

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2022/01796

In the matter between:

HENNING ASMUS SELENBINDER

PLAINTIFF

and

FISCHER SELENBINDER ASSOCIATES CC

DEFENDANT

Neutral citation: *Seelenbinder v Fischer Seelenbinder Associates CC* (HC-MD-CIV-ACT-OTH-2022/01796) [2023] NAHCMD NC 539 (1 September 2023)

Coram: RAKOW J

Heard: 9 August 2023

Delivered: 1 September 2023

Flynote: Summary judgment application – Rule 60(2) – No *bona fide* defence – Must show that the defence was merely a delaying tactic – Defendant appears to have a defence which is *bona fide* and good in law – Summary judgment dismissed.

Summary: In case number A 217/2015, Fischer brought an application seeking an order that in terms of an agreement between Fischer and Seelenbinder, Fischer could request Seelenbinder to retire whereupon Seelenbinder would then have to retire.

Fischer also sought an order that in terms of an agreement between Fischer and Seelenbinder, Fischer would not have to pay Seelenbinder any value for his 50% member's interest in the CC upon retirement. Ueitele J held that Fischer could request Seelenbinder to retire but had to pay to Seelenbinder the value of his 50% member's interest which Ueitele J ordered had to be determined by an independent referee as at the retirement date, which was a date in the past, which member's interest would then be transferred to Fischer. The judgment was not appealed and binds the parties (10 November 2017).

Fischer made payment to Seelenbinder and the parties finally parted ways. All that remains is this case where Seelenbinder claims payment of N\$285 235.29 for his after tax income earned in the period 31 March 2016 – 10 November 2017; and the case in which Fischer claims the (remaining) N\$148 237.08.

On 2 June 2022 Seelenbinder passed away and he has since been substituted by his executrix who is his wife, Baerbel Helene Brigitte Seelenbinder who also made the affidavit in support of the summary judgement application in this matter.

Held that: it is clear that not only were there no proper engagements under rule 32(9) of the High Court Rules, but the affidavit accompanying the summary judgment application does not show how the deponent had personal knowledge of the monies owed and how she obtained this information.

ORDER

The summary judgment application is dismissed with costs, such costs to include the costs of one instructed and one instructing counsel.

JUDGMENT

RAKOW J:

Introduction

[1] During these proceedings I will refer to the plaintiff as Seelenbinder and the defendant as the CC and its sole member will be referred to as Fischer. These parties have a long history of litigating against one another in our courts and this could be summarized as follows:

[2] In case number A 217/2015, Fischer brought an application seeking an order that in terms of an agreement between Fischer and Seelenbinder, Fischer could request Seelenbinder to retire whereupon Seelenbinder would then have to retire. Fischer also sought an order that in terms of an agreement between Fischer and Seelenbinder, Fischer would not have to pay Seelenbinder any value for his 50% member's interest in the CC upon retirement. Ueitele J held that Fischer could request Seelenbinder to retire but had to pay to Seelenbinder the value of his 50% member's interest which Ueitele J ordered had to be determined by an independent referee as at the retirement date, which was a date in the past, which member's interest would then be transferred to Fischer. The judgment was not appealed and binds the parties (10 November 2017).

[3] In the period after the retirement date being 31 March 2016, and the date on which the judgment of Ueitele J was delivered, being 10 November 2017, Seelenbinder continued to do work for the CC but he no longer received his monthly remuneration from the CC because Fischer, who was in charge of the finances, stopped paying it, with the result that he is owed his earnings. That is the subject of Seelenbinder's claim in this case. The claim is for payment of the amount of N\$285 235.29.

[4] To enable Seelenbinder to continue to do work for the CC he continued to utilise his cubicle in the offices of the CC and made limited use of some of the services, such as the copier, etc. Fischer claims those expenses from Seelenbinder under case number HC-MD-CIV-ACT-OTH-2020/05086. Fischer's claim is for payment of N\$177 487.14.

