CASE NO.: (T) I 3131/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NAMIBIA BREWERIES LIMITED **Applicant**

and

MARINA NENZA SERRAO **Respondent**

CORAM: **PARKER, A J**

Heard on: 2006 June 5

Delivered on: 2006 June 23

JUDGMENT:

PARKER, A J.:

[1] This is an application for summary judgement brought by the plaintiff in terms of Rule 32 of the Rules of Court. It is provided in the Rules that the plaintiff's claim for summary judgement must be (1) on a liquid document, (2) for a liquidated amount in money, (3) for delivery of specified moveable property, or (4) for ejectment. It is also

provided in the Rules that a defendant who wishes to resist an application for summary judgment must, unless he or she furnishes security or is given leave to adduce evidence, "satisfy the Court by affidavit … that he or she has a *bona fide* defence to the action, and such affidavit … shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor." It is also provided in subrule (5) that if the defendant does not find security or satisfy the Court as provided in subrule (3) (b), the Court may enter summary judgment for the plaintiff.

[2] Doubtless, the purpose of the summary judgment procedure is implicit in that part of Rule 32, which prescribes the contents of the plaintiff's affidavit that must be filed. In this connection, in a sense, the procedure is aimed at the defendant who gives notice of intention to defend merely to delay the grant of judgment in favour of the plaintiff, albeit he or she has no *bona fide* defence to the action. In this connection, it has been said, "The relevant Rule should, therefore, not be interpreted with such liberality to defendants that that purpose is defeated."[1] But, at the same time it is even more important to prevent injustice to the defendant who is asked, at short notice, to satisfy the Court in terms of subrule (3) (b) that he or she has a *bona fide* defence

[1] *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 at 227 C.

without the essential benefit of discovery, further particulars or cross-examination. Thus, if the requirements of subrule (3) (b) of Rule 32 are applied strictly, a defendant who has a defence may be denied – unjustly, I think – an opportunity of establishing that defence in a civil trial. In my opinion, the phrase *bona fide* defence cannot, therefore, be given its literal meaning: "It will suffice … if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing."[2]

[3] Another provision concerns the requirement that in his or her affidavit the defendant must disclose "fully" the nature and grounds of his or her defence and the material facts relied upon for such defence. In my view, the word "fully" should not be given a literal meaning: the defendant meets the requirements if the statement of material facts in his or her affidavit is reasonably full to persuade the Court that what he or she has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim.[3] According to Corbett, JA,

> "The word "fully" … connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material

[2] At 228 B.
[3] See *Shepstone v Shepstone* 1974 (2) SA 462 at 466 H-467 H.

> facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence."[4]

Nevertheless, in my view, the defence should not be vague or skeletal, taking into account all the circumstances of the particular case. I am fortified in my view by the following passage in *First National Bank of South West Africa v Graap*: "That a bold denial does not comply with the requirement of Rule 32 is trite law. Facts should be alleged from which the Court can determine whether such defence is bona fide or bogus."[5]

[4] Another aspect of the law on summary judgment merits mention. It is that Rule 32 (5) confers discretion on the Court, so that even if the defendant's affidavit does not meet fully the requirements of Rule 32 (3) (b), the Court may nonetheless refuse to grant summary judgment.[6] Van Winsen, J's insightful exposition on what a Court should take into account when exercising such discretion is instructive, and it reads:

> The Courts – quite rightly - never tire of pointing out that the drastic consequences of a summary judgment order and that the natural corollary to this is that such an order will only be given if the Court can be persuaded

[4] *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 426 C.
[5] 1990 NR 9 at 13 C-D, *per* Strydom, J (as he then was).
[6] *Breitenbach*, *supra*, at 229 B.

> on the evidence before it that plaintiff has what has sometimes been referred to as an unanswerable case.[7]

[5] I now proceed to apply these aspects of the law to the facts of this case.

