NOT REPORTABLE

CASE NO: SA 72/2024

IN THE SUPREME COURT OF NAMIBIA

In the application between:

OAMITIS TOURISM CC **Applicant**

And

ETTIENE HUGO BOTES **Respondent**

In re:

The appeal between:

ETTIENE HUGO BOTES **Appellant**

and

OAMITIS TOURISM CC **Respondent**

Coram: DAMASEB DCJ

Heard: *In Chambers*

Delivered: 16 August 2024

Summary: This is an application in terms of s 14(7)*(a)* of the Supreme Court Act 15 of 1990 read with rule 6 of the Rules of the Supreme Court after the applicant sought a summary judgment to evict the respondent from Portion 23 of farm Oamitis No. 53 (the plot) and to recover associated costs.

A lease agreement was signed on 25 April 2020, allowing the respondent to use the the plot for residential and agricultural purposes, with a monthly rental amount of N$8 450 payable in advance. The respondent also agreed to cover stamp duty costs. The respondent failed to make timely rental payments and did not pay the stamp duties.

Despite receiving notice, the respondent failed to rectify the breaches, prompting the applicant to cancel the lease and seek eviction.

The respondent claimed inadequate water supply, justifying withholding rent. The respondent also filed three counterclaims: damages for unlawful water disconnection, rent remission due to insufficient water supply, and compensation for improvements made to the plot if evicted. The court *a quo* found no *bona fide* defence or triable issues in the respondent's opposition and granted summary judgment in favour of the applicant, ordering eviction, *ex post facto* stamping of the lease agreement, and awarded costs to the applicant. The matter was postponed for case planning regarding the respondent's counterclaims.

On appeal, the respondent argued that the judge erred in law and fact by granting the summary judgment.

Rule 6 application

The applicant sought dismissal of the appeal, arguing it lacked merit and prospects of success. The applicant contended that the respondent had no valid defence and

failed to provide proof for water insufficiency or rent remission. Clauses from the lease agreement were cited to support the claim of the respondent's breach and the justification for eviction and lease cancellation.

Held, the issues raised by the respondent, including the need to interpret certain clauses of the lease agreement, warranted a full trial instead of granting summary judgment.

Held, the appeal is not without merit and has reasonable prospects of success on appeal.

The application under s 14(7)(*a*) of the Supreme Court Act 15 of 1990 read with rule 6 of the Supreme Court Rules is dismissed with costs, including those of one instructing and one instructed legal practitioner.

JUDGMENT PURSUANT TO SECTION 14(7)*(a)* OF THE SUPREME COURT ACT 15 OF 1990 READ WITH RULE 6(1) OF THE RULES OF THE SUPREME COURT

DAMASEB DCJ:

Introduction

[1] This is an application in terms of Rule 6 of the Rules of this Court read with s 14(7) of the Supreme Court Act 15 of 1990 for the summary dismissal of an appeal pending in this Court at the instance of the respondent.

[2] The applicant sought summary judgment in the High Court for the eviction of the respondent from Portion 23 of farm Oamitis No. 53 (the plot), together with costs, after the respondent had entered appearance to defend the applicant's combined summons.

Background

[3] The parties concluded a written lease agreement on 25 April 2020, in terms of which the applicant, as the registered owner, leased the plot to the respondent for residential and agricultural purposes. The lease was to run for nine years and 11 months at a monthly rental of N$8 450 payable in advance. The respondent also agreed to bear the stamp duty costs for the lease agreement. The applicant's obligation was to supply sufficient water to the plot for the respondent's benefit, for domestic and business purposes. (It is common cause that the respondent rented the plot to engage in the production of fruits and vegetables).

[4] In October 2023, the applicant instituted proceedings against the respondent. In the particulars of claim the applicant relied on three claims.

Claim one

[5] It is alleged under this claim that:

> '6.The parties to the lease failed to sign and integrate into the lease the leased portion map, the house rules and the architectural guidelines.
>
> 7. Parol evidence extrinsic to the lease is inadmissible to prove the leased portion. . ..
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> 8. The house rules or the architectural guidelines are essential or material terms of the lease.
>
> 9. Accordingly, the lease is inchoate or void for vagueness.'

[6] As regards claim one, the applicant sought the following order:

> 'An order declaring that the lease is void since its inception'.

Claim two

[7] Claim two is in the alternative to claim one and is said to be applicable only in the event that the 'the court [should] hold or assume that the lease is valid'. Claim two relies on alleged breaches by the respondent to pay rental and failing to rectify such alleged breach after being put on notice to rectify same, resulting in the applicant cancelling the lease agreement.

[8] The relief sought is an order confirming the cancellation of the lease agreement and payment of unpaid rent, including stamp duty, interest and costs.

