REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

RULING

Case no: HC-NLD-CIV-ACT-CON-2022/00003

In the matter between:

SHAFUDA FREGREGA **PLAINTIFF**

and

SPY MOTOR SPARES AND GARAGE CC **1st DEFENDANT**

SAKEUS POMBILI KANJUGULI **2ND DEFENDANT**

Neutral Citation: *Fregrega v Spy Motor Spare and Garage CC* (HC-NLD-CIV-ACT-CON-2022/00003) [2022] NAHCNLD 78 (15 August 2022)

CORAM: MUNSU AJ
Heard: **22 July 2022**
Delivered: **15 August 2022**

Flynote: Practice – Rule 60 – Summary judgment – requirements for a *bona fide* defence – issue of replying affidavit in an application for summary judgment – staying of proceedings pending payment of costs – requirements to be satisfied.

Summary: Before court is an application for summary judgment emanating from an alleged breach of an agreement of sale. The parties entered into an agreement for

the sale of a motor vehicle. The plaintiff claims that she complied with the terms of the agreement by paying the amount as agreed by the parties. She contends that the defendants failed to deliver the motor vehicle and that they failed to refund her of the amount paid.

The defendants on the other hand claim that they delivered the motor vehicle to the plaintiff but the latter refused to pay the remaining balance. Further, the defendants claim that the plaintiff refused to accept the motor vehicle that was delivered stating that she intended to order a different one, for which the defendants contend that the price was higher than the amount she paid. The defendants state that after a protracted dispute and negotiations, the plaintiff accepted on a "without prejudice" basis a substitute motor vehicle. They claim that the plaintiff undertook to collect the substitute motor vehicle but failed to do so and the said motor vehicle is still parked at the defendants' premises.

Held: the parties did not meaningfully engage each other in terms of rule 32 (9) as envisaged by the rules.

Held that: on the authority of *Standard bank Namibia Limited v Veldsman* 1993 NR 391 at 392 D-E: summary judgment should only be granted if it is clear that the plaintiff has an unanswerable case.

Held further that: the defendants deposed to facts, which if true, establish a defence,

Held that: The defendants gave a disclosure of the nature and grounds of the defence and the facts they rely upon. In addition, the defendants dispute the facts alleged by the plaintiff.

Held further that: as stated in *Government of the Republic of Namibia v Gertze* (HC-MD-CIV-ACT-OTH-2019/00978) [2019] NAHCMD 497 (30 October 2019) summary judgment is based on a trite argument that there are no triable issues of fact and the motion is initiated by a plaintiff who contends that all the necessary factual issues are settled and therefore, need not be tried. If there are triable issues of fact, summary judgment must be refused.

Held that: the defendants allege new facts which according to them constituted the terms of the agreement between the parties. There are factual disputes regarding the terms of the agreement. On the authority of *Di Savino v Nedbank Namibia* 20212 (2) NR 07 (SC), it is not the duty of the court to resolve the issues or new facts alleged by the defendants or to determine where the probabilities lie.

Held further that: the rules of court do not make provision for a replying affidavit in applications of this nature. An applicant must set out his cause of action and supporting evidence in his founding affidavit.

Held that: in order for the court to stay proceedings pending the payment of costs, the party bringing such an application should meet the requirements laid out in rule 60 (11), of which the defendants failed to do.

In the result the court refused the application for summary judgment.

ORDER

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1. The application for summary judgment is refused.
2. The plaintiff is ordered to pay the costs of this application which shall be subject to rule 32(11).
3. The matter is postponed to 26 September 2022 for a case plan conference.
4. The parties are to file a joint case plan report on or before 21 September 2022.

RULING

MUNSU AJ:

Introduction

[1] Serving before court is an opposed application for summary judgment. The plaintiff instituted action against the defendants for payment of an amount of N$ 85 000, arising from an alleged breach of an oral agreement of sale. The defendants entered appearance to defend the action. The plaintiff brought this application for summary judgment contending that the defendants have no *bona fide* defence and that their appearance to defend is solely to delay the plaintiff's claim.

