

Case No.: Case No. Case No.: Case No.: Case No.: Case No.: Case No.  
I. 1731/2000 I. 485/2001  
1772/2001 1773/2001 1732/2000 1343/2000 1342/2000

**BANK WINDHOEK LTD vs UWE KESSLER**

Hoff, J 2001/06/01

OPPOSED APPLICATION FOR SUMMARY JUDGMENT Parties confined to

summary judgment documents.

Court may however have regard to extrinsic evidence properly before court.

Applicant/plaintiff attempted to have an additional affidavit filed as extrinsic evidence by referring to it as a "discovery" or "replying" affidavit- such not permissible. Applicant must stand or fall by his/her verifying affidavit.

Defence of prescription raised.

Interpretation of phrase "debtor is outside Republic". Not to be interpreted literally. The word impediment as it appears in section 13(1)(i) of Act 68 of 1969 not to be taken too literally. Impediments range from the absolute to the relative.

//; *casu* there was no absolute bar to issue summons against respondent even where respondent was outside the Republic for two short periods. Defence raised *bona fide* and good in law. Application not granted.





CASE NO. I 1731/2000  
CASE NO. 1485/2001 CASE  
NO. I 1772/2001 CASE NO. I  
1773/2000 CASE NO. I  
1732/2000 CASE NO I  
1343/2000 A CASE NO I  
1342/2000

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**BANK WINDHOEK Ltd**

**APPLICANT**

versus

**UWE KESSLER**

**RESPONDENT**

**CORAM:** HOFF, J.

Heard on: **2001.03.26**

Delivered on: **2001.06.01**

**JUDGMENT**

**HOFF, J.:** This is an application for summary judgment in respect of the following cases:

1. Case number I **1342/2000** for payment in the amount of **N\$31 492 96;**

d) Case number I 1343/2000 A for payment in the amount of N\$34 391 96;

e) Case number I 1772/2000 for payment in the amount of N\$12 694 42;  
num

f) Case 21;

num g) Case number I 485/2001 for payment in the amount of N\$ 14 033 64;

ber I h) Case number I 1732/2000 for payment in the amount of N\$31 115 72;

1773 i) Case number I 1731/2000 for payment in the amount of N\$15 280 10.

/200 In all the applications respondent filed similar affidavits and raised the same defence viz. that of prescription. Applicant gave notice of its intention to apply for summary judgment on 31 October 2000. The respondent delivered his opposing affidavit on 9 November 2000 and raised prescription as a defence. This application was thereafter pay set down for argument on 26 March 2001. On 16 March 2001 instructing attorney of applicant filed a document and referred to it as a "discovery affidavit."

ment

In this document reference is made to certain passports of respondent which had in apparently been discovered for the purpose of summary judgment argument. In an affidavit in support of an application for condonation of the late filing of heads of the argument by respondent in main application the instructing attorney for respondent confirmed that the passports mentioned had been provided to the applicant but amo categorically denied that the passports had been made available for the purpose of

mm

summary judgment proceedings.

unt

Instructing attorney for applicant stated in his "discovery affidavit" that the reason he ofN\$ had deposed of that affidavit was to inform the Court that the "defendant did comply with the aforementioned agreement for discovery."

18

This "discovery affidavit" is also referred to as a "replying affidavit." In paragraph 10 730

of the However, the agreement to discover was only reached during January 2001, and "discover thereafter the Defendant only complied with the agreement on 14 March 2001. I accordingly pray for condonation of the late filing of this replying affidavit in as far as affidavit" it is necessary." (Underlining mine).

the

following The instructing attorney in this "replying affidavit" submitted that if one has regard to the information contained in the passports of respondent viz. that he had left Namibia appears: for a short period then respondent cannot succeed in his defence of prescription since the running of prescription had been delayed in terms of Section 13 (1)(b) of the "This Prescription Act, Act 68 of 1969.

replying

affidavit Mr Heathcote who appeared on behalf of the applicant argued that the travel has not documents i.e. the passports of respondent, although they are extrinsic evidence, are been properly before Court and if one has regard to the passports then the running of filed prescription has been delayed since the respondent had been outside Namibia during within the relevant period.

