchased by Eagle FM Radio is still available for collection at the plaintiff's cost. The said vehicle was however not collected by the plaintiff, the latter insisting that the defendant should deliver the vehicle to him, which was not the defendant's duty, he further deposes.

Application for condonation

[17] I should, before dealing with the main application, take a detour to deal with a preliminary issue, namely, an unopposed application for condonation. This is because the defendant failed to file his answering affidavit timeously. The explanation by the defendant is that when he was called by his legal practitioners to attend at their offices to sign the answering affidavit, he was out of town, having gone to the farm 30 kilometres from Otjiwarongo.

[18] When he tried to return in time to sign the affidavit the morning of the 27 July 2020, his motor vehicle developed a battery problem. When he eventually returned, and signed the affidavit, it was late on the 27 June and it could only be filed the following day. The defendant, in the said affidavit

repeats that he is not liable to the plaintiff at all and states that there is no case made against him that would render him liable to the plaintiff.

[19] The plaintiff did not file any opposing papers to the application for condonation. Mr. Kamuhanga contented himself with raising a legal point from the bar, without any notice to the court and the defendants. He argued forcefully that the matter must be struck from the roll because the defendants did not comply with the provisions of rule 32(9) and (10) before launching the application for condonation.

[20] That argument, though understandable, however flies in the face of a recent judgment of this court in *Minister of Urban and Rural Development v Witbooi*¹ where the court, dealing with a similar argument, stated as follows at paras 13 and 14:

[13] It must be recalled that condonation is an application brought by the errant party to the court, which must make the final decision. In this regard, it must be made plain that all that the parties to the matter can do is, even if the party not on the wrong side of the rules agrees, is not to oppose the application when eventually filed. The court is not bound by whatever agreement the parties come to in respect of the condonation as the power to condone resides in the court and the court alone.

[14] 'Accordingly what the parties may do is to agree about the other party not opposing the application and advise the court accordingly. Having done so, the errant party should still file the application for condonation and which the court will decide, based on the merits. In this regard, although the view of the parties may be considered, ultimately it is the court that has to decide the matter, based on the papers before it. In the premises, it is strictly not necessary for parties to comply with rule 32(9) and (10) in applications for condonation.'

[21] I am accordingly of the considered view that the belated opposition to the application for condonation cannot be sustained and must fail. This is so because rule 32(9) and (10) does not apply in a mandatory manner where an

¹ *Minister of Urban and Rural Development v Witbooi* (HC-MD-CIV-MOT-GEN-2019/00225) [2020] NAHCMD 279 (9 July 2020).

application for condonation by the court of the non-compliance with its rules is concerned.

[22] It is trite learning that an applicant for condonation must satisfy the court that he has a reasonable explanation for the delay and that he has prospects of success on the merits.² I am of the view that the applicant has given a reasonable explanation for the delay, namely his departure to the farm and the mechanical problems developed by his vehicle. In any event, the court cannot lose sight of the fact that the delay was minimal, namely a day late. There is no prejudice as such that the plaintiff would have been exposed to as a result of the delay.

[23] Regarding the prospects of success, the defendant albeit inelegantly so, did not deal directly with the issue of prospects of success. What he does say though, is that he has a valid defence to the claim and that the plaintiff's claim should fail for that reason. These allegations do, in my considered view, meet the second requirement of the application for condonation. I accordingly grant the application for condonation as prayed.

Summary judgment

[24] The principles applicable to summary judgment are now trite and need not be repeated in any great length. The main point worth emphasising is that summary judgment is a stringent remedy, which may permit the granting of a final judgment without affording the defendant the full benefit of a trial. In this regard, the court exerts strict compliance with the rules and legal requirements and only grants summary judgment in cases where the applicant for the relief has an unanswerable case.

[25] Does the plaintiff in this case have what can be regarded as an 'unanswerable case'? I think not. First, and I deal with the claim for N\$12 038.06. In that case, it is clear from the proof of payment attached by the plaintiff that the amount was paid not to the defendant but to another entity, called Motovac by the plaintiff. There is no explanation as to why it is that the

² *Petrus v Roman Catholic Archdiocese SA 32/2009.*

plaintiff has sued the defendant for that repayment when it was stated to be for parts for restoring the vehicle the plaintiff had bought to its pristine condition. In my view, the defendant has raised what appears to be a *bona fide* defence, which may entitle him to a valid defence at trial.