Parties and representation

[2] The plaintiff is Ms. Shafuda Fregrega, an adult female person residing at a village in Oshikoto Region.

[3] The first defendant is Spy Motor Spares and Garage CC a close cooperation duly registered in terms of the laws of the Republic of Namibia with its principal business situated at Ondangwa.

[4] The second defendant is Mr. Sakeus Pombili Kanjunguli, an adult male person and a member of the first defendant. He resides at a village in Oshikoto Region.

[5] Where reference is made to both the plaintiff and the defendants, they shall be referred to as 'the parties'.

[6] The plaintiff is represented by Mr. Nyambe while the defendant is represented by Mr. Matheus.

The application

[7] The plaintiff states in her founding affidavit that on 07 May 2018 at Spy Motor Spares and Garage in Ondangwa, the plaintiff and the first defendant, there being

represented by the 2nd defendant entered into an oral agreement of sale in terms of which:

(a) The first defendant would sell a certain Toyota Hilux motor vehicle to the plaintiff for an amount of N$ 100 000.
(b) The plaintiff would deposit an amount of N$ 95 000 into the second defendant's bank account held at First National Bank. The outstanding balance of N$ 5 000 would be paid upon delivery of the motor vehicle to the plaintiff.
(c) The first defendant would deliver the vehicle to the plaintiff within three months from the date of payment, being August 2018.

[8] The plaintiff avers that on 07 May 2018, she made payment in the amount of N$ 95 000, which payment was acknowledged by the first defendant. Proof of payment is attached to the founding affidavit.

[9] The plaintiff states that the defendants failed to deliver the motor vehicle to her despite numerous requests.

[10] The plaintiff avows further that the defendants failed to refund her the amount of N$ 95 000.

[11] It is the plaintiff's assertion that the agreement was terminated as a result of the defendants' unilateral breach. She states that the parties agreed to the termination of the agreement.

[12] Furthermore, the plaintiff states that the parties entered into a new oral agreement in terms of which the defendants were to reimburse the plaintiff the amount of N$ 95 000 on or before 31 December 2018.

[13] In compliance with the new agreement, the plaintiff states that the second defendant paid her an amount of N$ 10 000. Proof is attached to the founding affidavit.

[14] The plaintiff asserts that the defendants refused or neglected to pay the outstanding amount of N$ 85 000, and for that reason, they have been unduly enriched at the plaintiff's expense.

Defendants' opposition

[15] The defendants deposed to two affidavits, firstly to an opposing affidavit and secondly, with leave of court, to a supplementary opposing affidavit. In their opposing affidavits, the defendants raised a number of points in *limine* on which they implored the court to dismiss the application.

[16] The first issue raised is that the plaintiff did not comply with rule 32(9) and (10) of this court's rules. The defendants aver that an application for summary judgment is interlocutory in nature and should, thus, comply with rule 32(9) and (10). They claim that the plaintiff did not engage them in terms of the said rules. The defendants aver that the plaintiff only filed a purported rule 32(10) report on the basis of a letter dated 02 March 2022 that her legal representative had addressed to the defendants, which letter is not compliant with the rules and did not constitute a meaningful engagement envisaged by the rules.

[17] The defendants aver that at all material times relevant to this matter, they had the intention to pursue settlement negotiations and they proposed same to the plaintiff in a joint case plan report. The defendants further assert that non-compliance with rule 32(9) and (10) is fatal.

[18] The second point of law raised by the defendants is that the plaintiff failed to satisfy the requirement of a clear claim and pleadings which are technically correct. This is based on the fact that the plaintiff in her particulars of claim pleads that she entered into an oral agreement with an entity by the name Spy Motor Spares and Garage CC. However, in her application for summary Judgment, she states that she entered into an oral agreement with an entity - Spy Spare Motor and Garage CC. The defendants state that the two entities are not the same and that the plaintiff did not offer any explanation for the difference.

[19] The defendants deny any knowledge of an entity called Spy Spare Motor and Garage CC. They maintain that the application for summary judgment is sought against an entity which is not a party to the proceedings.