[5] In his amended plea, Seelenbinder calculated his pro rata share of the expenses to be N\$29 250.06 and he made an unconditional tender to pay that amount which he has paid over to Fischer. That leaves an amount of N\$148 237.08 in dispute in that case. That case is set down for trial for 16 – 20 October 2023.

[6] After the retirement judgment, Fischer spoliated Seelenbinder, which resulted in case number HC-MD-CIV-MOT-GEN-2018/00128 where Masuku J ordered Fischer to return possession to Seelenbinder which he did on 21 May 2018. On appeal to it the Supreme Court upheld the order in case number SA 31-2018 (8 June 2020). Fischer brought an eviction application under case number HC-MD-CIV-MOT-GEN-2018/00207 which was refused by Ueitele J on 27 November 2018. On appeal, the Supreme Court in case number SA 2-2019 found that the eviction order should have been granted and it then overturned Ueitele J's order on 4 December 2020.

[7] While Seelenbinder remained in the office of the CC, his loan account was determined by the CC's accountant to be N\$1 008 286. The appointed referee determined the value of the CC to be N\$2 900 000, with the result that Seelenbinder's 50 per cent member's interest therein was valued at N\$1 450 000. Fischer challenged the above values in case number A 217/2015 and sought to set aside the writ of execution issued therefore under case number HC-MD-CIV-MOT-GEN-2019/00229. Miller AJ dismissed both applications which were consolidated and heard together on 8 November 2019. On appeal under case number SA 79-2019, the Supreme Court upheld the orders of Miller AJ on 12 November 2021.

[8] Fischer made payment to Seelenbinder and the parties finally parted ways. All that remains is this case, where Seelenbinder claims payment of N\$285 235.29 for his after tax income earned in the period 31 March 2016 – 10 November 2017; and the case in which Fischer claims the (remaining) N\$148 237.08.

[9] On 2 June 2022, Seelenbinder passed away and he has since been substituted by his executrix who is his wife, Baerbel Helene Brigitte Seelenbinder, who also made the affidavit in support of the summary judgment application in this matter.

Particulars of claim

[10] The particulars of claim reads as follows:

1. The plaintiff is Henning Asmus Seelenbinder, a major male retired civil engineer. Residing at 10B Bishops Close, Windhoek, Namibia.
2. The defendant is Fischer Seelenbinder Associates CC, a close corporation duly registered under registration number CC/2003/3005, in terms of the Namibian close corporation laws, with its principal place of business situated at 15 Bougain Villa Centre, Hebenstreit Street, Windhoek, Namibia.
3. At all material times hereto the plaintiff was a 50% member of the defendant.
4. On 17 November 2017 this Honourable Court gave judgement in case number A217/2015 in terms of which, inter alia, it was ordered that the defendant's effective date of retirement as an active member of the defendant was 31 March 2016. A copy of the judgement is annexed and marked "A".
5. During the period after the effective date of retirement until the date of the aforesaid judgement, ie April 2016 to November 2017, the plaintiff continued to generate income which was retained by the defendant and which became payable to the plaintiff as a result of the aforesaid judgement (during this period plaintiff did not receive any income from defendant).
6. The income generated by the plaintiff during the period April 2016 to November 2017 was in a total amount of N\$285 235.29 (two hundred and eighty-five thousand two hundred and thirty-five Namibia Dollars and twenty-nine cents) (after tax).
7. On 29 April 2019. The defendant, duly represented by its legal practitioner, in the letter annexed hereto and marked "B", in writing acknowledged being liable to the plaintiff in an amount of N\$285 235, 29(two hundred and eighty-five thousand two hundred and thirty-five Namibia Dollars and twenty-nine cents) in respect of project income (after tax) generated by the plaintiff for the period April 2016 to November 2017.
8. Accordingly the aforesaid amount became due and payable with interest calculated from 30 April 2019.
9. The defendant has not paid to the plaintiff the aforesaid amount or any portion thereof at all.
10. In the premises the defendant is liable to the plaintiff for payment of the aforesaid amount plus interest calculated from 30 April 2019 at prescribed rate of interest.'