[6] The applicant, whom I shall refer to as the plaintiff, sought summary judgment on the simple basis that the respondent, whom I shall refer to as the defendant, had in 2003 illegally and fraudulently misappropriated from the plaintiff an amount of US$140,685.00. The plaintiff's supporting affidavit consists of three paragraphs; of the three paragraphs only one paragraph, which contains five paltry lines, provides the basis of the applicant's cause of action. In the material part, this paragraph says simply that the "defendant/respondent" "is thus truly and lawfully indebted to the applicant/plaintiff in the amount of US$140,685.00 …"

[7] The defendant opposed the plaintiff's application for summary judgment and filed an affidavit in which, after denying the defendant's averments that she was defending the action solely for purposes of delay and that she had no *bona fide* defence to the plaintiff's claim, proceeded to state the defence whereby she proposed to answer the plaintiff's claim.

[8] From the outset, I wish to dispose of Mr. Murorua's, the defendant's counsel's, argument that the plaintiff's claim can not be brought under Rule 32 of the Rules of Court because it is incapable of being based on a liquid document in terms of Rule 32 (1) (a) and (b) of the Rules. His reason was that "there was no commercial transaction between the parties but only an employer/employee relationship" and that "there was no amount of money owing between the parties capable of speedy and quick ascertainment." In other words, Mr. Murorua

[7] *Gilinsky v Superb Launderes and Dry Cleaners* 1978 (3) SA 807 at 811C-G.

submitted, a claim based on theft is not a liquid document.

[9] The response of Mr. Vaatz, counsel for the plaintiff, was that the plaintiff's claim was not based on "a liquid document" (Rule 32 (1) (a)); it was a claim for "a liquidated amount of money" (Rule 32 (1) (b)). I respectfully agree with Mr. Vaatz; nowhere on the papers does the plaintiff contend that its claim is based on a liquid document: on the evidence, the plaintiff's claim is for a liquidated amount in money.

[10] In *Commercial Bank of Namibia Ltd v Trans Continental Trading*,[8] Hannah, J approved the test applied by Howard, J in *Leymac Distributors Ltd v Hoosen and another*[9] to ascertain whether a money claim is "liquidated" within the meaning of Rule 32 (1) (b). The test is that "a claim cannot be regarded as one for 'a liquidated amount in money' unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation."[10]

[11] Having applied the test to the facts of the present case, I am satisfied that the plaintiff's claim passes the test: the liquidated amount in money is the calculated amount of US$140,685.00 that the plaintiff alleged were illegally and fraudulently misappropriated by the defendant from the plaintiff for the defendant's own benefit. And it has been held that a claim for a specific amount of money wrongfully and

[8] 1991 NR 135.
[9] 1974 (4) SA 524 (D) at 527 F.
[10] *Commercial Bank of Namibia Ltd v Transcontinental Trading*, *supra*, at 142 D.

unlawfully misappropriated by the defendant from the plaintiff is liquidated within the meaning of Rule 32.[11] In the result, with the greatest respect, Mr. Murorua's contentions fall to be rejected. But that is not the end of the matter.

[12] Another aspect of the law on summary judgment that has been recognized by the Courts is that what a defendant can reasonably be expected to set out in his or her affidavit depends, to some appreciable degree, on the manner in which the plaintiff's claim, which the defendant is seeking to answer, has been formulated.[12]

[13] Having carefully considered both the way in which the plaintiff's claim in the summons and the supporting affidavit have been formulated and the contents of the defendant's affidavit, I am satisfied that the defendant has fully disclosed the nature and grounds of her defence and the material facts upon which it is founded. I, therefore, come to the conclusion that the defendant's proposed defence is arguable both in fact and in law; it is not inherently and seriously unconvincing. In sum, the plaintiff's claim is not unanswerable. The fact that she was found guilty at a disciplinary hearing and did not wish to appeal against the disciplinary inquiry's decision does not put a different colour on my decision. The defendant gave what I consider to be a reasonable explanation as to why she did not want to appeal the decision. I cannot, with due respect, accept Mr. Vaatz's submission that Annex "C" (attached to the defendant's affidavit) constitutes an acknowledgement of debt. In my opinion, Annex "C" does not constitute an obligation to pay the amount of money claimed by the plaintiff.