Claim three

[9] This claim is predicated on the respondent's alleged 'wrongful' occupation of the leased plot following 'the service on him of the summons' which allegedly deprives 'the applicant of its use of the property'. It is alleged that the respondent is 'from the date of service on him of the summons, or the close of pleadings in this action . . . an occupier of the plot in bad faith'.

[10] The particulars continue:

> '3.1. Accordingly, the respondent is obliged to do an account to the applicant in respect of [the respondent's use of the the the property to produce agricultural products on the property for an income] from the date of service on him of the summons, or the close of pleadings . . . to the date of his vacation of or eviction from the property.'

[11] The prayers sought are: (a) the eviction of the respondent from the leased property, (b) payment of damages in respect of the unpaid rent, (c) debatement of an account by the respondent in respect of the income he is earning, (d) payment of such amount due to the applicant from the statement and debatement, and (d) interest and costs.

[12] Before dealing with the opposing affidavit, I wish to refer to two clauses in the lease agreement which appeared to have influenced the judgment of the judge at first instance.

> 'Clause 8.2. When the Lease Period terminates, and the Lessee has not exercised its option to purchase, any fencing and improvements whether permanent or temporary in nature including, *inter alia*, but not limited to which may have been erected by the Lessee on the Leased Portion will become the sole property of the Lessor, the Lessee waiving any *lien* of whatsoever nature it may have.
>
> Clause 8.3 The Lessee shall have no right of recourse in law to reclaim the value or any improvements from the Lessor when this Agreement terminates and such includes the monetary value of any costs related to road maintenance or creation, de-bushing, water installations, pumps, improvements to the Leased Portion, additional buildings erected by the Lessee or the cost of any other activities carried out by the Lessee in order to enhance the Leased Portion.'

The opposing affidavit

[13] The respondent in his affidavit opposing summary judgment denies that the written lease agreement is void. He asserts that the contracting parties' failure to annex the allegedly missing documents does not render the lease agreement void for vagueness as those documents do not constitute essential terms of the lease agreement.

[14] The deponent avers that prior to concluding the lease agreement, he had made it clear to a representative of the applicant that he would only conclude the lease agreement if water was available on the leased the plot for him to engage in fruit and vegetable production. He also states that the lease agreement stipulates that the applicant would ensure that water is available on the plot for the respondent's reasonable use, 'and impliedly sufficient for commercial production'. The respondent maintains that he has an enforceable right against the applicant to occupy the plot.

[15] The respondent further states that during November 2020 he started to experience water supply issues on the plot. His efforts to have the problem resolved by the applicant proved fruitless. (He attaches to the opposing affidavit several WhatsApp messages to the applicant dating from September 2023 to January 2024 complaining about the absence of water at the plot – and expressing frustration at being ignored by the applicant).

[16] According to the respondent, to mitigate his loses, he drilled two boreholes to supply water to the plot. To date, he says, he made a total rental payment to the applicant of N$183 620. He avers that he refuses to pay the applicant the balance because the applicant is not complying with its obligations of providing sufficient water to the plot for his reasonable use. He asserts that he refuses to pay the rent owing because he wants his counterclaims determined first.

[17] According to the respondent, he is advised that, in law, he is entitled to withhold payment of rent since the applicant had failed in its obligation to supply sufficient water; and that as a result of the existing lease agreement he has the right to occupy the plot.

[18] He further relies on three counterclaims. The first being damages he alleges to have suffered as a result of the applicant's unlawful intentional or negligent 'disconnection of water supply to the property between December 2022 and January 2023'. He alleges that the disconnection resulted in his crops failing. The loss is alleged to be N$141 351 976.

[19] The second counterclaim is for remission of rent resulting from the applicant's alleged defective performance.

[20] The third counterclaim is 'conditional'. He avers that should the court evict him he counterclaims for unjust enrichment. He had occupied the plot since April 2020 acting in good faith. In that capacity he made capital investments on the plot, totalling N$3,5 million. If he is evicted he will be impoverished to the extent of the capital investments, and the applicant unjustly enriched to the same extent.

The High Court

[21] The High Court wrote:

> '[13] Having considered the provisions of the lease agreement in the present matter, the respondent is not entitled to withhold the payment of rent. In terms of the

lease agreement, rent is payable monthly, in advance. It therefore follows that the respondent cannot succeed with his defence based on the principle of reciprocity.

[14] It is clear that the terms of the lease agreement preclude the withholding of rental by the respondent. Furthermore, the provisions of the agreement do not entitle the respondent to any improvements effected on the property. In my view, the respondent's intended counterclaims have no merit, based on the provisions of the lease agreement referred to above.' (My underlining for emphasis)

[22] The court's finding that the respondent was not entitled to withhold rent is in effect a rejection of the remission of rent defence. Besides, the court *a quo* rejected the counterclaims as meritless. In all those respects, the learned judge purported to enforce the lease agreement. The court therefore found no *bona fide* defence or triable issues in the respondent's opposition and granted summary judgment in favour of the applicant. The court ordered the eviction of the respondent, directed the stamping of the lease agreement with stamp duties and awarded costs to the applicant. The matter was then postponed for case planning proceedings on the counterclaims raised by the respondent – in other words, to be adjudicated in the future.