[26] Regarding the amount of N\$97 000, the defendant questions the propriety of the plaintiff suing him. This is so because he states that the money in question, was not paid by the plaintiff but rather by an entity called Omalaeti Foods (Pty) Ltd. The plaintiff has not shown what connection in law he is possessed of, to arrogate himself the right to sue the defendant personally when he did not pay the amount claimed against the defendant.

[27] In short, when cut to the chase, it appears that the defendant's case is that the plaintiff has no *locus standi* to sue for the amount in question because he did not pay it to the plaintiff. That appears like a formidable defence that carries a prospect of success at trial and thus entitles the defendant to unconditional leave to defend in my considered view.

[28] The second issue raised by the defendant in his affidavit is that the plaintiff has sued him for this money when the money in question was not paid to him but rather into the account of the second defendant. Again, he raises what appears to be a *bona fide* dispute when one has regard to the proof of payment. The amount in question was not paid to an account personally held by the defendant and there is a plausible legal question that arises, namely whether the defendant has been properly cited in these proceedings.

[29] Having said this, we must not forget the age-old principle that a company, including a close corporation, has, in law, an independent existence of its own from those who may have floated it. This is what is referred to in legal parlance as the *Salomon* principle. Whatever connections the defendant may have with the account holder, into whose account the money was deposited, the question looms large whether there is a legal basis pleaded in the papers for suing the defendant personally. The investigation of this question would suggest that this is not a proper case in which to grant the

plaintiff its claim as a defence, which *prima facie* carries a prospect of success is raised by the defendant in his papers.

[30] I am not inattentive to the groans and moans of the plaintiff that there are certain contradictions in the defendant's case. In this regard, it is even suggested that the plaintiff has companies and he decides where to source money from to pay to any person. Where he has done so as in this case, it is submitted that it is none of the defendant's business to question how the plaintiff deals with his companies.

[31] As will be obvious from what is discussed above, the plaintiff is not on a sound legal footing in arguing in that manner when one has regard to the trite legal principle that a company has a separate legal personality from those who float it. This legal position potentially places the plaintiff's case on the back-foot and whether that position ultimately holds, should be determined at trial, with the defendants having been given their full day in court.

[32] In *Standard Bank of SA Limited v Park Boulevard Trading CC and Another*³ the applicable law was stated as follows:

'In a summary judgment application, where the question of whether the respondent has a *bona fide* defence arises, the court does not attempt to decide the issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. The respondent is also not required to persuade the court of the correctness of the facts stated by him or where the facts are disputed, that there is a preponderance of probabilities in his or her favour. All that the court requires, in deciding whether the respondent has set out a *bona fide* defence, is:

- (a) whether the respondent has disclosed the nature and grounds of his or her defence; and
- (b) whether on the facts so disclosed the respondent appears to have a defence which is *bona fide* and good in law. It is sufficient if the respondent swears to a defence, valid in law, which is advanced, may succeed on trial'.

[33] Has the defendant met that threshold stated in the above matter? I am of the considered view that the defendant has met the requisite threshold. He

³ Case No. (20713/2013) [2013] ZAGPPHC 185 (5 July 2013), para 4.

has, in his affidavit disclosed a defence that appears both *bona fide* and good in law and which if raised during the trial, has the prospect of succeeding in deflecting the plaintiff's claim.

Conclusion

[34] Having regard to the discussion above, together with the issues raised by the defendant in his papers, I am of the considered view that the defendant has met the standard required of him to persuade the court to refuse the application for summary judgment. The application for summary judgment ought to fail therefor.

Order

[35] In the premises, the following order would commend itself as condign in the instant matter:

1. The application for condonation of the late filing of the Defendants' answering affidavit is hereby granted.
2. The application for summary judgment is hereby dismissed with costs.
3. The parties are ordered to file a revised joint case plan within a period of ten days from the date of this order.
4. The matter is postponed to 14 September 2020 at 14h30 for a case planning conference.

T S Masuku
Judge

APPEARANCES:

FOR THE PLAINTIFF:

Mr K. Kamuhanga
Of Kamuhanga, Hoveka, Samuel. Inc,
Windhoek

FOR THE DEFENDANTS:

Mr M. Nyambe
Of Mukaya Nyambe Incorporated,
Ongwediva