Application for summary judgment

[11] The summary judgment application sought the following relief:

- '1. Payment in the amount of NAD285 235.29 (two hundred and eighty-five thousand two hundred and thirty-five Namibia Dollars and twenty-nine cents) (after tax) by the Defendant;
2. Interest on the aforesaid amount, at a rate of 20% per annum from 30 April 2019, until date of final payment;
3. Cost of suit, including the cost of one instructing and one instructed counsel; and
4. Further and/or alternative relief.'

[12] It was further supported by an affidavit of Barbel Helene Brigitte Seelenbinder, who acted in her capacity as duly appointed executrix of the Estate of Late HA Seelenbinder, who passed away on 2 June 2022. She is duly authorized as such by the Master of the High Court, in terms of Letter of Executorship No E 2005/2022.

[13] She indicated in the affidavit that she can and does swear positively to the facts verifying that the respondent/defendant is indebted to the applicant/plaintiff on the grounds set out in the plaintiff's summons and particulars of claim in these proceedings together with interest and cost of suit as claimed therein. She further indicated that in her opinion the respondent/defendant has no *bona fide* defence to the action and delivered a notice of intention to defend solely for the purposes of delaying the action.

[14] Fischer on the other hand opposed the application and filed an opposing affidavit in which he states that he is the sole member of the defendant (CC) and as such, duly authorized to oppose the summary judgment application on behalf of the defendant and is personally acquainted with the facts set out in the affidavit unless where the context indicates otherwise. He read the allegations in the particulars of claim and annexures thereto and denies the allegations in the affidavit accompanying the summary judgment application. He further denied that the defendant does not have a *bone fide* defence to the claims of the plaintiff and denies that appearance to defend was entered solely for the purpose of delaying the action.

[15] Fischer further takes issue with the fact that the legal representative of Mr Seelinbinder did not engage him in terms of rule 32(9) and 32(10) on the time regarding

the summary judgment and when his office did so, it was not a proper engagement. The legal practitioner of the plaintiff had to engage the legal practitioner of the defendant by 6 April 2023 in terms of the court order of 28 March 2023. It transpired that Mr Behrens, the legal practitioner of the defendant had been sick and out of office and only returned on 17 April 2023 and would then respond to the rule 32 (9) engagement. The plaintiff's legal practitioners then proceeded to file a rule 32(10) report without engaging with the defendant's legal practitioners at all.

[16] Fischer denies that the plaintiff has a cause of action as the plaintiff's cause of action is based on the judgment of 17 November 2017. The judgment provides for the appointment of a receiver to do the valuation of the loan account and the value of the defendant up until 31 March 2016, but does not provide for the period 31 March 2016 to 17 November 2017. The Supreme Court judgment of *Fisher v Seelenbinder and Another* 2021 (1) NR 35 (SC) found that inter alia "on retirement, Seelenbinder no longer had any rights to the offices in FSA so as to carry on the business of FSA". The plaintiff therefore, did not disclose any cause of action in its particulars of claim and the summary judgment application should be dismissed.

[17] Fischer further alleges that the deponent of the affidavit on behalf of the plaintiff does not have personal knowledge of what was the nature of the work or when the alleged work the late Seelenbinder did at the defendant, or how the amount was calculated, when it became due and she cannot verify the alleged facts set out in the particulars of claim or the amount claimed.

[18] He also stated that she was further not involved in the settlement negotiations between himself and the late Seelenbinder and she does not disclose on what basis she has personal knowledge. The context of the letter written by the legal practitioner of the defendant is never explained. The letter seems to have been in response from a letter received from the plaintiff's legal practitioner regarding the valuation of the loan account and 50 percent of the membership interest dated 26 March 2019.

