

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING IN TERMS OF PRACTICE DIRECTION 61

<b>Case Title:</b> ZANNIER HOTELS NAMIBIA (PTY) LTD T/A SONOP LODGE  and  DAY DREAMERS INVESTMENTS CC BREYLON GUILLEAME BEUKES NAMIBIA REVENUE AGENCY	PLAINTIFF   1 <sup>st</sup> DEFENDANT 2 <sup>nd</sup> DEFENDANT 3 <sup>rd</sup> DEFENDANT	<b>Case No:</b> HC-MD-CIV-ACT-CON-2023/02159  <b>Division of Court:</b> Main Division  <b>Heard on:</b> 17 August 2023
<b>Heard before:</b> Honourable Lady Justice Rakow	<b>Reasons delivered on:</b> 7 September 2023	
<b>Neutral citation:</b> <i>Zannier Hotels Namibia (Pty) Ltd T/A Sonop Lodge v Day Dreamers Investments CC</i> (HC-MD-CIV-ACT-CON-2023/02159) [2023] NAHCMD 552 (7 September 2023)		
<b>Order:</b>  1. The summary judgment application is dismissed with costs. 2. The defendants to file their plea on or before 19 September 2023. 3. The plaintiff to replicate to the plea on or before 26 September 2023. 4. The parties to file their discovery on or before 3 October 2023. 5. The matter is postponed for a case management conference on 10 October 2023 at		

15:30 and the parties are to file their joint case management report on or before 5 October 2023.

**Reasons for order:**

RAKOW J :

Introduction

[1] The plaintiff instituted action against the first and second defendants, claiming damages suffered in the sum of N\$ 26 119.50 as a result of misrepresentation by the first and second defendants. The first and second defendants have defended the action, and as a result, the plaintiff has applied for summary judgment and the first and second defendants opposed the summary judgment application

Parties

[2] The plaintiff is Zannier Hotels Namibia (Pty) Ltd t/a Sonop Lodge, a private company, with registration number 2017/0021, duly registered and incorporated in terms of the Companies Act 28 of 2004. The first defendant is Day Dreamers Investments CC, a close corporation with registration number CC/2017/03637, duly registered and incorporated in accordance with the applicable Close Corporation Laws of the Republic of Namibia. The second defendant is Breyton Guilleame Beukes, a major male businessman, with identity number 93012600094. The third defendant is the Namibia Revenue Agency, a state owned enterprise and statutory body established in terms of s 2 of the Namibia Revenue Agency Act 12 of 2017. At all relevant times hereto, the second defendant was the sole member of the first defendant. The third defendant was cited as an interested party, and as such, no relief is sought from the third defendant.

## Background

[3] On 30 June 2022 and at Windhoek, the plaintiff and the first defendant, duly represented by Ms Charissa Hagen, entered into a partly oral and partly written agreement (hereinafter referred to as “the agreement”), the terms of which the first defendant was to repair the vehicle with registration number N 88579 W, a Toyota Hilux GD6, motor vehicle, bearing engine number 2GDC477766, chassis number AHTKB8CD602970426 of the plaintiff. At all material times hereto, the plaintiff was the owner, alternatively bona fide possessor of one Toyota Hilux GD6, vehicle registration number N 88579 W (the “Vehicle”) of which said ownership still persists.

[4] The plaintiff alleges that it complied with all its obligations to the first defendant in terms of the agreement and delivery of the motor vehicle was made to the first defendant on 30 June 2022. In breach of the aforementioned agreement the first defendant issued quotations and invoices to the plaintiff, fraudulently claiming Value Added Tax (VAT), for services rendered by the first defendant to the plaintiff despite first defendant not being registered for VAT in terms of s 15 of Value Added Tax Act 10 of 2000 (as amended). It was on the basis of these fraudulent misrepresentations that the plaintiff was induced to pay the amounts depicted on the invoices and quotations, inclusive of the VAT amount depicted therein, despite first and second defendants knowing that they were not entitled to charge VAT. As a result of first and second defendant, misrepresentation, plaintiff suffered damages in the sum of N\$ 26 119.50.

## Arguments

### *Plaintiff*

[5] Ms Angula on behalf of the plaintiff argues that the first defendant’s taxpayer registration certificate (“BGB1”) indicates unambiguous terms that they are only registered for income tax under number “ITX 07678049-11”, which begs the question as to how the defendants invoiced plaintiff for VAT when first defendant was not issued a value-added tax number by Namibia’s Revenue Agency as required by s 15 of the Value Added Tax Act.

[6] Ms Angula outlines that the defendants aver that the plaintiff's application for summary judgment is defective as it was lodged in terms of rule 65(4) instead of rule 60(2). They further contend that the affidavit deposed by Cornel de Villiers on behalf of the plaintiff is "defective" as "she failed to allege as to how the facts pertaining to the matter came to her alleged personal knowledge". However Ms Angula submits that Cornel de Villiers is plaintiff's General Manager who oversees its functions and is thus deemed a fit and proper person to depose to the affidavit. Knowledge of the facts were obtained from records and documents of the plaintiff.

#### *Defendants*

[7] Mr Karsten on behalf of the defendants submits that the application, purported to be an application for summary judgment, is brought in terms of rule 65(4), as is evident from the Notice of Motion, which renders the application as such in any event defective. Mr Karsten further outlines that rule 60 of the Rules of the Honourable Court deals with applications for summary judgment whereas rule 65 deals with the requirements of applications.

