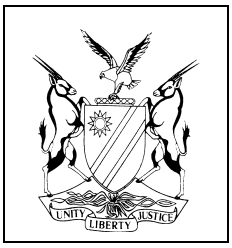

"SPECIAL INTEREST"

CASE NO.: I 1098/2008

SUMMARY

AARON MUSHIMBA versus **AUTOGAS NAMIBIA (PTY) LTD**

DAMASEB, JP

07/10/2008

PRACTICE – SUMMARY JUDGMENT

- Papers to be looked at as a whole in determining if plaintiff has unanswerable case even if pleadings defective in minor respect. Plaintiff not to be denied summary judgment simply because of a minor defect in pleadings.

"SPECIAL INTEREST"

Case No.: I 1098/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

AARON MUSHIMA **APPLICANT/PLAINTIFF**

and

AUTOGAS NAMIBIA (PTY) LTD **RESPONDENT/DEFENDANT**

CORAM: **DAMASEB, JP**

Heard on: 5th August 2008

Delivered on: 7th October 2008

JUDGMENT

[1] **DAMASEB, JP**: The first order of business when this application for summary judgment was called before me- was a point in *limine* taken by the respondent to the

effect that the summons is defective in the sense that it was not 'signed and issued by the registrar' of this Court as is required by Rule 17(3) of the Rules of this Court. Amongst the documents filed of record there is a Combined Summons with a stamp of the registrar of the High Court bearing the date of the 7th of April 2008 - being the same date on which the summons is dated and signed by Messrs M B De Klerk & Associates acting for the plaintiff. Next to the signature of M B De Klerk & Associates is provision made for the signature of the registrar and in that space the registrar's signature appears with the High Court date stamp bearing the date of the 7th of April 2008? There is, therefore, no merit in the point in *limine* and it was for that reason that I dismissed it with costs.

[2] I have before me an opposed application for summary judgment based on two claims for liquidated amounts arising from debts under two separate agreements concluded between the parties, respectively on 28 June 2007 ("the suretyship agreement") and 14 September 2007 ("the loan and pledge agreement"). In respect of claim 1, the applicant claims N$482 500, 00 plus agreed interest at the rate of 20% calculated from 19 November 2007until date of payment - and in respect of claim 2 the amount claimed is US$44 452.98 plus interest on that amount at the agreed prime rate of interest of Standard Bank of Namibia from time to time, plus 2% calculated from 1 March 2008 until date of payment. In respect of claim 2 and on the strength of clauses 4.1 – 4.3 of the loan and pledge agreement the plaintiff seeks an order declaring that the plaintiff be allowed without further notice to the defendant to cause all or any of the securities to be sold presently held in pledge either by public auction or by private treaty and to convey valid

title in the securities to any purchaser thereof in satisfaction of the aforesaid debt in the event of the defendant failing to satisfy the judgment debt.

Claim1

[3] I will now set out in some particularity the allegations pertaining to claim 1. On 28th June 2007 the plaintiff and the defendant concluded a written agreement of suretyship (the suretyship agreement) in terms of which the plaintiff provided a letter of credit to Easigas (Pty) Ltd for the purchase of gas by the defendant in the amount of N$481 500.00 ("the guarantee amount''). The defendant then bound itself as guarantor to the plaintiff in the amount of N$481 500.00 in respect of the letter of credit.

[4] The defendant undertook (in terms of clause 4.1 of the suretyship agreement) to pay to the plaintiff the guarantee amount after receiving 30 days' written notice from the plaintiff, alternatively to release the plaintiff from the letter of credit- failing which (in terms of clause 4.2 of the suretyship agreement) the guarantee amount plus interest at 20% per annum "shall immediately become due and payable'' to the plaintiff by the defendant. Clause 4.3 then provides as follows:

> "In the event of AUTOGAS failing to fulfill its obligations as aforesaid, then and in such an event AUTOGASS hereby irrevocably authorizes Messrs M B de Klerk & Associates to lodge and register the share transfer forms as envisaged in clause 3.2 on the instructions of MUSHIMBA' so as to release AUTOGAS from its guarantee and to transfer the 5% shares to MUSHIMBA."