The content of the letter

[19] Fischer and the CC's legal practitioner wrote the following letter to the legal practitioner representing Seelenbinder, at a time that all that was in dispute between the parties was the valuation of the CC. And it is based on this letter that the plaintiff insists the amount owed to them is clarified:

- '1. I refer to your letter dated 26 March 2019. I am instructed to reply as follows.
 2. My client confirms that Mr. Seelenbinder's loan account with FSA as at 31 March 2016 was N\$ 1 008 286.00. Since then your client became indebted to FSA as follows:
 - a. Your client's 50% of running costs from April 16 to Nov 17 N\$593 329,83.
 - b. Your client's direct private expenses from April 16 to Nov 17 N\$269 889,60.
 - c. Your client's portion of running costs from April 16 to Nov 17 N\$190 685,11.
- Mr. Seelenbinder's generated project income (after tax) for the period April 16 to Nov 17 amounted to N\$285 235,29. Having regard to the aforesaid, his loan account currently stands at N\$ 239 616,78.
3. The appointed referee valued the close corporation at N\$ 2,9 Million of which N\$ 76 124 represents the net asset value and the balance goodwill. In its judgment the court held in regard to the written minutes "that the evidence demonstrated that the parties intended concluding contract, contract therefor valid". These minutes included an agreement that no goodwill is payable between the founding members of the close corporation.
 4. Having regard to the aforesaid, the value of your client's 50% member's interest is an amount of N\$ 38 067,00.
 5. My client, having regard to what is stated hereinbefore and having regard to the taxed legal costs of N\$ 170 033,32, herewith tenders payment of an amount of N\$ 107 650,43 against transfer of the member's interest. The Financial Statements for March 2016 are still not signed by your client. This resulted in FSA not having any good standing with the Receiver of Revenue since and was not able to participate in any tenders since.'

The arguments

[20] On behalf of the plaintiff, it is argued that in the letter, Fischer states it as a fact that Seelenbinder's loan account is N\$1 008 286 and that the income earned by Seelenbinder is N\$285 235 29. At all material times those facts were common cause and were not in dispute. On behalf of Fischer, it is argued that the letter is privileged and

cannot be relied upon. That is plainly wrong. It is settled law that admissions made as a preliminary to negotiations on the amount is not privileged. In any event, there was never any dispute between Fischer and Seelenbinder regarding the income earned by Seelenbinder in the amount of N\$285 235.29 and so the admission of the amount is not excluded by privilege.

[21] On behalf of the defendant it was argued that rule 60(2)(a) stipulates that the estate's application for summary judgment must be accompanied by an affidavit by the plaintiff or a person who can swear positively to the facts verifying the cause of action and the amount claimed. The deponent however, is the executor of the estate and it is in that capacity that she deposes to the affidavit in support of the summary judgment. It is argued that the deponent does not have personal knowledge of what the nature was or when the alleged work the late Seelenbinder did at the defendant or how the amount was calculated, when it became due and she cannot verify the alleged facts set out in the particulars of claim or the amount claimed. She also does not show on what basis she has personal knowledge of the outstanding amount.

[22] It was also argued that in these circumstances, the jurisdiction threshold for the Court to grant summary judgement has not been satisfied and should be dismissed with costs.

Legal Arguments

[23] In *Bank Windhoek Limited v Benlin Investment CC*¹, Masuku J said the following regarding the engagement in terms of rule 32(9) and I quote him quite extensively as the issue at hand is very similar to the current matter before court:

'I am of the view that the letter written by the applicant's legal representatives cannot pass as a genuine attempt to settle the matter amicably. As indicated earlier, the onus to move the matter for amicable resolution, lies with the party seeking to move the interlocutory application before delivery of the said application. I am of the view that the mere writing of a letter, calling upon the other party to say 'how you intend to resolve the matter amicably', cannot, even with the widest stretch of imagination, amount to compliance with the rules. (Emphasis added).

