

Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

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| Case Title: BRAVO COMPLIANCE (PROPRIETARY) LIMITED V NAMIB DESERT DIAMONDS (PROPRIETARY) LIMITED | Case No: HC-MD-CIV-ACT-CON-2019/00396 |
| Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE | Division of Court: HIGH COURT(MAIN DIVISION) |
| Neutral citation: <i>Bravo Compliance (Proprietary) Limited v Namib Desert Diamonds (Proprietary) Limited</i> (HC-MD-CIV-ACT-CON-2019/00396) [2019] NAHCMD 533 (05 December 2019) | Date of hearing: 23 OCTOBER 2019 |
| Results on merits: Application for Summary Judgment. Merits not considered. | Date of order: 05 DECEMBER 2019 |
| The order: Having heard MR VILJOEN , for the Plaintiff and having read the documents filed of record: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none"> 1. The point <i>in limine</i> raised by the Defendant based on <i>locus standi</i> is upheld. 2. The plaintiff's application for summary judgment is dismissed with costs. 3. Such costs to include the cost of one instructed and one instructing counsel. The cost is limited to Rule 32(11). 4. The matter is postponed to 23 January at 15:00 for further case planning conference. 5. The Parties must file a further case plan on or before <u>20 January 2020</u>. | Reasons delivered on: 06 DECEMBER 2019 |
| Reasons for orders: | |
| <u>Introduction and brief background</u> [1] This is an application for summary judgment brought by the plaintiff against the defendant for breach of contract as set out in Claim A of the particulars of claim. The claim is for an amount of N\$ 297 427, interest on that amount at the rate of 20% per annum <i>a tempore morae</i> calculated from 7 February 2019 ¹ and costs | |

of suit. The claim emanates from services allegedly rendered by plaintiff to the defendant and the defendant's failure to pay the plaintiff's tax invoices for the services so rendered. The plaintiff claims an amount based on two invoices, one issued to the defendant and the other issued to Brave Souled Butterfly (Pty) Ltd (BSB).

[2] BSB was selected by the defendant, after submission of a proposal in response to the defendant's invitation of "expression of interest", to render consulting services and for preparing a Risk Management Framework/Plan detailing the risk strategy and assessment of corporate governance practices. The defendant opposed the summary judgment application and filed an opposing affidavit in which it sets out the following defences:

- (a) as a point *in limine*, that the plaintiff lacks *locus standi* to launch these proceedings against the defendant;
- (b) no agreement was concluded between the plaintiff (or BSB) and the defendant;
- (c) in the event that the court finds that an agreement was concluded, the defendant cancelled the agreement and paid for those services which were rendered to it.

The principles of summary judgment

[3] Applications for summary judgment are governed by Rule 60 of the High Court Rules and the principles and law applicable to summary judgment is trite. In the case of *Kukuri v Social Security Commission*² Mainga JA referred to the case of *Maharaj v Barclays National Bank*³ where Corbett JA had this to say:⁴

'All that the court enquires into is: (a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as either the whole or part of claim, a defence which is both bona fide and good in law. If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It 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 facts upon which it is based with

¹ It would appear from reading the relief claimed in the particulars of claim and that sought in the summary judgment application the date from when interest will run is different in both respect as the interest claimed in the particulars of claim starts to run from date of judgment while in the summary judgment application interest starts to run both from date of judgment and 7 February 2019. However, the plaintiff is not entitled to change anything pleaded in its pleadings unless leave to do so is granted and no objection has been raised. So should this application be in favour of the plaintiff, the latter is bound to what is prayed for in its particulars of claim.

² SA17/2015.

³ [1976 \(1\) SA 418A](#).

⁴ At 426 A-426 E.

sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence.'

Lack of *locus standi*

[4] Where *locus standi* is challenged as a point *in limine* it would be competent for this Court to firstly decide the point *in limine* before determining anything else. The outcome thereof will be determinative of the further conduct of the matter. Should the court uphold the point *in limine* then there will be no need for this court to determine other issues and must refuse the application for summary judgment.

[5] I will therefore first and foremost consider the question of whether or not the plaintiff has *locus standi* to bring the current application.