[5] For completeness, clause 3.2 - which is described in the suretyship agreement as a 'condition precedent' –states:

> "The Shareholders of AUTOGAS signing and completing share transfer forms for 5% of its shares to MUSHIMBA, which share transfer forms shall be kept in trust by Messrs M B de Klerk & Associates pending the fulfillment by AUTOGAS of its obligations in terms of clause 4 hereunder.''

[6] In terms of clause 3.1, the suretyship agreement "is conditional upon Easigas (Pty) Ltd accepting the Letter of Credit and delivering the envisaged gas shipment to AUTOGAS within 60 (sixty) days'' from the date of signing of the agreement - being 28 June 2007. On a contextual construction of the suretyship agreement, it is clear to me that the effect of clauses 4.1 and 4.3 is to give the plaintiff the election, in the event that the defendant fails to make good on the guarantee, to exact payment of the guarantee amount or to transfer the 5% shareholding in the defendant into his name.

[7]The suretyship agreement contains a 'non-variation' clause in the following terms:

> "No variation or consensual cancellation of this Agreement shall be of any force or effect unless reduced to writing and signed by both parties''

[8] The particulars of claim also allege that the plaintiff executed the letter of credit in favour of Easigas (Pty) Ltd in the amount of N$481 500.00. The letter of credit is not attached to the summons in support of this allegation. On 19 October 2007 the plaintiff demanded payment from the defendant in the amount of N$481 500.00. This demand was not complied with in that neither the amount of N$481 500.00 was paid, nor did the defendant release the plaintiff from his obligations under the letter of credit.

[9] On 24 December 2007, the defendant wrote a letter to the plaintiff's legal practitioner in the following terms:

> "We would like to inform you that as per the Agreement Autogas is unable to meet its obligations as per paragraphs 4.1 and 4.2 and hereby authorizes yourselves to exercise paragraph 4.2 of the agreement."

[10] On 20 February 2008 plaintiff's legal practitioner of record wrote to the defendant in, amongst others, the following terms:

> "We also confirm that in respect of the Agreement of Suretyship, our client is not willing to exercise his rights in terms of paragraph 4.3 of the Agreement , but in fact wishes to proceed in terms of clause 4.1 as read with clause 4.2 of the Agreement.''

Claim 2

[11] On 14 September 2007, the plaintiff and defendant concluded a written agreement of loan and pledge ("the loan and pledge agreement''). The plaintiff agreed in terms of that agreement to provide a letter of credit for the purchase by the defendant of 'securities' in the amount of US$44 452.98. This was in return for the defendant pledging to the plaintiff all its rights, title and interest in the said securities. If the defendant breached any obligation under the agreement, the plaintiff had the right to sell the securities either by public auction or by private treaty. In terms of the loan and pledge agreement the loan thus granted was to be repaid according to an agreed schedule in six equal monthly installments of US$7 408.83, commencing on 31 January 2008 and ending on 30 June 2008. (Vide clause 6 of the loan and pledge agreement)

[12] It is a term of the loan and pledge agreement that upon breach by the defendant of its obligations, and failing to remedy same within 7 days of a notice to remedy such breach, the plaintiff is entitled to demand immediate payment of all amounts which

defendant may then owe, together with the agreed interest. The agreement of loan and pledge contains the following non-variation clause:

> "No variation, cancellation, whether unilateral or consensual, or novation hereof shall be of any force of effect unless reduced to writing and signed by both Autogas and Mushimba."

[13] It is alleged that the plaintiff advanced the amount of US$44 452.98 to the defendant for the purchase of the securities aforesaid and the defendant proceeded to obtain delivery of the pledged articles and has since exercised its right of retention of the same. It is also alleged that the defendant failed to make any repayments in terms of the agreed schedule of payment contained in clause 6, and by letter dated 7 February 2007 admitted breach and stated the following amongst others:

> "Our agreement for repayment was based on our conviction that the cylinders will be in the country as early as December 2007 to allow Autogas to trade and be able to generate funds for repaying the debt. Unfortunately up to now the cylinders have not reached the Autogas depot and we now expect them during the third week of February 2008. The failure to have these cylinders has limited our capacity to generate income and has had a major impact on our cash flow hence our failure to meet the initial installment. Our Managing Director has been trying to reach Mr A Mushimba but we are made to believe that he is out of town.
>
> We are making a commitment to start repayment on 30 March 2008 at the agreed rate and by virtue of this letter we sincerely request your permission to proceed as proposed.
>
> We would be grateful for this consideration as well as a written letter of acknowledgement and acceptance of this matter." (My underlining)