[20] The third point raised by the defendants is that the plaintiff failed to comply with rule 45(7) of this court's rules. The defendants aver that the plaintiff's cause of action is based on a compromise. Rule 45(7) provides that:

> 'A party who in his or her pleadings relies on a contract must state whether the contract is written or oral and, when, where, and by whom it was concluded and if the contract is written a true copy thereof or of the part relied on in the pleadings must be annexed to the pleadings.'

[21] The defendants aver that the plaintiff failed to state in her pleadings when and where the compromise (new oral agreement) was concluded. They state further that the first defendant is a juristic person, however, the plaintiff failed to mention the person who represented the first defendant as well as, when such person was so authorised by the first defendant. In the circumstances, the defendants claim that the plaintiff failed to set out the necessary averments to sustain a cause of action.

[22] The fourth point in *limine* raised is that of prescription. The defendants aver that, according to the plaintiff, the motor vehicle was due for delivery by the defendants in August 2018 as per the initial oral agreement.

[23] The defendants avow that the plaintiff's claim constitutes a debt in terms of the Prescription Act[1] and would prescribe after three years.[2] Accordingly, the defendants assert that the debt prescribed in September 2021.

[24] The final point in *limine* raised by the defendants is one of *lis pendens.* The defendants avow that on 21 April 2021, the plaintiff instituted action against the defendants on the same cause of action involving the same parties at Ondangwa

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[1] Section 10 of the Prescription Act 68 of 1969.
[2] Section 11 of the Prescription Act 68 of 1969.

Magistrates' Court. The defendants further state that after they entered appearance to defend the matter, the plaintiff withdrew the matter on 10 June 2021.

[25] The defendants further state that after the said withdrawal of the matter, on 14 June 2021 the plaintiff reinstituted the claim again for the second time on the same cause of action, involving the same parties at Ondangwa Magistrates' Court.

[26] It is the defendants' assertion that after they entered appearance to defend the matter, the plaintiff withdrew the action on 12 January 2022.

[27] The defendants aver that the granting of a final withdrawal of any matter brought before court is vested with the presiding magistrate and or the court. They state that the withdrawal of the plaintiff's action has not been granted by the Ondangwa Magistrates' Court, and therefore this matter is still pending before another court.

[28] On the merits, the defendants' assert that they have a *bona fide* defence to the plaintiff's claim. They aver that they delivered the motor vehicle (Toyota Hilux) to the plaintiff during August 2018, but the plaintiff refused to pay the remaining balance of N$ 5 000. They claim that the plaintiff refused to accept the motor vehicle that was delivered stating that she intended to order a Toyota Hilux 4x4, for which the price, according to the defendants, was higher than the amount she paid.

[29] The defendants' aver that after a protracted dispute and negotiations, and during December 2019, the plaintiff decided to accept on a "without prejudice" basis a substitute motor vehicle, being a white Honda CRV- 4x4 valued at N$ 85 000 and a cash amount of N$ 10 000 which was deposited in her bank account on 19 December 2019.[3]

[30] The defendants' further claim that the plaintiff undertook to collect the substitute motor vehicle but failed to do so and the motor vehicle is still parked at the defendant's premises. A picture of the said vehicle is to the defendants papers.

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[3] This is the same amount mentioned by the plaintiff as having been paid to her by the second defendant in partial fulfillment of the reimbursement (second) agreement.

[31] The defendants deny having agreed to the termination of the initial agreement and aver that they have no knowledge of the subsequent oral agreement and the plaintiff is put to the proof thereof.

Plaintiff's reply

[32] The rule on summary judgment does not provide for a replying affidavit. After considering the status report in terms of rule 32(10), the court issued an order on 11 March 2022 directing the plaintiff to file her application for summary judgment on or before 25 March 2022. The order further directed the defendants to file their opposing affidavit resisting summary judgment on or before 04 April 2022. The parties filed their respective affidavits. On 11 April 2022 the defendants applied for leave to file a supplementary opposing affidavit by 18 March 2022. The parties agreed that the plaintiff would file a replying affidavit by 18 May 2022. The court granted the application.

