REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: I 1467/2014

In the matter between:

FIRST NATIONAL BANK OF NAMIBIA LIMITED **PLAINTIFF**

And

ANDRIES LOUW **DEFENDANT**

Neutral citation: First National Bank of Namibia Limited v Louw (I 1467-2014) [2015] NAHCMD 139 (12 June 2015)

CORAM: MASUKU A.J.

Heard: 28 May 2015

Delivered: 12 June 2015

Flynote: **Practice:** Rules of Court – implications of the provisions of rule 32 (9) and (10) on applications for summary judgment; Rule 60 examined and the responsibilities of the plaintiff and defendant in summary judgment revisited.

SUMMARY: The plaintiff moved an application for summary judgment in which some papers in opposition were filed. Held that court may in certain circumstances overlook the application of rule 32 (9) and (10) as in the instant case where the defendant actually does not raise any defence in the papers. Held further that in certain instances, application of rule 32 (9) and (10) may impinge on the other overriding principles of judicial case management e.g. saving costs and just speedy and expeditious resolution of disputes. The court in *obiter* further expressed doubt whether summary judgment is interlocutory in nature and effect and whether the court is precluded from dealing with summary judgment without reference to rule 32, especially in view of rule 60 (4).
The 'seven golden rules of summary judgment' are discussed and applied. Held that the plaintiff had complied with all the technical requirements and that the defendant had both in his plea and affidavit admitted liability to the plaintiff on all claims. Summary judgment granted as prayed and an order declaring the property executable stayed over pending compliance with rule 108.

REASONS

MASUKU, AJ;

[1] This is an action in which the plaintiff instituted four claims against the defendant. Presently serving before court is an application for summary judgment in which the plaintiff prays for the following relief to be granted:

'**CLAIM 1: HOME LOAN ACCOUNT NO: [3……..]**

1.1 Payment in the amount of N$1 065 504. 48;

1.2 Interest on the above-mentioned amount at the prime rate (currently 10.25%) per annum as from 1 June 2014 until date of payment. Interest is calculated on a daily basis and compounded monthly;

1.3 An order declaring the following property executable stands over for determination in terms of Rule 108 at a later stage:

CERTAIN **Erf No. 388, Kh……. (Extension No. 8)**
SITUATED **in the Municipality of Windhoek**
Registration Division "K"
Khomas Region
MEASURING **275 (Two Seven Five) Square Metres**
HELD BY **Deed of Transfer No. T 4……..**
SUBJECT **To the conditions contained therein**

CLAIM 2 – CREDIT CARD ACCOUNT NO: [8…….]:

2.1 Payment in the amount of N$13 329. 55;

2.2 Interest on the above-mentioned amount at the prime rate (currently 9.25%) per annum as from 1 June 2014 until date of payment. Interest is calculated on a daily basis and compounded monthly;

CLAIM 3 – CHEQUE ACCOUNT NO: [5…….]

3.1 Payment in the amount of N$46 782. 30;

3.2 Interest on the above-mentioned amount at the prime rate (currently 9.25%) per annum as from 1 June 2014 until date of payment. Interest is calculated on a daily basis and compounded monthly;

CLAIM 4 – CHEQUE ACCOUNT NO: [6……..]

3.1 Payment in the amount of N$51 261. 50;

3.2 Interest on the above-mentioned amount at the prime rate (currently 9.25%) per annum as from 1 June 2014 until date of payment. Interest is calculated on a daily basis and compounded monthly;

5. Costs on an attorney and client scale.'

[2] The matter has had a few twists and turns, some of which are necessary to chronicle in order to place the matter in a proper historical context.

[3] The history of the matter can be briefly summarized as follows: The plaintiff, by combined summons dated 20 June 2014, sued the defendant for the claims set out above. The combined summons and annexures thereto, were served on the defendant in terms of the rules of court on 2 July 2014. As he was entitled to, the defendant filed his notice of intention to defend dated 2 July 2014, which was subsequently followed by a plea and a claim in reconvention. I will comment on the latter pleading in due course.

[4] It is important to note that the plea, constituting a single page, and a single paragraph, whilst purporting to deny the correctness of the averrals in the particulars of claim, and putting the plaintiff to the proof thereof, did not put up any defence whatsoever to the four claims. In the valedictory paragraph, the defendant poignantly stated as follows: 'Defendant further pleads that he intends to settle the whole amount after receiving the judgment. In amplification thereto please refer (*sic*) the copy of Defendant's claim in reconvention annexure hereto marked "A".

