



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: **HC-MD-CIV-ACT-CON-2016/04179**

In the matter between:

CHRISTOPHER JONATHAN WOOD

PLAINTIFF

and

GIDEON JOSUA NIEUWOUDT

DEFENDANT

Neutral citation: *Wood v Nieuwoudt* (HC-MD-CIV-ACT-CON-2016/04179)
[2017] NAHCMD 178 (28 June 2017)

Coram: Bassingthwaighte AJ

Heard: 15 June 2017

Delivered: 28 June 2017

Flynote: Rule 60 – Summary judgment application – Claim not clearly established on the papers and pleadings not technically correct – defendant denying payment received in terms of an invalid agreement – reasonable doubt that plaintiff’s claim is unanswerable – residual discretion exercised.

Summary: Plaintiff claims payment of an amount of N\$3,500,000.00 based on two alternative causes of action. In the first cause of action the plaintiff claims restitution of the amount which was agreed to be allocated to the purchase of Plot 27 Omaruru on the ground that the agreement which was not in writing is void for non – compliance with section 1(1) of the Formalities in Respect of Contracts of Sale of Land Act, 71 of 1669. In the alternative, the plaintiff relies on the *condictio indebiti* which is a claim based on enrichment. Defendant in his opposing affidavit attacked the summary judgment application mainly on technical grounds and disclosed almost nothing of his defence except for denying that the payment by plaintiff was made in respect of a void agreement or in the bona fide and reasonable belief that it was valid.

Held, that when considering an application for summary judgment, the court must first be satisfied that the plaintiff has established his claim clearly on the papers and that his pleadings relied on are technically correct. Then only the court needs to consider whether the defendant had set up a defence;

Held, further that although the defendant has failed to put up much of a defence, summary judgment should be refused under the circumstances as the plaintiff's claim is not clearly established on the papers and his pleadings are not technically in order;

Held further that on the papers read as a whole, and in light of the defendant's denial, there is doubt that the plaintiff's case is unanswerable.

ORDER-

1. The plaintiff's application for summary judgment is refused and the defendant is granted leave to defend.
2. The costs shall be costs in the cause.
3. The matter is postponed to 4 July 2017 at 08h30 for a case planning conference.

JUDGMENT

BASSINGTHWAIGHTE, AJ

- (a) On 21 June 2017, I gave an order dismissing the plaintiff's summary judgment application and undertook to provide short reasons. These are my reasons.
- (b) The plaintiff's claim is for payment in the amount of N\$3,500,000.00. He also seeks interest on this amount at the rate of 9% per annum *a tempore morae* to date of final payment. The plaintiff in his particulars of claim relies on two causes of action, pleaded in the alternative, as the basis for his claim for payment. Both are in essence a claim for restitution of the same amount.
- (c) The plaintiff alleges that the parties entered into an oral agreement during September 2015 in terms of which plaintiff agreed to purchase the property of the defendant situated at Plot 27 Omaruru, The Wildlife Estate, Omaruru ("Plot 27") for a purchase price of N\$9,600,000.00. It is furthermore alleged that the parties agreed that an amount of N\$3,500,000.00 which the plaintiff had paid to the defendant on 18 August 2015 as a deposit for the purchase of another property ("the unidentified property") owned by the defendant would instead be utilized as a deposit for the purchase of Plot 27. Nothing more is said about the purchase of the unidentified property and what happened to the agreement the parties must have entered into in respect thereof.
- (d) The first cause of action is pleaded as follows:

'4. The agreement:

- 4.1 was not reduced to writing and signed by the plaintiff and the defendant;
- 4.2 is illegal and thus null and void in terms of section 1(1) of the Formalities in respect of Contracts of Sale of Land Act, 71 of 1969 (the Act).'

(e) The agreement referred to here is the one in respect of Plot 27. Both parties during arguments agreed that the agreement was not rendered illegal by virtue of non-compliance with the formalities prescribed in the aforementioned Act. The only consequence which follows on account of such failure is that the agreement is unenforceable. Thus, illegality is not in issue.

(f) The plaintiff in the alternative alleged the following which constitutes the alternative cause of action which is clearly based on the *condictio indebiti*:

'5. *Alternatively*, to paragraph 4:

- 5.1 The plaintiff paid the deposit to the defendant in the *bona fide* and reasonable belief that the agreement was valid;
- 5.2 The agreement is void in terms of section 1(1) of the Act in that it was not reduced to writing and signed by the plaintiff and the defendant.'