[33] However, the plaintiff deposed to two replying affidavits. The second replying affidavit appears to have been necessitated by the issues raised by the defendants in their supplementary opposing affidavit. However, both the replying affidavits were filed simultaneously after the defendants had filed their opposing and supplementary affidavits. The plaintiff raised new issues in her replying affidavit. I will briefly comment on the new issues raised in the replying affidavits later in the judgment.

[34] In her replying affidavit, the plaintiff denies the defendants' allegation that there was non-compliance with rule 32(9) and (10). She avers that the matter emanates from the magistrates court where the defendants equally defended the matter and tendered no settlement.

[35] The plaintiff further states that a joint case plan was forwarded to the defendants by email on 24 March 2022 wherein they were advised of the plaintiff's

intention to apply for summary judgment. The plaintiff avers that the defendants altered the joint case plan and wanted to protract the matter by suggesting that the parties exchange pleadings and initially refused to sign the case plan to the effect that the plaintiff intended to apply for summary judgment. When same was finally signed, the plaintiff's legal representative addressed a letter to the defendants' legal representative regarding the intended application to which the defendants replied that they would be opposing the application, which, according to the plaintiff, is an indication that the defendants are of the opinion that they have a defence.

[36] The plaintiff states that there was no need for a face to face meeting by the parties pursuant to rule 32(9) as the position had already been made clear on paper and from the history of the matter in the magistrates' court.

[37] Turning to the issue of wrong citation of the parties, the plaintiff ascribes it to a mere typographical error where one word "is put in front of the other and vice versa". This, according to the plaintiff, is not a citation of a wrong party. She states that if the defendants are of the view that they are not cited at all, they should then and there withdraw their defence. The plaintiff goes further to state that the defendants are in any event sued jointly and severally. She avers that her application should be read together with her combined summons.

[38] The plaintiff denies receiving the alleged motor vehicle from the defendants. She also denies that she entered into an agreement for substitution of the vehicle she ordered.

[39] The plaintiff avers that the second defendant paid her a sum of N$ 10 000 on 19 December 2019 in partial compliance with the compromised agreement. She states that the second defendant could not have done so if there was no compromise to reimburse her or if he had delivered a vehicle.

[40] The plaintiff further states that the allegation by the defendants that a vehicle was delivered and that the plaintiff failed to pay the outstanding amount is an afterthought and does not detract from the fact that she paid the defendants the amount claimed and that she is entitled to claim same.

[41] According to the plaintiff, the defendants tendered a plea on the merits of the matter in the magistrates' court. In the said plea, the defendants pleaded that the agreement was terminated and that they were going to restitute the plaintiff and that they were going to make further payments in addition to the initial payment of N$ 10 000 they made. The plaintiff states that the defendants' assertion that she agreed to a substitution of the vehicle for a different one in addition to payment of the amount of N$ 10 000 is untrue.

[42] According to the plaintiff, if the defendants were acting in good faith, and had tendered delivery of any vehicle to her, she would have considered it. Also, the defendants would have equally mentioned same in their plea.

The law on summary judgment

[43] In *Di Savino v Nedbank Namibia Ltd*[4] the Supreme Court sets out the principles governing summary judgment. The following is said at paragraph 23:

'One of the ways in which the defendant may successfully avoid summary judgment is by satisfying the court by affidavit that he or she has a *bona fide* defence to the action. The defendant would normally do this by deposing to facts which, if true, would establish such a defence. Under Rule 32(3)(b)[5] the affidavit must "disclose fully the nature and grounds of the defence and the material facts relied upon therefor". Where the defence is based upon facts and the material facts alleged by the plaintiff are disputed or where the defendant alleges new facts, the duty of the court is not to attempt to resolve these issues or to determine where the probabilities lie.'

