

REPUBLIC OF NAMIBIA



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

Case Title: Megacentre Joint Venture t/a Megacentre and Ondangwa Fish and Chip CC t/a Eagles Pizzeria Sevelus Nakashole Ananias Hanyendaula Nghidengwa	Plaintiff 1 st Defendant 2 nd Defendant 3 rd Defendant	Case No: HC-MD-CIV-ACT-CON-2023/04389 Division of Court: Main Division Heard on: 12 March 2024
Heard before: Honourable Lady Justice Rakow	Delivered on: 5 April 2024	
Neutral citation: <i>Megacentre Joint Venture t/a Megacentre v Ondangwa Fish and Chip CC t/a Eagles Pizzeria</i> (HC-MD-CIV-ACT-CON-2023/04389) [2024] NAHCMD 152 (5 April 2024)		
Order: <ol style="list-style-type: none">1. The cancellation of the lease agreement is herewith confirmed.2. Judgment in the amount of N\$589 895,37.3. Interest <i>a tempore morae</i> to be calculated on the aforesaid amount at the agreed upon prime rate plus 2% on the balance outstanding from month to month.4. Eviction of the First Defendant and all other persons holding under them and their belongings from shop 04, MegaCentre, Lifestyle, Erf 1345, Chasie Street Windhoek.5. Costs of suit on attorney-client scale, including the costs of one instructed and one instructing counsel.		
Reasons for order:		

RAKOW J:

Introduction

[1] The plaintiff in this matter, applied for summary judgment against the defendants and the affidavit of one Yolandi Engelbrecht who is the Managing agent of Safland International Property Services (Pty) Ltd and the appointed managing agent of the plaintiff. She was authorized to make the said affidavit by way of a resolution held on 21 September 2023.

[2] She verified that the defendants are indebted to the applicant in the amount of N\$589 895.37 plus interest a tempora morae to be calculated on the aforesaid amount at the agreed upon prime rate plus 2 per cent on the balance outstanding from month to month, alternatively, 20 per cent per annum from 1 September 2023 to date of final payment, alternatively, at 20 per cent per annum from the date of judgment to date of final payment. She further stated that the plaintiff is entitled to an order in terms whereof the lease agreement is cancelled alternatively terminated and also further rental in arrears and the pro rata share of additional charges including levies, rates and taxes which are payable to the relevant council and or the plaintiff. She also verified that the plaintiff is entitled to an order to evict the first defendant and all other persons holding under them and their belongings from Shop 4, Mega Centre Lifestyle, Erf 1345, Chasie Street, Windhoek Namibia.

[3] The summary judgment was initially opposed by all three defendants but only the first defendant filed an affidavit. The affidavit was deposed to by one Ameni Sunday Nghidengwa, who is the sole member of the first defendant. He raised a point in limine of misjoinder. He indicated that the first defendant vacated the property after the lease period expired on 31 July 2022 and it was not renewed. To his knowledge Eagles Pizza Mega Centre CC took occupation of the property after the first defendant vacated it. Eagles Pizza Mega Centre CC is a distinct, independent and separate legal entity from the first defendant. The first defendant is therefore wrongly joined to these proceedings.

[4] The deponent then proceeds and explains that on 26 July 2019, the first defendant represented by the second and third defendants and the plaintiff represented by Miranda van der Merwe, entered into a written lease agreement for three years. At the time of entering into the lease agreement, the second and third defendants were the members of the first defendant but the deponent became the sole member of the first defendant on 12 March 2021. On 1 August

2022, the first defendant vacated the property, as the lease period came to an end and it was not renewed. Thereafter, Eagles Pizza Mega Centre CC took occupation of the property and they are a separate juristic person from the first defendant.

Point in limine raised by plaintiff – failure to seek condonation by the first defendant

[5] Although this argument was not per se raised during the oral arguments, it was raised in the written papers. In terms of the case plan order dated 20 November 2023, the plaintiff had to comply with rule 32(9) and (10) by 1 December 2023 and file its application for summary judgment on or before 8 December 2023, if the parties could not reach an amicable resolution. The Plaintiff duly complied with rule 32(9) and (10) by filing the rule 32(10) report on 1 December 2023 and by filing its application for summary judgment on 6 December 2023. The defendants, in terms of the case plan order, had to file their notice of intention to oppose on 15 December 2023 and their opposing affidavits (or set security) on 25 January 2024. The defendants did file a notice of intention to oppose on 15 December 2023, but failed to file their opposing affidavits (or set security) on 25 January 2024, but filed the opposing affidavit late, in non-compliance with the case plan court order dated 26 January 2024.