(g) The plaintiff then proceeds to plead that defendant remains in possession of the deposit and is thus enriched at the expense of the plaintiff. These allegations must be read to apply to both causes of action.

(h) The defendant entered appearance to defend and the plaintiff filed an application for summary judgment in terms of a case plan filed jointly by the parties. In his opposing affidavit, the defendant raised three issues. Firstly, the defendant claimed that the

summary judgment application was premature as he had demanded security in terms of Rule 59 which demand had not been met nor has it been disposed of. He furthermore stated that he has a right in terms of Rule 59 to apply for a stay of the proceedings, that the time within which he should bring such application had not passed and that he is at risk of not being able to recover his costs. This point is without merit. The demand for security was only made after the summary judgment application was filed and no application for a stay has been brought to date. In any event, the plaintiff's counsel informed me at the hearing of the matter that plaintiff had tendered costs in the amount of N\$20,000.00. This tender was rejected. If the application had succeeded the issue of security for costs would have been a non-issue. As the application did not succeed and costs are ordered to be costs in the cause, the defendant can still pursue the issue of security of costs.

- (i) The second point raised by the defendant in his opposing affidavit is that the plaintiff in his particulars of claim disclosed no basis in law or fact whereupon he is entitled to an order for interest at the rate of 9% per annum and that given the allegations made by the plaintiff, the plaintiff would in any event not be entitled to claim interest. The defendant expanded on this point in his heads of argument by stating that in light of the allegations in the particulars of claim that the agreement is illegal and thus null and void, there is no basis in law or fact whereupon the plaintiff can seek an order for interest *a temporae more*. Furthermore, the defendant argued, there is no evidence that the defendant had invested the deposit or that he had earned interest on the deposit in any manner and was thereby enriched at the expense of the plaintiff. The defendant relied on the cases of *Du Toit v Dreyer*¹ and *Schweiger v Muller*² in support of this point.

¹ *Du Toit v Dreyer* (I 1751/2007) [2013] NAHCMD 64 at paras 49 to 52.

² *Schweiger v Muller* (SA 3/20015) [2012] NAHC 20 at paras 25 to 30.

- (j) In light of the fact that the application for summary judgment has been refused, I express no view on this point raised by the defendant.
- (k) The defendant's final and third basis for opposing the application for summary judgment was contained in the final paragraph of the opposing affidavit. I quote the entire paragraph.

[11] I am further advised that the applicant alleges in paragraph 3.2 of the main claim that a deposit was paid in respect of the purchase of another property. In paragraph 5.1 of the alternative claim the applicant alleges that he paid the deposit in respect of an allegedly void agreement, and in the "*bona fide and reasonable belief that the agreement was valid*". No deposit was paid as alleged by the applicant in the alternative claim. I am advised that from a proper reading of the main and alternative claims it is apparent that no deposit could in fact be paid (*sic*) as alleged in the alternative claim and accordingly the main and alternative claims contradict each other to the extent that they render the plaintiff's particulars of claim vague and embarrassing and/or excipiable.' (my emphasis)

- (l) The reference to the alternative claim is a reference to the allegations in paragraph 5 of the particulars of claim which is not an alternative claim, only an alternative cause of action. The underlined sentence is the only place where the defendant made an attempt to deal with the factual allegations in the plaintiff's particulars of claim and also constitutes the whole basis of his defence.
- (m) This court has on a number of occasions restated the principles applicable in the consideration of applications for summary judgment. It is not necessary to repeat all these principles because they are trite. I only refer to those which I consider necessary in providing reasons for my decision to dismiss the application. It is, however, important to once again emphasise

that summary judgment is an extremely extraordinary and drastic remedy which shuts the door finally to the defendant. Therefore, the plaintiff must comply strictly with the requirements of the rule, his case must be established clearly on the papers and must be technically correct. This must be considered before the court considers whether the defendant has set up a bona fide defence. If the plaintiff does not meet these requirements the court is obliged to refuse summary judgment even if the defendant fails to put up a bona fide defence or puts up a defence which does not meet the required standard.³ This does not mean that a plaintiff's application for summary judgment should, in cases where no bona fide defence has been put up, fail simply because his papers contain insignificant defects. In *Mushimba v Autogas Namibia (Pty) Ltd*, Damaseb JP held that a plaintiff should not be penalised simply because his papers are technically wanting. If, on the pleadings and the papers forming part of the summary judgment looked at as a whole, there is a clear cause of action and it appears that the plaintiff has an unanswerable case, summary judgment should not be refused.⁴

(n) In deciding an application for summary judgment, the court is restricted to the manner in which the plaintiff has presented his case.⁵ Rule 60 (6) also precludes the plaintiff from adducing any evidence other than what must be stated in the verifying affidavit.