¹ *Bank Windhoek Limited v Benlin Investment CC* (HC-MD-CIV-CON-2016/03020) [2017] NAHCMD 78 (15 March 2017).

[13] It appears to me that what the applicant sought to do was to exclude itself from participating in the amicable resolution of the matter, throwing the ball, as it were, into the defendant's court to say, "Tell me...how you intend to resolve this matter amicably?' This process, though initiated by the party seeking to deliver the interlocutory application, is in essence one that must necessarily involve the full and undivided attention and participation of both parties to the lis. In the context of a summary judgment, it is not a call to the defendant to say how it wants to settle the debt, as the intimation in the letter by the applicant's legal practitioners seems plain.

[14] I am of the considered view that the mere writing of the letter may be the precursor to a meeting where the parties, duly instructed with issues or material for full discussion, and possibly resolution of some, if not all the issues on the table. The letter initiating the meeting cannot be an end in and of itself. It is the initial step to what should be an actual meeting where the parties will put their cards on the table, with the defendant, in this case, stating what its defence to the summary judgment, if any, is and where the parties cannot meet each other half way, then the summary judgment application could be delivered to the court for determination.'

[24] The learned judge continued and at paragraph 19 and 20 to say the following:

'[19] In this regard, I am of the view that legal practitioners should take the peremptory provisions in question seriously and make every effort, with every sinew in their bodies, to fully and deliberately engage in the process of attempting to resolve matters amicably. The impression one gets from the letter by the applicant's legal practitioner, is that some legal practitioners merely pay lip service to the said subrules and behave in a manner appears to have all the hallmarks a perfunctory approach to dealing with this subrule.

[20] This, it must be made clear, will not accepted or tolerated by the courts. Parties will not be allowed to merely go through the motions as the rule is designed to assist practitioners deal with the wheat and not concentrate on the chaff, and thus not expending time needlessly on lost or still-born causes, to the detriment of clients' interests and the administration of justice in general.'

[25] In this instance, the engagement did not happen on or before the date determined by the court for the filing of the rule 32(10) report and there is however, a condonation application before court to condone the non-compliance with the court order setting out in detail the reasons for not doing so. It however, still leaves us without a proper engagement.

[26] The requirements of rule 60(5)(b) which must be satisfied for a successful opposition to a claim for summary judgment was stated as follows in the *locus classicus*, *Maharaj v Barclays National Bank Ltd*² by Corbett JA with regard to the previous rule 32, dealing with summary judgment applications:

‘Accordingly, one of the ways in which the defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff/applicant in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

All that the Court enquires into is:

(a) whether the defendant has fully disclosed the nature and the 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 to either the whole or part of the claim, a defence which is 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 sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.’

[27] In general, the approach of the court is as set out by Justice Cheda in *Lofty-Eaton v Ramos* as follows:³

‘The general approach of these courts in applications of this nature is that cognisance is taken into account that a summary judgment is an independent, distinctive and a speedy debt collecting mechanism utilized by creditors. It is a tool to use by a plaintiff/applicant where a defendant raises some lame excuse or defence in order to defend a clear claim. These courts, have, therefore, been using this method to justly grant an order to a desperate plaintiff/applicant

² *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).

³ *Lofty-Eaton v Ramos* (I 1386/2013) [2013] NAHCMD 322 (08 November 2013).

who without doing so, will continue to endure the frustration mounted by an unscrupulous defendant (s) on the basis of some imagined defence. As remedy available to plaintiff/applicant is an extra-ordinary one and is indeed stringent to the defendant, it should only be availed to a party who has a watertight case and that there is absolutely no chance of respondent/defendant answering it, see *Standard Bank of Namibia Ltd v Veldsman*.⁴ Rule 32 specifically deals with the said applications. Summary Judgment is therefore a simple, but, effective method of disposing of suitable cases without high costs and long delays of trial actions, see *Caston Ltd v Barrigo*.⁵ In that case, Roberts, AJ went further and crystalised the principle as follows:

“it is confined to claims in respect of which it is alleged and appears to the court that the defendant has no bona fide defence, and that appearance has been entered solely for the purpose of delay.’