[5] It is perhaps now propitious to refer to the said claim in reconvention. It is fitting to mention that the said pleading is an unconventional claim in reconvention. I say so for the reason that the particulars of the claim in reconvention refer to an agreement to build a house for the plaintiff and it is claimed that both parties acted personally. It appears that the claim in question has nothing whatsoever, to do with the plaintiff and may well be a claim that the defendant has against some other party expressly excepting the plaintiff. For that reason, whatever the said counterclaim may be worth, it serves no useful purpose in the present proceedings and is a total misfit.

[6] In view of the admission of liability and a promise to pay the plaintiff in respect of the plaintiff's claim, the plaintiff proceeded to file an application for summary judgment dated 24 July 2014, duly supported by the requisite affidavit. The defendant filed an affidavit supposedly resisting the granting of summary judgment. I shall advert to its

terms and contents in due course and at the appropriate juncture, when I decide whether or not a case has been made for summary judgment.

[7] The matter then served before Mr. Justice Smuts for case management. On 30 July 2014, the learned Judge postponed the matter to 24 September 2014 for hearing of the summary judgment application. The court further placed the parties on terms to file their respective sets of affidavits and heads of argument. The parties complied with the timelines regarding the respective sets of affidavits and the plaintiff complied by filing its heads of argument as ordered by the court. I must hasten to say the defendant was put to terms to file his heads of argument by 19 September 2014. He has not done so to date.

[8] On 24 September 2014 the matter was postponed to 1 October 2014 for a status hearing. On 1 October 2014, the defendant was ordered by the court to pay costs on the attorney and client scale. It is not quite apparent from the file as to why the matter was postponed nor why the defendant was ordered to pay the costs on the said date. The matter was then docket allocated to me and the first appearance before me was on 4 March 2015 on which date the matter was postponed to 28 May 2015 for the hearing of the summary judgment application. The defendant, who as indicated, did not file his heads of argument as ordered by Mr. Justice Smuts. He was afforded a second bite to the cherry as it were by being put to terms to file his heads of argument on or before 12 May 2015. Again, the defendant, as indicated in the immediately preceding paragraph, did not comply with the court order in that regard.

[9] After reading the papers filed of record, including the plaintiff's heads of argument and the authorities cited therein and having listened to oral argument on 28 May 2015, I granted summary judgment in the plaintiff's favour as prayed for in paragraph 1 above, subject to the declaration of the bonded property executable being held in abeyance pending compliance with the provision of rule 108 of this court's rules. I indicated on that day that reasons for the order would follow. Captured below are the said reasons.

[10] The first issue falling for determination, is whether this is an appropriate case to deal with the summary judgment application for the reason that it would appear there has not been compliance by the plaintiff with the provisions of rule 32 (9) and (10). The said rules provide the following:

> '(9) In relation to any proceeding referred to in this rule, a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication.
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> (10) The party bringing any proceedings contemplated in this rule must, before instituting the proceeding, file with the registrar details of the steps taken to have the matter resolved amicably as contemplated in subrule (9), without disclosing privileged information'.

[11] The said provisions have been held by this court in *Irvine Mukata v Lukas Appolus*[1] to be mandatory and that non-compliance therewith is fatal to the extent that the court may be inclined to strike a matter off the roll for non-compliance therewith. In that case, which was a summary judgment application, the application was struck off for the reason of non-compliance with the said subrules. What is evident is that in the *Mukata* matter, the summary judgment application was opposed and papers in that regard possibly raising a defence were filed. In the instant matter, however, a reading of both the plea and the affidavit resisting summary judgment show indubitably that the defendant actually admits liability. Not only that, even during his address at the hearing, he did not deny his liability to the plaintiff in respect of all the claims. All he pleaded for was a moratorium within which to settle his indebtedness to the plaintiff. I discerned from the defendant's argument that his main preoccupation was to save the house which was bonded to the plaintiff, an eventuality that is unlikely to occur immediately in view of the procedure to be followed in terms of rule 108 as set out in the judgment of *Futeni Collections Pty Ltd v De Duine (Pty) Ltd.*[2]

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[1] Case No. I 3396/2014.
[2] Case No. I 3044/2014.

