

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SUMMARY JUDGMENT

PRACTICE DIRECTION 61

Case Title: Piet Basson and Jan Jarson	Plaintiff Defendant	Case No: HC-MD-CIV-ACT-OTH-2023/04247 Division of Court: High Court, Main Division
Coram: Honourable Justice Schimming-Chase	Heard on: Determined on the papers Delivered on: 18 March 2024	
Neutral citation: <i>Basson v Jarson</i> (HC-MD-CIV-ACT-OTH-2023/04247) [2024] NAHCMD 121 (18 March 2024)		
Order:		
1. The plaintiff's application for summary judgment succeeds to the following extent: The defendant and/or any other person in occupation and/or possession of the property described as Erf 124, Sonara, Hardel Street, Aranos, Republic of Namibia is		

hereby evicted and ordered to immediately vacate the aforesaid property.

2. The defendant is granted leave to defend the plaintiff's claim for damages.
3. The defendant is ordered to pay the plaintiff's costs of this application, which shall be limited under rule 32(11).
4. The matter is postponed to **8 April 2024 at 15h30** for a case planning conference.
5. The parties must file a joint case plan on or before **3 April 2024 at 15h00**.

Reasons:

SCHIMMING-CHASE J:

[1] Serving before court is an application for summary judgment lodged on 2 November 2023 by the plaintiff, Piet Basson, a major male pensioner residing at Erf 732, Sonara, Aranos, Namibia. The defendant is Jan Jarson, a major male currently residing at No 78, Hoogenhoud Street, Aranos, Namibia, who opposes this summary judgment application.

[2] The plaintiff instituted action against the defendant on 15 September 2023, alleging that he is the registered owner of Erf 124, Sonara, Handel Street, Aranos, Namibia ('the property'). He attaches a copy of the title deed to the property to his particulars of claim. The plaintiff further alleges that since 1 April 2019, the defendant has unlawfully occupied the property without a valid written and/or oral lease agreement and without the plaintiff's consent. As a result, the plaintiff is apparently suffering damages of N\$7000 per month since 1 April 2019 and continues to suffer such damages.

[3] Summarily, the plaintiff seeks the eviction of the defendant (or any other person in occupation and/or possession of the property) from the property together with payment of N\$7000 per month as of 1 April 2019 to date of eviction plus interest of 20 per cent per annum

as of 1 April 2019 to date of eviction and legal costs.

[4] The defendant defended the main action on 29 September 2023. On 23 October 2023, having considered the parties joint case plan filed of record on 18 October 2023, the court recorded that the plaintiff intends to apply for summary judgment but that summary judgment cannot be applied for in the damages claim, as it is not a liquidated amount as envisaged by rule 60(1). The court then issued directions for the plaintiff's summary judgment application.

[5] The plaintiff lodged his summary judgment application on 2 November 2023, and despite my recordal on 23 October 2023 that the plaintiff cannot apply for summary judgment for the damages claim, the plaintiff still sought summary judgment on the damages claim alongside an order for the eviction of the defendant (and others) from the property.

[6] The defendant delivered an opposing affidavit on 17 November 2023 and denies that he entered an appearance for the sole reason to delay the proceedings; denying further that he does not have a bona fide defence to the plaintiff's claim. The defendant's grounds for opposition are that the parties concluded an oral agreement during April 2014 in terms of which the plaintiff would sell to the defendant, who would purchase the property for N\$200 000, payable in cash. It is alleged by the defendant further that in addition to the purchase of the property, he purchased a Volkswagen Jetta 3 motor vehicle from the plaintiff which was valued at N\$50 000. He alleges that the money was paid and the plaintiff delivered the vehicle. Neither proof of payment nor proof of the delivery of the vehicle to him was provided to the court by the defendant.

[7] The defendant further deposes that the purpose for purchasing the property was to conduct a bar, and upon purchasing the property he commenced trading in the bar until 14 July 2023, when he was apparently unlawfully evicted from the property. He acknowledges that at the time of the conclusion of the apparent oral agreement regarding the purchasing of the property, neither he nor the plaintiff had knowledge of the law surrounding the purchasing of immovable property and he was only informed of the correct legal position regarding purchasing of immovable property by his legal practitioners of record. In this regard, the defendant's position is that he intends to bring a counterclaim to rectify the supposed oral agreement to have the

same reduced to writing in line with the relevant statute. He admits that he does not have a lease agreement regarding the property with the plaintiff but correctly points out that this can only be ventilated at trial stage.