Rule 32(9) and (10)

[44] The parties did not meaningfully engage each other in terms of the above rules. Unlike the plaintiff, the defendants managed to attach the correspondence they rely upon in asserting that the plaintiff did not engage them in terms of the aforementioned rules. The plaintiff alleges that she forwarded a joint status report to the defendants' legal representative wherein they were advised of her intention to

[4] *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 07 (SC).
[5] The forerunner of the current rule 60.

apply for summary judgment. According to her, the defendants altered the joint case plan and wanted to protract the matter by filing pleadings. The plaintiff did not attach the said joint status report. Conversely, the defendants attached their proposed joint status report which was forwarded to the plaintiff's legal representative. The relevant parts of the report read:

> **a) <u>Summary Judgment application and the dates for filing necessary papers and proposed date for hearing:</u>**
>
> Plaintiff intends to apply for summary judgment, but the parties herein agreed for the intended application to be held in abeyance pending the outcome of court connected mediation.
>
> **d) <u>Dates for filing of Plea, Replication and Plaintiff's Plea to Counterclaim.</u>**
>
> The parties propose that the dates herein be held in abeyance pending the outcome of settlement negotiations.
>
> **f) <u>Any issues that may be appropriately dealt with at that early stage or on which the managing judge's direction is sought by the parties:</u>**
>
> There are great prospects for settlement, and the parties herein propose for the matter to be referred to Court connected mediation for the parties to pursue and finalise settlement negotiations.
>
> A draft initial mediation referral order (in word format) is annexed hereto for consideration by the Honourable Court.

[45] There is no part in the defendants' joint status report forwarded to the plaintiff that suggests that the defendants intended the parties to exchange pleadings. On the contrary, the captured parts show that the defendants were amenable to settlement negotiations.

[46] Be that as it may, on 09 March 2022, the parties filed a joint case plan report wherein the following appears:

a) Summary Judgment application and the dates for filing necessary papers and proposed date for hearing:

1. The plaintiff intends to apply for summary judgment against the defendant.
2. The parties to comply with rule 32(9) and plaintiff to file rule 32(10) report on or before 17 March 2022.
3. Should the parties fail to resolve their dispute in terms of rule 32(9) and (10) and subject to that stated in paragraph 1 supra, the plaintiff shall apply for summary judgment and will file its application for summary judgment on or before 25 March 2022.

[47] The following day (10 March 2022) the plaintiff filed a rule 32(10) report stating that the parties were unable to settle the matter. Remarkably, the plaintiff's report is based on a letter dated 02 March 2022 that counsel for the plaintiff addressed to the defendants informing them of the plaintiff's intention to file for summary judgment to which counsel for the defendants reacted by advising that the defendants were going to oppose the application.

[48] The defendants are therefore correct in stating that the report in terms of rule 32(10) is based on a letter that the plaintiff addressed to the defendants prior to the parties agreeing to engage in terms of rule 32(9). In any event, the court on 11 March 2022 granted an order in line with the parties' joint case plan report, directing them to comply with rule 32(9) and (10) on or before 17 March 2022. There is no mention about what happened during the period 11 - 17 March 2022. The rule 32(10) report was supposed to capture events, mainly in respect of that period and not only past events. Accordingly, I find that the parties did not meaningfully engage each other as envisaged by the rules.

[49] Notwithstanding my findings above, I propose to also deal with the defence raised on the merits.

Defendants' defence on the merits

[50] Over and above the points of law raised by the defendants, they also put up a defence to the plaintiff's claim. I have outlined the defendants' defence in para 28 – 31 above. Briefly, the defendants claim that they delivered the motor vehicle to the plaintiff but the latter refused to pay the remaining balance of N$ 5 000. The defendants' further claim that the plaintiff refused to accept the motor vehicle that was delivered stating that she intended to order a Toyota Hilux 4x4 for which the defendants contend that the price was higher than the amount paid by her.

[51] The defendants state that after a protracted dispute and negotiations, the plaintiff decided to accept on a "without prejudice" basis a substitute motor vehicle, being a white Honda CRV-4x4 valued at N$ 85 000 and a cash amount of N$ 10 000 which was deposited in her bank account. The defendants further claim that the plaintiff undertook to collect the substitute motor vehicle but failed to do so and the said motor vehicle is still parked at the defendants' premises. The defendants deny having agreed to the termination of the initial agreement and state that they have no knowledge of the subsequent oral agreement.