[12] I am of the view that in such circumstances, no value could be added by having the matter placed for compliance with rule 32 as there was really no issue in dispute to resolve. Rather, an escalation of costs and loss of time may have resulted in the circumstances as the liability is not denied by the defendant. In the case of *Bank Windhoek v Nosib Farming CC And Four Others*[3], where summary judgment was not opposed, I found it would work hardship for the plaintiff and would serve to delay unnecessarily its enjoyment of the judgment to comply with the provisions of rule 32 (9) and (10) as it was evident that the application for summary judgment in that case was not opposed. I again come to the conclusion that on the facts of the current case, strict adherence to rule 32 (9) and (10), while it would answers to the possible amicable settlement of cases which is encouraged in the rules, unfortunately have the corresponding effect of detracting from the speedy and inexpensive resolution of this case, which as I have pointed out, is strictly speaking not opposed. It is my view that the court ought to consider the application of the sub-rule in the context of each case, carefully weighing in the scales all the relevant overriding considerations set out in rule 1 (3).

[13] Having said this, I am acutely aware that in the *Mukata* judgment, and in a few other authorities, it has been stated that summary judgment is an interlocutory proceeding. Whilst that may conceivably be true, it cannot be denied that summary judgment is in many cases final in effect and is capable of disposing fully and finally the entire *lis.* The finality that results regarding the correctness of granting summary judgment is such that it may be appealed directly to the Supreme Court without leave. As indicated, this is an issue that I have not considered in any great depth and may be the subject of future examination by this court.

[14] All I can say though is that there may be more argument about whether summary judgment should be subject to the provisions of rule 32 at all in view of it being subject to a different rule and procedure on the one hand, including a case plan, in terms of which the managing judge may place the parties to terms regarding the various steps

[3] Case No. I 1404/2014.

and time limits, including, in some cases the date of hearing the summary judgment itself. This would appear to be the import of rule 60 (4), which is itself couched in peremptory terms and also hazards the possibility of determining the date of hearing of a summary judgment at the case planning conference in terms of rule 23. On the other, of course may be the argument I have mentioned whether summary judgment is without doubt interlocutory in nature and effect. These are difficult matters that may require time and attention to investigate fully. In sum, I find that the non-compliance with rule 32 (9) and (10) in the instant case was not necessary and therefore not fatal to the hearing of the application for summary judgment.

[15] Having dealt with this preliminary issue, it is now appropriate to deal with the application itself. In terms of rule 60 (5), a defendant served with an application for summary judgment, has options open to him or her, namely to put up security to the satisfaction of the registrar for any judgment, including costs or by filing an affidavit before 12 noon on the court day but one before the day on which the application is to be heard. In the latter event, the defendant, in the said affidavit, must disclose a *bona fide* defence and should also disclose the material facts upon which the said defence is based[4]. The defendant may also, with the leave of court, tender oral evidence of the defendant or any other person on its behalf, who can swear positively to the fact that the defendant has a *bona fide* defence to the claim and must fully disclose the nature and grounds of that defence, together with the material facts on which it is predicated.

[16] As foreshadowed above, the defendant chose to file an “affidavit” in his attempt to ward off the summary judgment. I have deliberately put affidavit in parenthesis above for the reason that the document filed by the defendant in opposition to the application for summary judgment, is not an affidavit in the conventional sense. Rule 9 (1) says an affidavit ‘means a written statement signed by the deponent thereof under oath or affirmation administered by a Commissioner of Oaths in terms of the Justice of the Peace and Commissioner of Oaths Act, (Act 16 of 1963)’. Although the statement has

[4] Rule 60 (5) (b)

been signed by the defendant, it has not been sworn before a commissioner of oaths. For that reason, it is defective.

[17] I will, however, consider its contents, for whatever it is worth, in a quest to do justice in the instant matter for the reason that the defendant, who is unlettered in law, represented himself and may not have understood what an affidavit is. I must stress though that persons, including those in the defendant's position, should respect the prescriptions in the rules of court. There is good reason why the respondent should commit his defence on affidavit and not present it in any other manner. This is to ensure that the defendant commits the defence in writing and under oath, understanding that any attempt to mislead the court by putting up a false, contrived and concocted defence may have consequences, least of which may even be perjury proceedings. Responding to summary judgment under oath is therefore a serious and solemn matter, hence the invocation of the oath or affirmation as the case may well be.

[18] In this document, it is noteworthy that the defendant states the following[5], 'I further submit that I pleated (*sic*) that the Honourable High Court Judge should grant me time to sell my house so that I can meet my obligation towards the plaintiff in the matter'. There is, in my opinion, no better manner of admitting liability than what the defendant stated in this document. Nowhere does the defendant deny liability and certainly does not state any defence, *bona fide* or otherwise. As it would be expected, there are no facts disclosed on which the defence could conceivably be predicated. For that reason, it is clear that this is a case which admits of no other conclusion than that summary judgment is eminently called for in this case.