fourteen

days He argued that the ordinary rules of interpretation must be applied in determining the after the phrase "outside the Republic" and that "outside" does not refer to domicile as Defenda submitted by Mr Mouton who appeared on behalf of the respondent.

nt filed

his Applicant and respondent both filed heads of argument late and both gave notices of affidavits an intention to apply for condonation of the late filing of the heads of argument. Each in application was supported by an affidavit explaining the reasons why heads of support argument could not be filed timeously. At the hearing the parties agreed that of the condonation in respect of their respective applications may be granted.

condonat

ion

The court condoned the late filing of heads of argument.

applicati

on.

In my view, the issues to be properly before this Court, and

view

there are Secondly, if they are properly before this Court, how the phrase "outside the two Republic" as embodied in Section 13 (l)(b) of the Prescription Act, Act 68 of 1969 should be interpreted.

be

decided

Regarding the first issue

in this

It is trite law that in an application for summary judgment litigants are confined to summary judgment documents viz. the summons, the notice of intention to defend, the notice of application for summary judgment, the plaintiffs verifying affidavit and

Firstly, defendants opposing affidavit.

whether

the travel

The plaintiff is precluded from annexing any evidence to his affidavit and may not file supplementary affidavits nor a replying affidavit.

ts

annexed

Referring to Rule 32 (4) the following appears on p.442 G in the case of *Nepet (Pty)*

to the *Ltd v Van Aswegen's Garage* 1974 (3) SA (OPD):

"discover

y/replyin

"The Rule, according to my judgment, is peremptory by nature and does not permit of any other or further affidavit by the plaintiff....."

affidavit"

This is the general rule to which there is an exception. A court may have regard to the extrinsic evidence which is properly before court. Where a defendant applies for

instructin

condonation of the late filing of his opposing affidavit the plaintiff may in his affidavit

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opposing the application deal with the defence on the merits and may thus file an

attorney

affidavit in this regard. In *South African Breweries Ltd v Rygerpark Props (Pty) Ltd*

of

1992 (3) SA 829 at 833 A-D the following is stated:

applicant

can be

"In the normal case where the existence of a *bona fide* defence is sought to be shown

said to

the respondent is at liberty, in answer, to seek to prove that the applicant has no *bona*

*bona fide* case. Rule 32, a Court should decline to allow a plaintiff to go into the merits. Though to denyallow him to do so would be to permit him to do in the summary judgment a proceedings what he is not permitted to do in the summary judgment proceedings, it responde seems to me that it would be wrong to refuse permission on the basis of Rule 32 (4). A nt thatdefendant cannot call in aid a Rule which only applies if he has brought himself opportun within its terms. If he is not within its terms, he must apply for condonation and this is ity is toan indulgence which is in the Court's discretion. It would be wrong in my view to deny himfetter that discretion by laying down that a respondent is not entitled to found its a hearingopposition on proof that the defence alleged is not *bona fide* at all. What I think can be on anysaid, however, is that, where a respondent in summary judgment condonation essential proceedings seeks so prove an absence of *bona fides* by the filing of affidavits on the part ofprobabilities, he runs a very real risk that he will be mulcted in costs should the applicant attempt fail. The stage of summary judgment is not an appropriate stage at which to go 's case.into the merits. An applicant will accordingly be at a considerable disadvantage should The crisrespondent be permitted a full scale reply and I am satisfied that it is only in rare cases question that this should be allowed. However, because there may be cases where the *bona* that *fides* of a defence can be effectively destroyed even a summary judgment state, the arises inright to oppose on this ground cannot in principle be denied a plaintiff."

this case

is Another instance where the court can have regard to extrinsic evidence is where prior whether, to the application for summary judgment further particulars have been requested and in anprovided. Further particulars which do not constitute evidence form part of plaintiffs applicati summons are an integral part of plaintiffs papers and may be considered by the court on forin the resolution of the application. See *Hire Purchase Discount Co v Ryan Scholz* condonat 1979 (2) SA (SECLD) 307 C-F.