The appeal

[23] Paraphrased and reduced to their bare essential, the respondent relies on three grounds of appeal. First, that the court *a quo* failed to properly apply the test in summary judgment applications as set out in *Di Savino v Nedbank Namibia Limited* 2012 (2) NR 507 (SC). Second, the court *a quo* erred in relying on the lease agreement concluded between the parties considering that (a) a dispute of fact and/or law exists on the validity of the lease agreement in light of the applicant's pleaded case that the lease agreement is null and void and should be declared void

ab initio – whereas the respondent's pleaded case is that the lease agreement is valid and that whether or not the lease agreement is void is an issue still to be determined by the trial court; (b) the proper interpretation of the lease agreement – especially whether the respondent's counterclaims are prohibited by the lease agreement – is a contested matter and by its judgment (in effect enforcing the lease agreement) the court below created a risk of conflicting judgments in the event that it ultimately finds the agreement to be null and void; and (c) should the respondent be successful in respect of the conditional counterclaim, the court *a quo* in effect deprived the respondent of his right to exercise a *lien* over the the plotuntil duly compensated for the improvements to the plot. Third, the court *a quo* erred in failing to find that the respondent's counterclaims constituted a *bona fide* defence to the applicant's claim.

Rule 6 application

[24] The sole member of the applicant deposed to an affidavit in support of the rule 6 application. According to the deponent, the respondent failed to provide a valid defence against the applicant's eviction claim. The applicant contends that the lease agreement obliges the respondent to pay N$8 450 monthly in advance, while they must provide occupation and sufficient water.

[25] The lease further allows for cancellation if rent is unpaid, and the respondent received notice to remedy the breach but failed to remedy such breach after being put on notice to do so and thus entitling the applicant to cancel the lease agreement. It is also alleged that under the lease agreement, the existence of a counterclaim does not suspend the respondent's obligation to pay rent. It is stated further that the

respondent’s failure to establish a right under the lease agreement to withhold rent and the absence of proof of insufficient water supply or an entitlement to remission of rent renders his continued occupation of the plot unlawful.

The provisions of the lease agreement relied upon by the applicant

[26] Clause 5.2: The respondent is required to pay rent monthly in the amount of N$8 450 in advance on the first day of each month. In return, the respondent must provide occupation of the leased portion and ensure water availability for reasonable use at the plot.

[27] Clause 5.4: If the respondent fails to pay rent on time, the applicant can elect to cancel the lease.

[28] Clause 17: If either party commits a material breach, the aggrieved party can issue a written notice to remedy the breach within one month. Failure to do so allows the aggrieved party to cancel the lease upon written notice.

[29] These clauses formed the basis for the applicant's claim that the respondent breached the lease agreement by not paying rent, justifying the eviction and cancellation of the lease agreement.

Disposal

[30] The remedy provided for by s 14(7) of the Supreme Court Act 15 of 1990, read with rule 6 of this Court’s rules, is a drastic and exceptional one intended to

stop unmeritorious appeals in their tracks – certainly not where it is apparent that an appeal raises arguable issues with reasonable prospects of success.

[31] If I am satisfied that at least one of the grounds of appeal relied on by the respondent has reasonable prospects of success, the rule 6 application must fail.

[32] A peculiar feature of the case before the court *a quo* is that the primary relief sought by the applicant in its particulars of claim is to void the lease agreement. Yet, summary judgment (and the eviction) was sought relying on the third claim which does not, for its success, necessarily depend on the enforcement of the lease agreement. Assuming the main claim succeeds and the lease agreement is declared void *ab initio*, the applicant would obviously rely on its third claim in order to claw back income derived by the respondent from his horticulture exploits on the plot.

[33] Now, once the lease agreement has been declared void, the clauses relied on by the applicant to deprive the respondent the right to claim compensation for the improvements effected to the plot (and a resultant lien over the plot until he is compensated for the improvements), would be inoperable. On what basis then would the counterclaims – which could entitle the applicant to remain in occupation of the plot until compensated for his improvements – not be a viable counterweight to the eviction claim?