[6] Rule 53 and 54 of the High Court Rules states the following:

'53. (1) If a party or his or her legal practitioner, if represented, without reasonable explanation fails to –

- (a) attend a case planning conference, case management conference, a status hearing, an additional case management conference or a pre-trial conference;
- (b) participate in the creation of a case plan, a joint case management report or parties' proposed pre-trial order;
- (c) comply with a case plan order, case management order, a status hearing order or the managing judge's pre-trial order;
- (d) participate in good faith in a case planning, case management or pre-trial process;
- (e) comply with a case plan order or any direction issued by the managing judge; or
- (f) comply with deadlines set by any order of court, the managing judge may enter any order that is just and fair in the matter including any of the orders set out in subrule (2).

(2) Without derogating from any power of the court under these rules the court may issue an order -

- (a) refusing to allow the non-compliant party to support or oppose any claims or defences;
- (b) striking out pleadings or part thereof, including any defence, exception or special plea;
- (c) dismissing a claim or entering a final judgment; or

(d) directing the non-compliant party or his or her legal practitioner to pay the opposing party's costs caused by the non-compliance.

54. (1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for a failure to comply imposed by the rule, practice direction or court order has effect and consequences for such failure and such effect and consequences follow, unless the party in default applies for and is granted relaxation or extension of time from sanction.

(2) Where a rule, practice direction or court order -

(a) requires a party to do something within a specified time; or

(b) specifies the consequences of a failure to comply,

the time for doing the act in question may not be extended by agreement between the parties.

(3) Where a party fails to deliver a pleading within the time stated in the case plan order or within any extended time allowed by the managing judge, that party is in default of filing such pleading and is by that very fact barred.'

[7] The effect is therefore that the first defendant was to seek condonation for the late filing of the affidavit, opposing the summary judgment application. Although it was filed only a day later, the first defendant still needs to explain and give a reasonable explanation for the non-compliance with the court order, also indicate that the delay was not due to any wilful conduct on the part of the first defendant or that there was no reckless or intentional disregard of the court order by the first defendant.

[8] In the Supreme Court of Namibia's judgment in the matter of *Leweis v Sampoio*¹ where the Supreme Court approved the following content given to the requirements implied by the phrase of "good cause" to allow condonation, from the judgment in *Grant v Plumbers (Pty) Ltd*,² being:

'a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence, the Court should not come to his assistance.

b) His application must be bona fide and not made with the intention delaying the plaintiff's claim.

c) He must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that

¹ *Leweis v Sampoio* 2000 NR 186 (SC) at 191G-H.

² *Grant v Plumbers (Pty) Ltd*, 1949(2) SA 470 (O) at 476-477:

the probabilities are actually in his favour.³

[9] No application was made by the first defendant, neither was it mentioned in the arguments of the first defendant. The point *in limine* must therefore be upheld and the court finds that the opposing affidavit on behalf of the first defendant is not properly before court. The court is not going to grant prayer four, for the paying of pro rata share of additional charges, as this amount was not quantified and summary judgment can therefore not be granted on the said amount. The court is further awarding costs on an attorney-client scale as per clause A.59 of the rental agreement.

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

1. The cancellation of the lease agreement is herewith confirmed.
2. Judgment in the amount of N\$589 895,37.
3. Interest a tempore morae to be calculated on the aforesaid amount at the agreed upon prime rate plus 2% on the balance outstanding from month to month.
4. Eviction of the First Defendant and all other persons holding under them and their belongings from shop 04, MegaCentre, Lifestyle, Erf 1345, Chasie Street, Windhoek.
5. Costs of suit on attorney-client scale, including the costs of one instructed and one instructing counsel.

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Plaintiff:	Defendants:
CJ Van Zyl (with him C Turck) Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek	T Nanhapo Of T Nanhapo Incorporated, Windhoek

³ See also *SOS-Kinderdorf International v Effie Lentin Architects* 1990 NR 300 (HC) at 302D-F; *Krauer & Another v Metzger (2)* 1990 NR 135 (HC) at 139G-J and *Mutjabikua v Mutual & Federal Insurance Company Limited* 1998 NR 57 (HC) at 59D-F.