[28] Where a summary judgment has been applied for, the defendant is entitled to oppose, if he has a *bona fide* defence and in that opposition he/she must depose to an affidavit where he/she should positively state and show that he/she has a *bona fide* defence to applicant’s claim. The defendant must not only show, but, must satisfy the court that he/she has a *bona fide* defence. In furtherance of the satisfaction to the court, the defendant must at least disclose his defence and material 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, see *Breitenbach v Fiat SA (Edms) BPK*⁶ and *Namibia Breweries Ltd v Marina Nenzo Serrao*.⁷ This, however, is not to say that he/she should do so by disclosing all the details and particulars as would be the case of proceedings, see *Maharaj v Barclays National Bank Ltd*⁸ and *Breitenbach v Fiat SA*.⁹

[29] The requirement seems to be relaxed to a certain extent as it is not rigorous *per se*, but, is designed to enable a genuine respondent to defend a claim which otherwise would result in applicants’ obtaining judgment under circumstances where respondent had a genuine defence. The need for clarity on defendant’s part is designed to avoid the entry of intention to defend an action solely to delay an otherwise just claim by plaintiff/applicant.

⁴ *Standard Bank of Namibia Ltd v Veldsman* 1993 NR 391 (HC).

⁵ *Caston Ltd v Barrigo* 1960 (4) SA 1 at 3H.

⁶ *Breitenbach v Fiat SA (Edms) BPK* 1976 (2) SA 226 (T) at 228 B-C.

⁷ *Namibia Breweries Ltd v Marina Nenzo Serrao* (3131 of 2005) [2006] NAHC 37 (23 June 2006).

⁸ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418.

⁹ *Breitenbach v Fiat SA* 1976 (2) 226.

[30] For that reason, these courts will always seriously consider the granting of a summary judgment and will only do so where a proper case has been made out by applicants. The above principle has been applied in many cases, see also *Crede v Standard Bank of South Africa Ltd*¹⁰ where Kannemeyer, J remarked:

‘One must bear in mind that the granting of summary judgment is an extraordinary and drastic remedy based upon the supposition that the plaintiff/applicant’s claim is unimpeachable and that the defendant’s defence is bogus or bad in law.’

[31] Regarding the question of personal knowledge, it is a clear requirement that the deponent of the affidavit in support of the summary judgment application must have personal knowledge of the facts on which the plaintiff’s cause of action is based and of the amount which is being claimed. If there is no personal knowledge, allegations of the deponent will be mere hearsay. (See Summary Judgment, A practical Guide by Van Niekerk, Geyer and Mundell at 5 – 9).¹¹

Conclusion

[32] It is therefore, clear that not only were there no proper engagement under rule 32(9) of the High Court Rules, but the affidavit accompanying the summary judgment application does not show how the deponent had personal knowledge of the monies owed and how she obtained this information.

[33] In the result, I make the following order:

The summary judgment application is dismissed with costs, such costs to include the costs of one instructed and one instructing counsel.

¹⁰ *Crede v Standard Bank of South Africa Ltd* 1988 (4) SA 786 at 789 E.

¹¹ Summary Judgement, A practical Guide by Van Niekerk, Geyer and Mundell at 5 – 9; LexusNexus April 2014; also see *Shackleton Credit Management (Pty) Ltd v Microzone trading 88 CC and Another* 2010 (5) SA 112 (KZP).

APPEARANCES

Plaintiff: A Van Vuuren

Instructed by Van der Merwe-Greeff Andima Inc., Windhoek.

Defendant: J Jacobus

Instructed by Behrens & Pfeiffer, Windhoek.