[11] *Colrod Motors (Pty) Ltd v Bhula* 1976 (3) SA 836 (W) at 837 H; *Tones v Sithole and others* 1982 (1) SA 62 at 62 H.
[12] E.g. *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (AD); Breitenbach, supra, at 229.

[14] I pass to deal with the matter of costs. Mr. Murorua argued strenuously that the plaintiff should be mulcted with costs on the attorney and own client scale in terms of Rule 32 (10) (a) of the Rules of Court because the application for summary judgment was "unnecessary or unjustified" as it lacked good grounds. Mr. Vaatz argued against the granting of costs – on any scale – at this stage because, he reasoned, if summary judgment was refused and the matter went to trial it might be proved at the trial that the plaintiff was after all right in bringing the summary application. I think Mr Vaatz's argument is well founded.

[15] Be that as it may, Mr. Murorua referred me to authorities on which he relied for his argument, including the most recent one which is *South African Bureau of Standards v GGS/AU (Pty) Ltd*.[13] I have visited all those authorities, and I have no doubt that they correctly state the law. For instance, in *South African Bureau of Standards v GGS/AU (Pty) Ltd,* Patel, J stated:

> Clearly there must be grounds for the exercise of the Court's discretion to award costs on an attorney and client scale. Some of the factors which have been held to warrant such an order of costs are: that unnecessary litigation

[13] 2003 (6) SA 588 (TPD).

> shows total disregard for the opponent's rights (*Ebrahim v Excelsior Shopfitters and Furnishers (Pty) Ltd (II)* 1946 TPD 226 at 236); that the opponent has been put into unnecessary trouble and expense by the initiation of an abortive application (In *re Alluvial Creek Ltd* 1929 CPD 532 at 535; *Mahomed Adam (Pty) Ltd v Barrett* 1958 (4) SA 507 (T) at 509B-C; *Lemore v African Mutual Credit Association and another* 1961 (1) SA 195 (c) at 199; *Floridar Construction Co (SWA) (Pty) Ltd v Kries* (*supra* at 878); *ABSA Bank Ltd (Voklskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (c) at 268D-E); that the application is foredoomed to failure since it is fatally defective (*Bodemer v Hechter* (*supra* at 245D-F)) or that the litigant's conduct is objectionable; unreasonable, unjustifiable or oppressive.[14]

[16] I respectfully agree that these are some of the factors that would warrant the order of costs on attorney and own client scale. In *Ebrahim*, *supra*, the Court concluded that it was apparent from a letter, dated 16 April 2002, that the plaintiff was sufficiently appraised of the defendant's defence and yet went ahead to launch the summary judgment application. *A fortiori*, the plaintiff in the end conceded giving of leave to defend after the defendant had gone into an unnecessary trouble and expense to oppose the application. On that score *Ebrahim* is distinguishable. Besides, I do not think any of the

[14] At 592 B-D.

factors in *Ebrahim* exist in the present case. In any case, as was observed in that case, "The awarding of such costs is a matter within the discretion of the Court and usually costs of abortive applications are reserved for determination at the trial.[15]

[14] Accordingly, the application for summary judgments is dismissed, and leave is given to defend the plaintiff's claim; costs shall be costs in the cause.

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Parker, A J

ON BEHALF OF THE PLAINTIFF:	**Mr A Vaatz**
Instructed by:	Andreas Vaatz & Partners
ON BEHALF OF THE RESPONDENT:	Mr L Murorua
Instructed by:	Murorua & Associates

[15] *Ibid*. at 591 I-J.