ion for

failure toMr Heathcote argued that there is no numerous clauses when documents can be said to comply be properly before court and submitted that by virtue of *inter alia* the condonation timeousl application for the late filing of heads of argument applicant is entitled to refer to the y withtravel documents. It was also submitted that the travel documents were properly



before n of applicant and could therefor be referred to in this application.

court

because He then submitted that the *bona fides* of respondent had been destroyed since of the respondent said that prescription was never interrupted, but if regard is had to the agreeme travel documents and the fact that he had been outside the Republic, then prescription nt to had been delayed.

discover

them and I do not agree that the contents of supporting affidavits in condonation applications for furtherm late filing of heads of argument can be regarded as extrinsic evidence which in turn ore that would entitle a litigant to use it in an attempt to destroy a defence or the *bona fides* of even if a respondent since heads of argument are required in terms of rules of practise and not the in terms of Rules of Court promulgated in terms of the High Court Act and heads of parties argument serve a different purpose than Rules of Court. Furthermore applicant filed were not his "discovery/replying affidavit" in terms of Rule 35 (14) a week prior to the notice *ad idem* given by respondent of his intention to apply for condonation of the late filing of regardin heads of argument.

g the

Rule 35 (14) reads as follows:

discover

y of the "After appearance to defence has been entered, any party to any action may, for travel purposes of pleading, require the other party to make available for inspection within 5 document days a clearly specified document or tape recording in his or her possession which is ts it was relevant to a reasonably anticipated issue in the action and to allow a copy or irrelevant transcription to be made thereof." (Underlining is mine).

t because

Applicant attempted to have this affidavit filed as extrinsic evidence by referring to it the as a "discovery" or "replying affidavit."

documen

ts had

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been It is clear from the wording of the Rule 35 (14) that it has only application in action placed in procedures and for purposes of pleading and that it cannot be used in application possessio procedures where litigants are restricted to a limited number of affidavits. At the stage

the of Rule 32 (4) and no further evidence may be adduced by applicant.

filing of

this

Applicant *in casu* must stand or fall by his verifying affidavit.

affidavit

there was See *M.A.N. Truck Bus (SA) (Pty) Ltd v Singh and Another* (1) 1976 (4) SA NPD 264.

nothing

to Regarding the submission that the parties had agreed to the discovery of the travel

discover documents the following appears on pi 10 A-B in *TrustBank of Africa Ltd v Hansa*

and *and Another* 1988 (4) SA 102.

nothing

to reply "Nor is it within the province of contractual arrangements to alter the intentions of and

to by limits laid down in Rule 32. If Rule 32 does not permit evidence to prove liability or

applicant to prove that some one has determined liability, the parties cannot by contract create

· different procedural rights. They have no contract with the Rule-maker or the Court."

The In my view the discovery or replying affidavit of applicant to which copies of

responde passports have been attached are not properly before court, it cannot be labeled

nt had in extrinsic evidence and I cannot have regard thereto in the resolution of this

my view application.

brought

himself

Regarding the second question

within

the terms It was submitted on behalf of applicant that the legal effect of the phrase "debtor is

of Rule outside the Republic" was that the period of prescription had been delayed.

32 (3)

and It is common cause that from the information contained in the passports of respondent

applicant that he had entered Zambia on 3 November 1999 and returned to Namibia on 5

is November 1999 and again entered Zambia on 24 June 2000 and returned to Namibia

therefore on 28 June 2000.

bound by

Section 13 (l)(b) of the Prescription Act 68 of 1969 provides as follows:

Debtor is outside the Republic (including the territory of South-West Africa); or

l) --

m) --

n) ....

o) --

(h) —; and

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)-"

"13. Completion of prescription is delayed in certain circumstances -

(1) If-

j) -

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The effect of Section 13 (l)(b) is therefore "that where more than one year remains of the original period of prescription after the impediment has ceased to exist, the period of prescription will terminate on the date when it would have terminated in the absence of any relevant impediment. Where less than a year remains of the original period of prescription after the impediment has ceased to exist the period of prescription will be extended and prescription will not take effect before one year has elapsed after the impediment has ceased to exist." See Extinctive Prescription by M M Loubser p 117.