[52] In *Standard Bank of Namibia Limited v Veldsman*[6] the court opined as follows:

'Summary judgment should only be granted if it is clear that the plaintiff has an unanswerable case'[7]

[53] 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.

[54] In *Government of the Republic of Namibia v Gertze*[8] the court had the following to say:

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[6] *Standard Bank of Namibia Limited v Veldsman* 1993 NR 391 at 392 D-E.

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

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

'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…'

[55] Similarly, it was held in *Kramp v Rostami*[9] 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.'

[56] In their opposing affidavit, the defendants further allege new facts which according to them constituted the terms of the agreement between the parties. The agreement between the parties was not reduced to writing. There are factual disputes regarding the terms of the agreement. On the authority of *Di Savino v Nedbank Namibia* cited above, it is not the duty of this court to attempt to resolve these issues or to determine where the probabilities lie.

[57] In *Standard Bank of SA Limited v Park Boulevard Trading CC and Another*[10] 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

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[9] *Kramp v Rostami* 1998 NR 79 (HC) at 82 C-I.

[10] *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).

(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'.

[58] The plaintiff raised new issues in her replying affidavit to which the defendants did not have an opportunity to answer. The new issues relate to the plea tendered by the defendants in the magistrates' court. To consider this new issue will not only be unfair to the defendants but will also amount to an attempt to decide the probabilities of the parties respective versions on the disputed terms of the agreement and the performance thereof by the parties. This is impermissible especially when the defendants did not get to deal with the said new facts. On the authority of *Stipp and Another v Shade Centre and Others*[11], an applicant must set out his cause of action and supporting evidence in his founding affidavit. It is only in exceptional circumstances that the court will allow an applicant to supplement its allegations in a replying affidavit in order to establish its case.

[59] In light of the foregoing, the application for summary judgment must fail. I need not deal with the other points in *limine* raised by the defendants in light of the conclusion I have reached.

Costs

[60] It is trite that costs follow the event. There is no reason why this rule should not be applied in this matter. The defendants asked the court to award costs in their favour on a punitive scale and to stay the matter until costs have been taxed and paid by the plaintiff.

[61] Considering the history of the matter, the defendants' argued that the plaintiff's application constitutes an abuse of the process. I got the impression that the defendants emphasised primarily, the procedural steps that have been taken by the plaintiff in the prosecution of the matter as opposed to the substantive reasons for doing so. Having had the benefit of perusing the papers filed in this application, I am

[11] *Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC).

of the view that this is a matter that should have been resolved by the parties without a necessity to incur further legal costs.

[62] I find that the plaintiff did not act frivolously in bringing this application. There is therefore no basis for an award of costs on a punitive scale. As for staying the matter until the costs have been paid, suffice to say that the defendants did not deal with the two requirements under rule 60(11). They did not make out a case or argue that the plaintiff's case is not one within the terms of subrule (1). The authority they relied upon[12] involved a claim which did not meet the terms of subrule (1). I am also not of the opinion that the plaintiff knew or ought to have reasonably known that the defendants rely on a contention which would entitle them to leave to defend. This is determined from what appears in the papers filed in this application.

Order

[63] In the result, it is ordered as follows:

1. The application for summary judgment is refused.
2. The plaintiff is ordered to pay the costs of this application which shall be subject to rule 32(11).
3. The matter is postponed to 26 September 2022 for a case plan conference.
4. The parties are to file a joint case plan report on or before 21 September 2022.

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D.C. MUNSU

ACTING JUDGE

[12] *Gariseb v Ultimate Safaris (Pty) Ltd* (SA 51-2018) [2020] NASC (6 July 2020).

APPEARANCES:

PLAINTIFF:	M. M. Nyambe Of Mukaya Nyambe Inc, Ongwediva
DEFENDANTS:	J. L. Matheus Of Slogan Matheus & Associates, Ongwediva