[14] The plaintiff's legal practitioner replied to that letter in the following terms by letter dated 20 February 2008:

> "2. We have discussed the contents of your letter with our client, but our client has instructed us to advise you that unless the outstanding payments for January and

> February 2008 are paid **before or on 28 February 2008,** and the subsequent monthly payments are made on a monthly basis thereafter as stipulated in the agreement, we are to issue Summons against your company without any further notice herein.'' (My emphasis)

[15] It is alleged in the particulars that notwithstanding demand, the defendant failed to remedy the breach.

[16] The defendant's affidavit in opposition to the application for summary judgment discloses the following defences:

(i) That the letter of credit actually passed and honoured was in the amount N$479 406.07 and not the N$481 500.00 claimed by the plaintiff and verified as such in the affidavit in support of summary judgment. The defendant then annexes to its affidavit "AN2'' with the clear implication that it is the letter of credit actually passed in the amount of N$479 406.07.

(ii) That the suretyship agreement was conditional upon Easigas (Pty) Ltd accepting the letter of credit and delivering the gas to the defendant within 60 days from the 28th of June 2007; it being alleged that this pre-condition was not met. As proof that gas was not delivered within the period envisaged, defendant annexes documents AN3, AN4 and AN5 to the affidavit in opposition to summary judgment. (More about these documents later);

(iii) That the plaintiff, following the breach by the defendant , exercised the option under clause 4.3 through his legal practitioner MB de Klerk and Associates and transferred into his (plaintiff's) name the 5% shares in the defendant- an election which precludes the plaintiff from now exacting payment of the guarantee amount.

(iv) In respect of claim 2, the defendant's defence is that with the knowledge of the plaintiff it was unable to meet the payment schedule in clause 6 of the loan and pledge agreement and proposed to the plaintiff – who accepted the same trough his agent Phillip Hikumwah- a new repayment schedule (with an amount of N$50 000 already made in terms of the new payment schedule). It is alleged that the plaintiff cannot now claim breach based on the original loan and pledge agreement. The defendant does not attach to the affidavit any proof that the 5% shares had been transferred to the plaintiff. In fact, in Annexure AN6 to the defendant's affidavit, being a "Valuation Report on Autogas Namibia (Pty) Ltd" date June 2008, the defendant's owners are reflected as follows:

"Table I: Shareholding structure

Name	**% Shareholding**
A. Mendonca (Managing Director)	58.00%
M. Nangombe	2.00%
A. Ipinge	2.00%
J. Haufiku	13.75%
M. Nogueira	5.10%
M. Shivute	3.62%
S. Polera	7.50%

Oshiwana Trust	5.03%	
H. Ndume		1.00%
U. Shivute		2.00%
Total		100.00%

Source: Autogas shareholders' register.''

Discussion

[17] The difficulty facing the defendant is its admission in the letter of 24 December 2007 that it ''is unable to meet its obligations as per paragraphs 4.1 and 4.2" of the suretyship agreement, and its "authorizing the plaintiff to exercise paragraph 4.2 of the agreement''. This is a clear admission that (i) the plaintiff's demand for payment in terms of clause 4.1 was proper and that (ii) in terms of clause 4.2 of the suretyship agreement, the guarantee amount plus agreed interest immediately became due and payable. These admissions put to paid the assertion that the clause 3.1 precondition had not been complied with. The defendant's obligation to pay the guarantee amount and the plaintiff's corresponding right to demand payment thereof - alternatively to exercise the clause 4.3 election to take transfer of the 5% shares - could not have arisen if, as alleged in the defendant's affidavit, the clause 3.1 precondition had not been complied with. I am satisfied that Easigas had accepted the letter of credit and delivered the gas to the defendant. The defendant annexes to its affidavit documents AN3-AN5 which it alleges represent proof that the gas was not delivered within 60 days from 28 June 2007. Having looked at the annexures I agree with Mr. Strydom for the plaintiff that AN3–AN5 are not related to the delivery of gas under the suretyship agreement. They relate to the delivery of empty cylinders (not gas) and to a corporate entity not envisaged under the suretyship agreement.