[19] I should extend my apologies to Mr. Schickerling, who in his erudite heads of argument, came out guns blazing, with his arsenal ready to do battle, only to find the defendant with hands up, carrying a white flag, indicating his readiness to surrender as it were. I cannot, for that reason make much reference to his helpful heads of argument and this is not because they were irrelevant or misplaced. Far from it. I will, however, in

[5] Paragraph 4 page 138 of the Record.

fortifying my decision to grant summary judgment, make reference to what he aptly referred to as 'the seven golden rules of summary judgment', which I found extremely helpful in any application for summary judgment. I will not expand on them more than is necessary. I deal with these nuggets briefly below:

(a) The resolution of summary judgment does not entail the resolution of the entire action i.e. the defendant is required to set out facts which if proved at trial would constitute a defence. The upshot of this is that the court is required to refuse summary judgment even though it might consider that the defence will probably fail at the trial.[6]

(b) The adjudication of summary judgment does not include a decision on factual disputes. This means that the court should decide the matter from the assumption or premise that the defendant's allegations are correct[7]. For that reason, summary judgment must be refused if the defendant discloses facts which, accepting the truth thereof, or if proved at trial, will constitute a defence.

(c) Because summary judgment is an extra ordinary remedy, it should be granted only where there is no doubt that the plaintiff has an unanswerable case[8].

(d) In determining summary judgment, the court is restricted to the manner in which the plaintiff has presented its case. In this regard, the court must insist on a strict compliance by the plaintiff and technically incorrect papers should see the application being refused[9].

(e) The court is not bound by the manner in which the defendant presents his case. This is to mean that if the defendant files an opposing affidavit that discloses a triable issue, the defendant should, on that account, be granted leave to defend the action[10].

(f) It is permissible for the defendant to attack the validity of the application for summary judgment on any proper ground. This may include raising an argument about the excepiability or irregularity of the particulars of claim or even the admissibility of the

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[6] See e.g. *Estate Potgieter v Elliot 1948 (1) SA 1084 (C) at 1087.*
[7] Trekker Investments (Pty) Ltd v Wimpy Bar 1977 (3) SA 4447.
[8] Nathan, Barnard and Brink Uniform Rules of Court, 3r edition at 190.
[9] Visser v De La Ray 1980 (3) SA 147.
[10] Lombard v van der Westhuizen 1953 (4) SA 84 (C) at 88A -88F.

evidence tendered in the affidavit in support of summary judgment, without having to record same in the affidavit.[11]

(g) Summary judgment must be refused in the face of any doubt arising as to whether or not to grant it. The basis for this rule is that an erroneous finding to enter summary judgment is heralds more debilitating consequences for a defendant than a plaintiff. This is because any error committed in refusing summary judgment may be dealt with during the substantive trial. In this regard therefore, leave ought ordinarily to be granted unless the court is of the opinion that the defendant has a hopeless case.[12]

[20] I am of the considered view that these golden rules are extremely useful in guiding both practitioners and the court on matters relating to summary judgment and adherence thereto is unlikely to lead one astray. Having regard to these nuggets of wisdom relating to summary judgment, I am fortified that none of the rules have been breached in arriving at the ultimate conclusion that this case is eminently fit for granting the relief sought on all the claims. There can be no gainsaying that the defendant admitted liability and there is really no defence or arguable case, or whatever epithet one may be tempted to use to suggest that the plaintiff deserves leave to defend the claim. It would actually amount to an injustice to order the matter to proceed to trial as both time and money would be expended on a crusade which should stop at this very moment. This is simply an answerable case, which the defendant has unequivocally accepted. I am of the view that the plaintiff's papers are technically in order and all the necessary averments have been made. There is thus no room for an injustice being visited upon the defendant in the circumstances by the grant of the relief sought. As indicated above, the opposite would rather be true.

[21] It is for the foregoing reasons that I granted judgment in the plaintiff's favour on 28 May 2015.

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[11] Spice Works and Butcheries (Pty) Ltd v Conpen Holdings (Pty) Ltd 1959 (2) SA 198 (W).

[12] Tseven CC and Another v South African Bank of Athens 2000 (1) SA 268 (SCA) at 277; Smith Kruger Incorporated v Benvenuti Tiles Ltd [1999] All SA 242 (C) at 249 B-D; Frist National Bank of South Africa Limited v Myburgh And Another 2002 (4) SA 176 (C) at 184 F-J.

TS Masuku, AJ

APPEARANCE

PLAINTIFF	:	J Schickerling Instructed by Van der Merwe-Greeff Andima Inc.
DEFENDANT:		A. Louw The defendant in person