[8] It is the defendant's further stance that he intends to bring a counterclaim for *rei vindicatio* for the return of certain valuable items that the plaintiff was ordered to return to him by this court, *per* Ueitele J, on 18 August 2023. He also intends to counterclaim against the plaintiff for contempt of court as a failure to comply with the court's order of 18 August 2023. Lastly, he intends to bring a counterclaim of spoliation on the basis that after the plaintiff was ordered to restore possession of the property to him under the court order of Ueitele J, the plaintiff apparently unlawfully disconnected the water supply to the property by purportedly removing and withholding the water meter on 23 August 2023.

[9] Resultantly, the defendant claims that he has bona fide defences to the plaintiff's claim and seeks this court's discretion to dismiss the plaintiff's summary judgment application.

[10] It is only in four circumstances that a plaintiff may apply to court for summary judgment and these are: (1) a liquid document; (2) a liquidated amount in money; (3) the delivery of specified movable property; and (3) ejectment.¹

[11] The plaintiff's claim for damages cannot be entertained in terms of rule 60. Not only is the plaintiff's claim for damages not a liquidated amount or premised on a liquid document, but the claim also seems excipiable. It is uncertain on what basis the plaintiff seeks N\$7000 per month in damages. A claim for damages must properly be set out to enable the defendant to 'reasonably assess the quantum thereof'.²

[12] On the issue of ejectment, same is covered by rule 60. Although not residing on the property,³ it appears that the defendant runs his bar operations on the property and is thus in possession of the property. This is not a possessory claim, but one relating to ownership of the property. Despite the defendant's averments on the oral agreement relating to the immovable property, and the rectification sought on a potential counterclaim, the fact is that s 1 of the

¹ High Court Rule 60(1).

² High Court Rule 45(9).

³ See para 1 of the defendant's opposing affidavit.

Formalities in respect of Contracts of Sale of Land Act 71 of 1969, invalidates an agreement relating to the sale of immovable property that is not reduced to writing and signed by the parties.

[13] In order to comply with the relevant laws pertaining to the sale of land, the defendant has indicated that he intends to bring a counterclaim against the plaintiff to have the oral agreement rectified by means of reducing it to writing. This claim is also untenable because the object of rectification is to have a written contract conform to the common intention of the parties. The essential allegations in a rectification claim were reiterated in *Arysteq Financial Services (Pty) Ltd v Quinto Ockhuizen*⁴ the following: (1) there is an agreement between the parties which was reduced to writing; (2) the written agreement does not reflect the parties' common intention; (3) both parties' intention to reduce the agreement to writing; (4) there is a mistake in drafting the written agreement (whether bona fide or intentional); and (5) the wording of the agreement as rectified.⁵ The defendant would have to institute a claim for the return of the moneys allegedly paid.

[14] I hasten to add that save to depose that an alleged oral agreement was concluded between the parties during April 2014, the defendant failed to provide any particularity regarding this purported oral agreement. He failed to allege where the agreement was concluded, the terms of the agreement – specifically when possession was to be taken over by the defendant under the supposed oral agreement. Additionally, no evidence has been presented to this court that the defendant actually made payment of N\$200 000 to the plaintiff. The nature and grounds for the defence have also not been fully disclosed.⁶

[15] The plaintiff has attached proof of ownership of the property to his particulars of claim and verified his cause of action as owner of the property for purposes of the eviction application. The defendant has however disclosed a defence to the plaintiff's claim for damages, and possibly, one of his counterclaims. On that basis summary judgment will be granted only on the eviction

⁴ *Arysteq Financial Services (Pty) Ltd v Quinto Ockhuizen* HC-MD-CIV-ACT-CON-2019/00478 [2022] NAHCMD 16 (21 January 2022) para 51.

⁵ *Ibid* para 53 and the authorities collected therein.

⁶ *Di Savino v Nedbank Namibia Limited* 2012 (2) NR 7 (SC).

application.

[16] Before I conclude, I am bound to consider costs. The general principle needs no regurgitation and denotes that the successful litigant must be awarded costs. I see no need and no reasons have been provided to this court why the general principle should not follow. The plaintiff shall therefore be awarded costs.

[17] For the foregoing reasons, I make the following order:

1. The plaintiff's application for summary judgment succeeds to the following extent:

The defendant and/or any other person in occupation and/or possession of the property described as Erf 124, Sonara, Hardel Street, Aranos, Republic of Namibia is hereby evicted and ordered to immediately vacate the aforesaid property

2. The defendant is granted leave to defend the plaintiff's claim for damages.
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Judge's signature	Note to the parties:
Counsel:	
Plaintiff	Defendant

<p>J Arnols Of Sisa Namandje & Co Inc., Windhoek</p>	<p>S N Enkali Of Kadhila Amoomo Legal Practitioners, Windhoek</p>
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