

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT

Case Title: MAGIC BUILDERS CENTRE PTY (LTD) vs FYSAL FRESH PRODUCE	Case No: HC-NLD-CIV-ACT-CON-2020/00303
	Division of Court: HIGH COURT (NORTHERN LOCAL DIVISION)
Heard before: HONOURABLE MR JUSTICE GEIER	Date reserved: 29 APRIL 2021
	Delivered on: 31 MAY 2021
Neutral citation: <i>Magic Builders Centre (Pty) Ltd v Fysal Fresh Produce</i> (HC-NLD-CIV-ACT-CON-2020/00303) [2021] NAHCNLD 49 (31 May 2021)	
IT IS ORDERED THAT: <ol style="list-style-type: none">1. The application for summary judgment is dismissed.2. The resultant costs are to be costs in the cause.3. The defendant is granted leave to defend the action.4. The case is postponed to 7 June 2021 at 09h00 for a Case Planning Conference hearing.	
Following below are the reasons for the above order:	
[1] I have not considered an application for summary judgment for some time.	
[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 used to be sufficient for 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 the affidavits constitute the 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 therefore, in order to determine whether or not summary judgment is to be granted or refused.¹

[5] Also the opposing affidavit filed in this instance is not beyond criticism. Save for a standard general denial contained in the introductory portion of the affidavit it is not even expressly denied that the notice to defend was delivered solely for the purpose of delay. Be that as it may.

[6] More importantly and in any event it also seems inexplicable why these summary judgment proceedings still require the determination of the court, when the opposing affidavit, filed in the quest to ward off these proceedings – clearly – and at a cursory glance already – discloses that summary judgment should be refused.

[7] I say so because the threshold to ward off summary judgment proceedings is very low. In the words of the Supreme Court :

¹ Compare for instance : *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC) at [23] and [26].

‘What the court enquires into is whether the defendant has put forward a triable and arguable issue in the sense that there is a reasonable possibility that the interpretation contended for by the defendant may succeed at trial, and, if successful, will establish a defence that is good in law.² Similarly, where the defendant relies upon a point of law, the point raised must be arguable and establish a defence that is good in law.³

[8] It so appears that all that requires determination is whether or not the defendant has shown a triable issue or a point of law that is arguable and that will establish a defence that is good in law.

[9] In this regard one need to look no further than the defence of misjoinder that was raised in this instance, which was also the first line of defence and in respect of which it is contended that the plaintiff has sued the wrong entity, that is an entity which operates a service station, an unrelated business, and that this entity had no agreement or dealings with the plaintiff at all.

[10] It does not take much to fathom that, if these facts would be established at a trial, the plaintiff’s claim cannot succeed, or, in the words of the Supreme Court, the defendant would have established a defence good in law.

[11] It so becomes clear that the other grounds of defence raised do not even have to be considered and that summary judgment must be refused.

[12] In the result :

1. The application for summary judgment is dismissed.
2. The resultant costs are to be costs in the cause.
3. The defendant is granted leave to defend the action.
4. The case is postponed to 7 June 2021 at 09h00 for a Case Planning Conference hearing.

² *Shingadia v Shingadia* 1966 (3) SA 24 (R) at 26A – B; *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) ([1999] 4 All SA 396) at para 26; *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467A; *Marsh and Another v Standard Bank of SA Ltd* 2000 (4) SA 947 (W) at 949.

³ *Di Savino v Nedbank Namibia Ltd* at [26].

Judge's signature:	Note to the parties:
GEIER Judge	Not applicable.
Counsel:	
Applicant	Respondent
M Amupolo of Jacobs Amupolo Lawyers & Conveyancer	W Horn of W Horn Attorneys