

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

Case Title: CRAIG RODNEY DENNIS // POTENTIA NAMIBIA RECRUITMENT (PTY) LIMITED	Case No: HC-MD-CIV-ACT-CON-2023/01874
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING	Heard on: 7 SEPTEMBER 2023
	Delivered on: 27 SEPTEMBER 2023
Neutral citation: <i>Dennis v Potentia Namibia Recruitment (Pty) Limited</i> (HC-MD-CIV-ACT-CON-2023/01874) [2023] NAHCMD 598 (27 September 2023)	
Order:	
<ol style="list-style-type: none">1. Summary judgment is granted with costs, including costs of one instructing counsel and one instructed counsel, for the payment of N\$26 868 509,71.2. Payment of interest on the said amount at the rate of 20 per cent per annum from 18 April 2023 to date of full and final payment.3. The matter is finalised and removed from the roll.	
Reasons:	
PARKER AJ:	

[1] The plaintiff, represented by Ms van der Westhuizen, has applied for an order for summary judgment. The defendant, represented by Dr Diedricks, has moved to reject the application.

[2] The plaintiff instituted action against the defendant wherein he claims payment in the amount of N\$26 868 509,71, plus interest on the said amount at the rate of 20 per cent per annum from the date of the issuance of summons to the date of full and final payment. He seeks also costs of suit and further or alternative relief.

[3] As I see it, the basis of this claim is briefly this: He claims the repayment of loans he had extended to the defendant. The plaintiff relies on an oral, alternatively, a tacit agreement, and the facts he relies on to sustain a tacit agreement and the terms thereof are set out in his pleading.

[4] Significantly, the plaintiff has annexed to his particulars of claim ('the POC') Annexure 'A' to show the amounts he had lent to the defendant. Dr Diedricks characterised Annexure 'A' as the hinge on which the plaintiff's case is anchored and rebuffed it as not establishing any loans advanced to the defendant by the plaintiff. I disagree.

[5] It is stated on Annexure 'A' that it was prepared by the defendant. After the horizontal line of subheadings, we see the following entry:

'Shareholding/Directors/Members Loans: Mr C. Dennis'

[6] Significantly, the legend appearing immediately after para 10 of Potentia (ie the defendant) Namibia Recruitment (Proprietary) Limited ... 'Notes to the Annual Financial Statements ... for the year ended 28 February 2022' ('the AFS') reads:

'The above *loans* are unsecured, bear no interest and have no fixed terms of repayment. The borrower (ie the defendant) has the unconditional right to defer settlement of these *loans* for at least twelve months after the balance sheet date.'

[Italicised for emphasis]

[7] The heading of para 10 reads:

'Loans from shareholders and directors'

C R Dennis (ie the plaintiff)

Z Dennis

S Dennis

Z Dennis'

[8] The extract of lines and paragraphs I have referred to in paras 5, 6 and 7 above establish conclusively the existence of loans made to the defendant by the plaintiff in terms of a tacit agreement, as pleaded by the plaintiff. The fact that there are entries in Annexure 'A' indicating such items as 'Sanlam Policy Mr Dennis', 'C Dennis tax repayment', '5400010 Water Consumption & Refuse Removal' does not detract from the fact that the document says what it is, that is, a document in respect of the plaintiff's loan account with the defendant.

[9] As I understand the submission by Ms van der Westhuizen, Annexure 'A' shows that in the plaintiff's loan account, the account was debited whenever payment was made from it for the benefit or on behalf of the plaintiff, and credited when money, including dividends came into the account.

[10] Thus, I find that the plaintiff does not rely on Annexure 'A' only. He relies on Annexures 'B' and 'C' also. Annexure 'B', which the defendant prepared, shows that at the relevant time, the Directors were R Dennis (the plaintiff), N Dennis, S Dennis and Z Dennis. Annexure 'C', which was also prepared by the defendant, contains the following important description, namely, 'GL Detailed Ledger 01/03/2022 to 31/03/2023', and a stand-alone title: 'Mr C Dennis'. Annexure 'C' contains similar entries in the 'Debit' columns and 'Credit' columns as in Annexure 'A'. The closing balance as on 31 March 2023 shows an amount of N\$26 868 509.71 and it is to the credit of the plaintiff.

[11] In all this, it should be remembered, it has not been suggested that the accounts were cooked to make it appear that there were earnings when that was not the case. In any case, the essence of s 294 of the Companies Act 28 of 2004 is that the annual financial statements of a company is a presentation of a fair picture of financial affairs of the company as required by that section of the Act for the financial year in question.¹

¹Philip M Meskin (Ed.) *Henochsberg on the Company Act* 4 ed (1985) at 448; LCB Gower *The Principles of Company Law* 3 ed (1969) at 120 and the case there cited, interpreting provisions in s 149 of the English Companies Act (c.1) that are like Namibia's s 294 of the Companies Act 28 of 2004.

[12] At all events, the parties are of one mind that the records of accounts of the defendant are not fictitious, that is, not cooked. In that regard, it should be remembered that, a balance sheet, if duly signed by the directors, as is the case in the instant matter, is capable of being an effective acknowledgement by the company of its indebtedness.²

[13] The plaintiff pleaded that the defendant was indebted to him in the said amount. The plaintiff has called up his loan, and demanded on 3 March 2023, as of right, payment thereof. Reading from the AFS, I see that the only power the defendant has is to defer the settlement of the loans for 12 months after the balance sheet date. I find that the balance sheet date is 28 February 2022. It follows, as a matter of course, that the defendant has a legal duty, as a matter of law – not a discretion – to settle the plaintiff's loans on any date after 27 February 2023. And the plaintiff demanded the 'settlement of the loans' in March 2023. It was, therefore, within his right, as I hold, to receive repayment of the loans.