[6] The defendant stated in its opposing affidavit that the plaintiff in its particulars of claim is cited as 'Bravo Compliance (Pty) Ltd'. The defendant however stated that it had not dealt with nor had any dealings with Bravo Compliance (Pty) Ltd. When the proposal to the 'expression of interest' was submitted it was done by an entity by the name of Brave Souled Butterly (Pty) Ltd, with its shortened name as 'BSB' and that the only other name that appeared on the documents exchanged between the defendant and 'BSB' is BSB Compliance Assurance and Advisory. There is no reference to the name of Bravo Compliance (Pty) Ltd.

[7] Counsel on behalf of the defendant argued that a party's legal standing appears from its description hence when instituting an action, it is required that the parties to the litigation are properly described. Counsel submitted that rule 6 (4) (c) read with rule 7 (9) requires that the name, registration number, postal addresss and registered office of the company must be provided in the summons to ensure that the party furnishes sufficient details to establish *locus standi*. Counsel argued that it is not for the defendant and court to speculate and that proper pleadings must therefore be placed before court.

[8] Further to this the defendant submitted that the plaintiff does not allege in the particulars of claim that it is the same entity as BSB, neither does the plaintiff explain the difference in name. Counsel therefore argued that a defect in the plaintiff's case which is not technical and which cannot be condoned should result in the refusal of the summary judgment.

[9] Counsel for the plaintiff argued that the citation of the plaintiff is defined and crystalised by the remaining allegations in the particulars of claim, such as the registration number of the company and the registered office or principal place of business, which remains constant throughout all the documentation.

However, counsel for the defendant argued that although the company registration number and address pleaded is the same as those which appear on the documents of BSB it does not mean it is the same entity. Counsel argued that it could mean that two different companies are operating from the same premises and the drafter of the particulars of claim could have mistakenly cited the plaintiff or mistakenly used BSB's registration number. There is therefore no certainty that the correct party is before court and the court cannot infer that a correct party is before court. The proper citation of the parties should be evident in the pleadings before court.

[10] Counsel for the plaintiff further argued that security of cost was sought by the defendant against the plaintiff (as it is currently cited), therefore the defendant cannot suggest that it is prejudiced going forward. In reply, counsel for the defendant argued that the fact that security of costs has been provided to the defendant is neither here nor there as the court cannot grant judgement in favour of the plaintiff if there is no certainty that the plaintiff is the actual party that dealt with the defendant. Counsel further argued that the defendant will suffer no prejudice if the summary judgment application is refused and the plaintiff is afforded the opportunity to amend the citation. On the other hand there will be substantial prejudice in respect of the defendant if the application is granted and it turns out that the plaintiff is a different entity to BSB. In support of her argument defendant's counsel cited the case of *Wilkie's Continental Circus v De Raedt's Circus*⁵ where the court held that 'it is really trite law that where an artificial person is not properly cited so that its legal capacity appears from the citation, the petition is defective.'

[11] Counsel for the plaintiff also argued that the court should consider all documents properly before court as the defect (wrong citation of party) may be cured by reference to these documents. In this regard counsel referred the court to the case of *Di Savino v Nedbank Namibia Ltd*⁶. Counsel for the defendant however argued that plaintiff's reliance on the *Di Savino* case is misguided as the court in that case was referring to the approach to be employed in considering an opposing affidavit. Counsel submitted that the opposing affidavit is not subject to the same requirements of strict compliance as is required of the plaintiff in the presentation of its case.

[12] In conclusion the defendant contends that should the proceedings not be dismissed, the defendant will be prejudiced on account of the irregularity of the wrong plaintiff cited in the particulars of claim. The application must therefore fall on this basis.

⁵ 1958 (2) SA 598 (SWA) at 600C-F.

⁶ 2012 (2) NR 507 (SC) at 516 para 27-28.

Whether the plaintiff lacks *locus standi*

[13] Rule 6 (4) (c) and 7(9) (b) makes specific reference to the second part of the summons and what must be contained therein⁷. The purpose of these rules is to warrant that the correct party is cited and to provide adequate information to establish *locus standi*.

[14] Before one cites a party in a summons, it is important to consider whether the party has *locus standi* to sue or to be sued and to ascertain what the correct citation of the party is. The expression *locus standi* means 'place to stand before a court'.