Did the plaintiff take transfer of the 5% shares?

[18] I have already referred to the plaintiff's legal practitioner's letter of 20 February 2008 which made clear that the plaintiff did not wish to acquire the shares and intended to exact payment of the guarantee amount. Annexure AN6 *supra* to the defendant's affidavit establishes clearly that as recently as June 2008, the plaintiff was not a shareholder in the defendant: Summons in the present case was issued in April 2008, i.e. before 'AN6'; while service of the summons on the defendant took place on 10 May 2008. There is therefore no *bona fides* in the allegation- or an arguable case- that the plaintiff took transfer of 5% shares in the defendant in tandem with clause 4.3 of the suretyship agreement which debars him from exacting payment of the guarantee amount. The plaintiff is therefore entitled to summary judgment in respect of the guarantee amount in terms of the suretyship agreement.

[19] It has been held (as to which see *Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd* 1998 1 SA 679 (O)) that summary judgment should not be granted even in the absence of a *bona fide* defence where the plaintiff fails to make out a claim clearly on the papers and does not present pleadings which are technically correct. I, however, prefer the approach adopted in *Standard Bank of SA Ltd v Roestof* 2004 2 SA 492 (W) 498B-C where it was held that the preferable approach should be to consider the papers forming part of the summary judgment application as a whole and not punish the plaintiff simply because his papers are technically wanting albeit in an insignificant respect. In my view, if the pleadings disclose a clear cause of action although defective in a minor respect, and it is

clear on the papers looked at as a whole that the plaintiff has an unanswerable case, summary judgment should not be refused.

[20] *In casu* the defendant alleges that the amount actually honored under the letter of credit is less than what is claimed in the combined summons. Regrettably the plaintiff's papers do not attach the letter of credit actually honored. The guarantee amount in the agreement relied on and the amount claimed in the summons are, however, the same, while AN2 to the defendant's papers at best seems tentative only and part of some inchoate negotiation which still had to be finalized- not as alleged by the defendant the actual letter of credit. Besides, it was made clear to me during argument that the plaintiff is not persisting with the claim that the defendant pay him the full guarantee amount of N$481 500.00 envisaged in the suretyship agreement of 28 June 2007 - and Mr. Strydom submitted that the plaintiff would instead seek judgment in the amount N$479 406.07 which is admitted by the defendant as the amount actually honored under the letter of credit. Being satisfied that no real factual dispute exists and that the defendant has no *bona fide* defence to claim 1 in the summons, I would enter judgment in the lower amount in respect of which indebtedness is not denied.

The second Claim

[21] As we have seen, the defendant's defence is that clause 6 of the loan and pledge agreement was varied by agreement between the parties. The defendant does not aver that the alleged new repayment schedule was agreed to in writing by both parties as required by the non-variation clause. The plaintiff's letter of 20 February 2008 in any

event does not support such a conclusion. In the absence of proof that a novation of the plaintiff's rights in clause 6 took place in terms of the non variation clause, and in the absence even of as much as a bare allegation that the plaintiff accepted the alleged new repayment terms and what it constituted, I am not persuaded that the acceptance by the plaintiff of the payment of N$50 000 after the breach by the defendant of the agreed re-payment schedule, was a waiver on the plaintiff's part to hold the defendant to the terms of the original agreement. Ms van der Westhuisen for the defendant made the rather courageous submission on behalf of the defendant that the payment of N$50 000 (i.e. in Namibian currency and not in USS$ as required by the loan and pledge agreement) is proof:

(i) of the existence of a new agreement as to repayment varying clause 6; and

(ii) the plaintiff's acceptance that he would henceforth be paid in Namibia dollars at such intervals as the defendant is able to pay and not in terms of a specific time-frame. Nowhere in the defendant's affidavit or annexures is such an agreement discernable or alleged.

[22] Where the parties have incorporated a non-variation clause in their written agreement, any attempt to agree informally on a topic covered by the non-variation clause is not permissible. See: *Brisley v Drotsky* 2002 4 SA1 (SCA); *HNR Properties CC v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) at 479 C-F. An oral agreement to alter the terms of payment (e.g. extension of time) where the parties have bound themselves to

a non-variation clause is therefore not permissible unless it is reduced to writing and agreed by both parties: *Van Tonder v Van der Merwe* 1993 2 SA 552 (W) E-G.