(o) As indicated above, plaintiff in his particulars of claim relies on

³ *Gulf Steel (Pty) Ltd v Rack – Rite Bop (Pty) Ltd and Another* 1998 (1) SA 679 (O) at 683G – 684B; See also *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd* 1998 NR 198 (HC) at 201D – E where the court endorsed the approach that courts should only grant summary judgment in instances where the plaintiff's case is unanswerable.

⁴ *Mushimba v Autogas Namibia (Pty) Ltd* 2008 (1) NR 253 (HC) at 259 para 19. This is also in line with the following statement by Corbett JA in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423F-G: 'The grant of the remedy is based upon the supposition that the plaintiff's case is unimpeachable and that the defendant's defence is bogus or bad in law.'

⁵ *Namibia Airports Co Ltd v Conradie* 2007 (1) NR 375 (HC) at 377 paras 7 and 8.

alternative causes of action. From the particulars of claim it is apparent that plaintiff only made one payment to the defendant in the amount of N\$3,500,000.00 which payment was made on 18 August 2015 as a deposit for the purchase of the unidentified property. This was prior to the parties entering into the agreement for the purchase of Plot 27.

- (p) In his first alternative cause of action, the plaintiff claims that the agreement for the purchase of Plot 27 is illegal and null and void for want of compliance with formalities set out in the Act. In the second alternative cause of action, as set out in paras 5.1 and 5.2, the plaintiff once again refers to 'the agreement' and states that it is void, also for want of compliance with the Act. The agreement referred to in para 5 can only be taken to be a reference to the agreement in respect of which the payment was made, that is for the purchase of the unidentified property because that is the only time (based on the allegations in the particulars of claim) when the plaintiff made a payment to the defendant. In his opposing affidavit, the defendant denies that the deposit was paid as alleged in the alternative claim (which as I said earlier is a reference to what is alleged in para 5). With this denial, the defendant effectively denies that the agreement in respect of which the payment was made is void or that the plaintiff paid the deposit under the bona fide belief that the agreement is valid whilst it is in fact void.
- (q) This creates a problem for the plaintiff because I cannot in these circumstances accept that the payment was made without cause or that the defendant is enriched at his expense. In the face of this denial, I cannot on the papers as they are find that the first agreement in respect of the purchase of the unidentified property was also void for want of compliance with the formalities prescribed in the Act. In fact, it would appear that this is not what the plaintiff intended to plead. Plaintiff's counsel argued that the

agreement referred to in para 5.1 is the agreement in respect of the purchase of Plot 27 and that I can read the reference to “paid” as being a reference to the agreement to utilise the amount as a deposit for the purchase of Plot 27, because, so he argued, it is clear from the particulars of claim that the parties in September 2015 decided to no longer continue with the purchase of the unidentified property and to instead utilise the deposit paid in respect thereof for the purchase of Plot 27. I do not agree that this appears from the pleadings. Furthermore, the argument also illustrates that plaintiff’s claim was not made out clearly on the papers, is not technically correct and, more importantly, that I would be required to read more into what is actually stated in the particulars of claim to clarify the plaintiff’s case.

- (r) For this reason, I find that there is some doubt that the plaintiff has an unanswerable case because although the defence put up by the defendant was rather bare of detail, there is a reasonable possibility that it is good and therefore I exercised the court’s residual discretion in favour of the defendant and refused the summary judgment.⁶

N BASSINGTHWAIGHTE
Acting Judge

APPEARANCES

PLAINTIFF: J P Jones
Instructed by Engling Stritter & Partners,
Windhoek

DEFENDANT: K Mudzanapabwe

⁶ *Namibia Airports Co Ltd v Conradie* above at 380 paras 21-22.

Etzhold Duvenhage, Windhoek