[8] Mr Karsten argues that Cornel de Villiers not being present during the conclusion of the agreement, cannot swear positively to the facts and she cannot verify the cause of action as set out in the plaintiff's particulars of claim attached to the combined summons.

[9] Mr Karsten outlines that the defendants dispute the correctness of certain of the annexures to the plaintiff's particulars of claim. The annexures differ from the invoices which were forwarded to the plaintiff. The defendants stated under oath that it is evident that the Tax Number, which appears on certain invoices, which is a template used by the defendant, had been altered and amended by the plaintiff.

[10] Mr Karsten argues that the first defendant was at all times entitled to charge VAT on the invoices rendered to the plaintiff as the VAT collected forms part of the income of the first defendant which is linked to its income tax number, and payable to the Receiver of Revenue. Mr Karstens submits that the plaintiff, in any event will need to present evidence as to the alleged

damages in the alleged amount of N\$26 119.50 and how such an amount was calculated and arrived at.

### Legal considerations

[11] In *Standard Bank of Namibia Limited v Veldsman*<sup>1</sup> the court opined as follows:

‘Summary judgment should only be granted if it is clear that the plaintiff has an unanswerable case’<sup>2</sup>

[12] In the instant matter, the defendants deposed to facts which, if true, would establish a defence. The defendants gave a disclosure of the nature and grounds of the defence and the facts they rely upon. As if that is not enough, the defendants dispute the facts alleged by the plaintiff.

[13] In *Government of the Republic of Namibia v Gertze*<sup>3</sup> the court had the following to say:

‘The quest for summary judgment is based on a trite argument that there are no triable issues of fact and the motion is initiated by a plaintiff that contends that all the necessary factual issues are settled and, therefore, need not be tried. If there are triable issues of fact in any cause of action or if it is unclear whether there are such triable issues, summary judgment must be refused as to that cause of action...’

[14] Similarly, it was held in *Kramp v Rostami*<sup>4</sup> that:

‘The test in an application of this nature is for the respondent (defendant) to set out a *bona fide* defence in his answering affidavit. There is no onus on him apart from setting out the facts which in the absence of a trial would satisfy the court that he has a *bona fide* defence in order to entitle the court to decline applicant’s application for summary judgment.’

<sup>1</sup> *Standard Bank of Namibia Limited v Veldsman* 1993 NR 391 at 392 D-E.

<sup>2</sup> See *Fair Play Nam Investments (Pty) Ltd v Standard Bank Namibia Limited* (I 3664-2012) [2013] NAHCMD 227 (30 July 2013).

<sup>3</sup> *Government of the Republic of Namibia v Gertze* (HC-MD-CIV-ACT-OTH-2019/00978) [2019] NAHCMD 497 (30 October 2019).

<sup>4</sup> *Kramp v Rostami* 1998 NR 79 (HC) at 82 C-I.

[15] In *Standard Bank of SA Limited v Park Boulevard Trading CC and Another*<sup>5</sup> the applicable law was stated as follows:

'In a summary judgment application, where the question of whether the respondent has a *bona fide* defence arises, the court does not attempt to decide the issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. The respondent is also not required to persuade the court of the correctness of the facts stated by him or her or where the facts are disputed, that there is a preponderance of probabilities in his or her favour. All that a court requires, in deciding whether the respondent has set out a *bona fide* defence, is:

- (a) whether the respondent has disclosed the nature and grounds of his or her defence; and
- (b) whether on the facts so disclosed the respondent appears to have, a defence which is *bona fide* and good in law. It is sufficient if the respondent swears to a defence, valid in law, which if advanced, may succeed on trial.'

[16] It has been said without number and put beyond dispute that summary judgment is a drastic civil procedure engaged by the creditor for the speedy recovery of what is due to it for a liquidated amount of money. The claim may be based on a liquidated document. The aforesaid drastic nature of this application cannot be overemphasized as it literally entails that once the application is granted the defendant is shut out of court so to speak. It is therefore critical that a court should carefully evaluate the application, the merit of the opposition and the defences raised in the quest to attain justice.

### Discussion

[17] In the current matter the defence put forward by the respondent is that they indeed paid over the money recovered as VAT to the Receiver of Revenue as income tax and that they were advised to do so by the representatives of the Receiver of Revenue when they approached them for advice. The money did not go into their own pockets but went to the Receiver of Revenue.

<sup>5</sup> *Standard Bank of SA Limited v Park Boulevard Trading CC and Another* Case No. (20713/2013) [2013] ZAGPPHC 185 (5 July 2013), para 4 cited in *Walenga v Nangolo* (HC-NLD-CIV-ACT-CON-2020/00091) [2020] NAHCNLD 122 (31 August 2020).

[18] The defendants' explanation therefore amounts to a possible defence and they should therefore be granted the opportunity to defend the matter.

Order

[19] In the result, I then make the following order:

1. The summary judgment application is dismissed with costs.
2. The defendants to file their plea on or before 19 September 2023.
3. The plaintiff to replicate to the plea on or before 26 September 2023.
4. The parties to file their discovery on or before 3 October 2023.
5. The matter is postponed for a case management conference on 10 October 2023 at 15:30 and the parties are to file their joint case management report on or before 5 October 2023.

<b>Judge's signature</b>	<b>Note to the parties:</b>
RAKOW J Judge	Not applicable
<b>Counsel:</b>	
<b>Plaintiff:</b>	<b>Defendant:</b>
M Angula Of Monika Angula & Associates Incorporated, Windhoek	L Karsten Of Louis Karsten Legal Practitioner, Windhoek