[34] In its summary judgment application, the applicant had not abandoned the main relief sought under the first claim. That relief therefore remains a live dispute between the parties. Incongruously, the court *a quo* has effectively enforced the

lease agreement whose terms it might yet declare void, and effectively dismissed the counterclaims when, if the first claim succeeds, there is no sound basis in law for denying the respondent to pursue his counterclaims. Rule 48(5) of the High Court Rules makes provision exactly for this kind of situation: a conditional counterclaim in the event that the defence in convention fails.[1] The correct position is that where there are competing claims between parties it is not only desirable but proper for a court to adjudicate them simultaneously.[2]

[35] This Court in *Di Savino v Nedbank Namibia Limited,*[3] laid down the principles of summary judgment as follows:

> '[23] One of the ways in which the respondent may successfully avoid summary judgment is by satisfying the court by affidavit that he or she has a bona fide defence to the action. The respondent would normally do this by deposing to facts which, if true, would establish such a defence. Under rule 32(3)(*b*), the affidavit must 'disclose fully the nature and grounds of the defence and the material facts relied upon therefor'. Where the defence is based upon facts and the material facts alleged by the applicant are disputed or where the respondent alleges new facts, the duty of the court is not to attempt to resolve these issues or to determine where the probabilities lie.
>
> . . .
>
> [26] Where the defence is based on the interpretation of an agreement, the court does not attempt to determine whether or not the interpretation contended for by the respondent is correct. What the court enquires into is whether the respondent has put forward a triable and arguable issue in the sense that there is a reasonable possibility that the interpretation contended for by the respondent may succeed at trial, and, if successful, will establish a defence that is good in law. Similarly, where the

[1] *SA Onderling Brand & Algemene Versekeringsmaatskappy Bpk v Van den Berg* 1976 (1) SA 602 (A).
[2] *Du Toit v De Beer* [1955] (1) SA 469 (T).
[3] *Di Savino v Nedbank Namibia Limited* 2012 (2) NR 507 (SC).

> respondent relies upon a point of law, the point raised must be arguable and establish a defence that is good in law'. (My underlining for emphasis)

[36] The respondent in his opposing affidavit asserts that the lease agreement is valid and enforceable and that he has the right to remain in occupation. He disclosed evidence that the applicant failed to supply water to the plot and that as a result his crops failed, forcing him to mitigate his losses by, amongst other things, sinking boreholes at his own expense. His answering affidavit thus raised issues of interpretation of the lease agreement. On that scenario, and on the test established in *Di Savino,* the proper thing is for the court to determine 'whether the respondent has put forward a triable and arguable issue in the sense that there is a reasonable possibility that the interpretation contended for by the respondent may succeed at trial, and, if successful, will establish a defence that is good in law'.

[37] In the present matter, the court *a quo* preferred an interpretation of the lease agreement put forward by the applicant without showing how the interpretation put forward by the respondent was not reasonable. That is potentially a misdirection.

[38] Therefore, there are reasonable prospects that this Court will find in favour of the respondent based on the grounds of appeal that the court *a quo* ought not to have enforced a lease agreement whose validity remains a live dispute; and that if the court ultimately finds for the applicant on the first claim, the counterclaims could be legally sustainable. In any event, the dismissal of the counterclaims sits uncomfortably with the court's decision to postpone the matter to a future date for the determination of those counterclaims.

[39] The court *a quo* also took the view that the defence of remission of rent was precluded by the terms of the lease agreement. But that is precisely one of the issues of interpretation that arises in light of the respondent's averments in the opposing affidavit. All he had to satisfy the court was that he has a reasonable prospect that his contention is correct. Can it really be correct, as found by the court *a quo*, that the applicant had no reciprocal duty to meet his side of the bargain: to make sure that the plot was supplied with water as contractually agreed? The court seemed to suggest that the applicant's performance or lack thereof is irrelevant and that the respondent was under a duty to pay rent whether or not the applicant performed.

[40] The view I take, is that, the respondent's stance as reflected in the affidavit opposing summary judgment – that there is a reciprocal duty on the applicant to perform by supplying water to the plot – is reasonably arguable. And 'If the obligations of parties to a contract are reciprocal, the claim of the applicant who has not yet performed or tendered to perform may be met by the defence that the respondent's obligations to perform has not arisen because of the applicant's lack of performance'.[4]

[41] This is not a proper case for the exceptional and drastic remedy of summary dismissal. The application should be dismissed.

Costs

[42] There is no reason to deviate from the normal rule regarding costs. Therefore, costs should be awarded to the respondent for successfully opposing the application.

[4] LTC Harms *Amlers Precedents of Pleadings* 7 ed p 201.

Order

[43] In the result:

1. The application in terms of s 14(7)(a) of the Supreme Court Act 15 of 1990 read with rule 6 of the Rules of the Supreme Court is dismissed with costs, such costs to include the costs of one instructing legal practitioner and one instructed legal practitioner, where retained.

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DAMASEB DCJ

REPRESENTATION

RESPONDENT/RESPONDENT:	S Venter Of Dr Weder, Kauta & Hoveka
RESPONDENT/APPLICANT:	J Van Vuuren Of Kruger, Van Vuuren & Co