[15] It is correct and it has been held that where a party has been cited incorrectly, the citation can be amended⁸. However, it should be noted that such an amendment can only be allowed if an application is brought before court. In the present case an amendment was never sought by the plaintiff nor does the plaintiff allege that it was a misnomer that the plaintiff was cited the way it is so cited in the particulars of claim. It is the plaintiff's position that the party suing the defendant is cited properly taking into account that the registration of the entity and the registered office and/or principal place of business is the same as the entity that the defendant dealt with. I must however disagree with these submissions raised by the plaintiff because if one looks at the names of the two entities, one can see that these are two different companies, the one being Bravo Compliance (Pty) Ltd and the other Brave Souled Butterly (Pty) Ltd. The names are therefore worlds apart. According to the documents before court there is no reference to the name of the plaintiff but only to the reference of BSB. The court and the defendant therefor cannot speculate as to who the plaintiff is. It must be clear from the pleadings that the person who sues another is properly cited and has *locus standi* to bring such an action against the other party, to whom it has dealt with.

[16] To grant summary judgment against the defendant where the citation of the party is disputed amounts to an injustice on the defendant and the defendant will be prejudiced should summary judgment be granted and it transpires that the plaintiff is a different company from BSB.

⁷ Rule 6 (4) (c) states that:

'(c) in the case of a company, its name and registered number, postal address and registered office referred to in section 178 of the Companies Act 2004 (Act No. 28 of 2004) and the particulars referred to in paragraph (a) of at least one director and the secretary referred to in section 223 of that Act including all particulars referred to in section 223(1) of that Act and, in case of the officer or secretary of any other body corporate, the particulars referred to in paragraph (b) of section 223(1) of that Act;'

Rule 7 (9) (b) states that:

'(b) the full names, sex, occupation and the residence or place of business of the plaintiff, and where he or she sues in a representative capacity, that capacity;'

⁸ First National Bank of SA Ltd v Strachan Family Trust [2000] 3 ALL 379 (tT).

[17] In a ruling delivered by this court⁹, a summary judgment application was brought against the defendants who raised a point *in limine* of *locus standi* in that the plaintiff cited therein lacks the *locus standi in judicio*. In that case the summons cited the plaintiff as 'Small and Medium Enterprises represented by Bruni and McLaren'. The argument advanced on behalf of the respondents was that the word 'bank' was not contained in the combined summons and because of that the plaintiff lacked a standing in law to sue, as the combined summons does not comply with the rules. A further argument advanced was that the omission of the word 'bank' was a material defect in the citation of the plaintiff. It was argued that the summons only refers to 'Small and Medium Enterprises Limited' but it was not clear what type of company is referred to. The respondents therefore prayed that the application for summary judgment by applicant be dismissed with costs. It was however argued on behalf of the applicant that the omission of the word 'bank' was a typographical error and does not affect the *locus standi* of the plaintiff and that the second respondent in any event confirmed in his opposing affidavit that he applied for a loan from the plaintiff which was granted and money was paid into his account. The second respondent disputed his liability to the applicant in respect of amount claimed in the particulars of claim.

[18] In the above case the point *in limine* was dismissed on the grounds that the plaintiff, in the particulars of claim, is described in such detail that there can be no doubt in the mind of the defendants as to who the plaintiff is, and, the approach taken by the respondents is overly technical and is not conducive to having real issues between the litigants decided in as speedy and cost effective manner as possible.

[19] The above case is distinguishable to the current matter before me because a completely different entity is cited herein. It was not a mere fact of a 'word' missing or the plaintiff's name incorrectly cited. It is clear from documents attached to the particulars of claim and opposing affidavit that the company that the defendant dealt with was Brave Souled Butterly (Pty) Ltd and not Bravo Compliance (Pty) Ltd.

[20] With this in mind the court cannot be left to speculate who the correct party is if the documents before court shows a different entity from that cited in the particulars of claim.

[21] My order is therefore as set out above.

| Judge's signature | Note to the parties: |
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| | Not applicable. |

⁹ *Small and Medium Enterprises Limited represented by Bruni & McLaren v Colgar Investment CC* (HC-MD-CIV-ACT-CON-2018/01116) [2018] NAHCMD 319 (11 October 2018).

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| Counsel: | |
| Applicant | Respondent |
| <i>Mr Chibwana On instructions of Viljoen & Associates</i> | <i>Ms Bassinghwaithe On instruction of Katjaerua Legal Practitioners</i> |