See also *Owner of the MV Lash Atlantico v Owner of MV Maritime Prosperity* 1994 (3) SA 157D-CLD.

It is alternatively 18 July 1997 and that summons had been issued against respondent on 11 common October 2000.

cause

that the It was submitted on behalf of applicant that the impediment referred to in Section 13 period of (1)(d) of the Prescription Act ceased to exist when the respondent returned to Namibia prescripti on 5 November 1999 and/or 28 June 2000 and that prescription would accordingly on in only be completed on 5 November 2000 and 28 June 2001 respectively.

casu in

terms of It was argued that the ordinary meaning should be attached to the word 'outside' and Section that it should be interpreted literally. I do not agree with this submission. I also do not 11 (d) of agree that the words "outside the Republic" has reference only to a change of domicile Act 68 of as had been submitted on behalf of respondent. I however agree with the submission 1969 is by Mr Mouton that had the intention of the legislature been to restrict debtors from three leaving the borders of Namibia for short periods of time it would have meant that years. prescription is delayed against every citizen who had been away for a short period for

It is holiday and or business purposes and that such a contention would create immense practical complications in establishing whether a claim in a particular instance has further prescribed or not.

common

cause The effect of the submission on behalf of applicant means that even if a debtor is outside Namibia for a few hours and then returns to Namibia then prescription may be that the delayed. This in my view is an absurd situation and it must be kept in mind that there cause of is a presumption that the Legislature does not intend an absurdity.

action

arose and

prescripti In his treatise "Extinctive Prescription M M Loubser said the following on p 113-114:

on began

to run on "The policy objective ... to ... the delayed completion provisions is that extinctive or during prescription should operate equitably and not as a blunt instrument for rigid April enforcement of a time bar."

1997

In Prescription) Act that there are circumstances in which it would be unfair to require of  
Murray the creditor that he institute proceedings within the time normally allowed. This  
and unfairness arises in the main where it is impossible or difficult for a creditor to enforce  
Roberts his rights within the time limit." (Underlining mine).

Construc

tion It is also in my view apposite to have regard to the dictum of Marais JA in *ABP 4x4*  
(Cape) *Motor Dealers (Pty) Ltd v IGI Insurance Company Ltd* 1999 (3) SA 924 at 930 I-J to  
(Pty) Ltd<sup>931 A</sup>:

v "Next to be observed is that the use of the word 'impediment' in ss (l)(i) is not to be  
Upingto taken too literally and interpreted as meaning an absolute bar to the institution of legal  
n proceedings. While some of the circumstances set forth in ss (l)(a) to (h) give rise to  
Municip an absolute bar, other do not....

ality The word 'impediment' therefore covers a wide spectrum of situations ranging from  
1984 (1) those in which it would not be possible in law for the creditor to sue to those in which  
SA 571 it might be difficult or awkward, but not impossible, to sue. In short, the impediments  
(A) at range from the absolute to the relative."

578 B

the Applicant's principal place of business is situated in Windhoek and the respondent is  
followin ordinarily resident in Windhoek. I conclude that the two short periods of 2 days each  
g is during which respondent had been 'outside' Namibia cannot be regarded as  
stated: impediments within the meaning of Section 13 (l)(b) of the Prescription Act. It could  
furthermore not have been impossible, difficult or awkward for applicant to sue  
"It is respondent under the circumstances. There was no absolute bar to issue summons.

accepted

in the The defendant/respondent filed an affidavit opposing the application for summary  
(1969 judgment in which he disclosed his defence of prescription as well as the material  
facts on which the defence is based.





It is trite law that in order to resist an application for summary judgment a defendant must in his affidavit disclose a defence which is *bona fide* and good in law. *Maharay v Barclays National Bank* 1976 (1) SA 418 A.

I am of the view that the respondent succeeded in showing, that if proved at the trial, the defence raised would constitute a defence to applicants actions.

My ruling is therefor as follows:

1. The applications for summary judgments are hereby dismissed.
2. Defendant is granted leave to defend the actions.
3. Costs to be costs in the case.