[14] Dr Diedericks' submission that there has not been demand for the repayment of the loans, if I understood him, is met with the authority that in our law, where demand for the payment of an amount of money or the doing of a thing is requiring the issuance of summons is sufficient.³ As Ms van der Westhuizen submitted, if there was no term fixed for the settlement of the loans, as Dr Diedericks appeared to submit, then, as a matter of law, the loans were payable upon demand. The only qualification in the present matter, as I have said previously, is that repayment would only be made if demand for it was made any day after 27 February 2023, and the plaintiff made demand after 27 February 2023. But the defendant has failed or refused to make repayment of the loans, as aforesaid.

[15] The purpose of an order in terms of rule 60 of the rules of court is to enable a plaintiff to obtain a summary judgment swiftly without trial, if the plaintiff has a clear case and if the defendant is unable to set up a bona fide defence which is good in law or raise an issue against the claim which ought to be tried.⁴

[16] It follows inexorably that to resist summary judgment, the defendant bears the onus of satisfying the court that he or she has set up a bona fide defence which is good in law or that he or she has raised an issue which ought to be tried. To establish these requisites, the

² Philip M Meskin (Ed.) *Henochsberg on the Companies Act* footnote 1 at 455.

³ *PDS Holdings (BVI) Ltd v Zaire* 2014 (3) NR 676 (HC).

⁴ *Namibia Wildlife Resorts Limited v Maxuilili-Ankama* [2023] NAHCMD 94 (7 March 2023); *First National Bank of Namibia v Yeung Tai Foodstuff & Trading CC* [2022] NAHCMD 143 (26 March 2022).

defendant must fully disclose the nature and grounds of the defence and the material facts upon which that defence is founded, in the sense that there need to be factual material placed before the court sufficiently placing in doubt that the plaintiff's claim is unanswerable.⁵

[17] The next level of the enquiry is, therefore, to consider whether the defendant has satisfied the requirements discussed in para 15 above to see if the defendant has succeeded in resisting summary judgment.

[18] The defendant contends that there was no tacit agreement between the plaintiff and the defendant whereby the plaintiff extended loans to the defendant. I have rejected that contention as baseless. The defendant contends further that the amounts indicated in the aforementioned documents are dividends payable to the plaintiff and that it was agreed that such dividends would be ploughed back into the business of the defendant as reinvestments. But the aforementioned documents belie the defendant's contention.

[19] The defendant averred further that as reinvestments, the amounts were not there for the plaintiff to access them. But that cannot be entirely correct. I have shown previously that moneys were paid out of the plaintiff's loan account on the plaintiff's behalf to defray certain indebtedness accrued by the plaintiff, eg in respect of an insurance policy with Sanlam, tax, local authority council fees and charges, etc. Yes, it is true, as I have shown above, that the plaintiff could not get his loans repaid before the expiry of 12 months after the balance sheet date of 28 February 2022. But that did not give the defendant the entitlement to withhold repayment after the expiry of the stipulated period. That was the only stumbling block that stood in the plaintiff's way in receiving repayment of his loans. Once that stumbling block was removed on 27 February 2023, as aforesaid, the defendant has no choice but to make repayment to the plaintiff.

[20] I hold that the defendant cannot airbrush the existence of the aforesaid tacit agreement, considering the overwhelming and uncontradicted evidence laid bare by the aforesaid documents. This reminds me of the legal truism that in an application the answer always lies in the annexures filed of record.

[21] For the foregoing analysis and conclusions, I have come to ineluctable conclusion that the defendant has failed to satisfy the court that it has set up a bona fide defence that is good

⁵ *Radial Truss Industries (Pty) Ltd v Aquatan (Pty) Ltd* [2019] NASC (10 April 2019) para 37.

in law. It has also failed to raise any triable issue that ought to be tried. I find that no factual material has been placed before the court, sufficiently placing in doubt that the plaintiff's claim is unanswerable.⁶

[22] For the sake of completeness, I shall say the following: The challenge based on rule 32 and 60 of the rules of court raised by the defendant could not assist the defendant.

[23] On the facts, I find that there was a genuine and sufficient rule 32 (9) engagement, but it yielded no positive result. I do not read 32 (9) to prescribe that the plaintiff should persistently and unceasingly badger the defendant into submitting to an agreement. That would be a contradiction in terms, flying in the teeth of the scheme of amicable resolution of disputes under rule 32 of the rules of court. All that is required is that the attempt to reach an amicable resolution of the dispute should be sufficient and genuine and not perfunctory.

[24] I do not see how subsection (1) or (2) of rule 60 of the rules of court assists the defendant. The fact that the plaintiff knew or ought to have known that the defendant's record of accounts was not 'fictitious' only goes to strengthen rather than damage the plaintiff's case, as Ms van der Westhuizen submitted, and as I have demonstrated above.

[25] Based on these reasons, I conclude that the plaintiff has made out a case for the relief sought, whereupon I order as follows:

1. Summary judgment is granted with costs, including costs of one instructing counsel and one instructed counsel, for the payment of N\$26 868 509,71.
2. Payment of interest on the said amount at the rate of 20 per cent per annum from 18 April 2023 to date of full and final payment.
3. The matter is finalised and removed from the roll.

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

⁶ See para 15 above.

Counsel:	
Plaintiff	Defendant
C van der Westhuizen Instructed by Etzold-Duvenhage, Windhoek	J Diedricks Instructed by Petherbridge Law Chambers, Windhoek