[23] In addition, clause 15 of the loan and pledge agreement provides as follows:

> "15. NON-WAIVER
>
> 15.1 Neither party shall be regarded as having waived, or be precluded in any way from exercising, any right under or arising from this Agreement by reason of such party having at any time granted any extension of time for, or having shown any indulgence to the other party with reference to any payment or performance hereunder, or having failed to enforce, or delayed in the enforcement of, any right of action against the other party.
>
> 15.2 The failure of either party to comply with any non-material provision of this Agreement shall not excuse the other party from performing the latter's obligations hereunder fully and timeously."

[24] I am satisfied that the defendant does not raise a factual or legal dispute which is fit for trial because all available proof produced by the defendant itself provides no evidence of the existence of an agreed new repayment schedule. In fact, in its letter of 7 February 2008 the defendant said it committed itself "to start repayment on 30 March 2008 at the agreed rate''. Since no mention is made in that letter (or any other correspondence forming part of the summary judgment pleadings) of a new agreed schedule, the "agreed rate'' can only mean the repayment schedule contained in clause 6 of the loan and pledge agreement which the defendant is admittedly in breach of. That further negates the existence of a new agreed repayment regime. The defence raised in respect of claim 2 is thus "obviously untenable'': See *Bonnet en Andere v Snaar Dorpsontwikkelaars* 1978 4 SA 212 at 217C-D – and does not raise a triable factual or legal dispute.

Conclusion

[25] I wish to echo the following words of wisdom by Didcott J in *Cloete v Government of the Republic of SA; Matiso v Commanding Officer , Port Elizabeth Prison* 1995 4 SA 631 (CC) at 648H-I.

> "Credit plays an important part in the modern management of commerce. The rights of creditors to recover the debts that are owed to them should command our respect, and the enforcement of such rights is the legitimate business of our law. The granting of credit would otherwise be discouraged, with unfortunate consequences to society as a whole, including those poorer members who depend on its support for a host of heir ordinary requirements. That does not mean, however, that the interests of creditors may be allowed to ride roughshod over the rights of debtors.''

[26] I am satisfied that the defences raised against plaintiff's claims 1 and 2 are bogus and are only intended to delay the satisfaction of a good claim. The success of the defences raised is not just unlikely (in which case I must refuse summary judgment) – it is improbable. A case has therefore been made out to grant the plaintiff relief in respect of both his claims 1 and 2.

Special costs order?

[27] The plaintiff asks for a special costs order. Neither in the pleadings nor in the heads of argument was any basis laid for me to make such an order. I will therefore not make such an order.

The order

[28] I accordingly make the following orders:

Ad Claim 1

The defendant is ordered to pay the plaintiff:

(i) The amount of N$479 406.07; together with

(ii) Interest accrued on the aforesaid amount at the agreed rate of 20% *per annum* calculated from 19 November 2007 until date of payment;

Ad Claim 2

The defendant is ordered:

(i) To pay to the plaintiff the amount of US$44 452.98 minus N$50 000 and minus any other amount subsequently paid by the defendant in US$ or any other currency in partial payment of the US$44 452.98; together with

(ii) Interest calculated on the aforesaid amount at the agreed rate of prime rate of Standard Bank of Namibia Limited from time to time plus 2%, calculated from 1 March 2008 until date of payment;

And it is declared:

(iii) That the plaintiff may without further notice to the defendant cause all or any of the securities to be sold presently held in pledge either by public auction or by a private treaty and to convey valid title in the securities to any purchaser thereof in

satisfaction of the debt in respect of claim 2 in the event of the defendant failing to satisfy the judgment debt.

IN RESPECT OF BOTH CLAIMS

[29] The defendant is ordered to pay to the plaintiff's costs of suit on a party and party scale consequent upon the employment of one instructing and one instructed counsel.

DAMASEB, JP

On behalf of the Applicant:	**Mr Strydom**
Instructed by:	**M B De Klerk & Associates**
On behalf of the Defendant:	**Ms Van Der Westhuizen**
Instructed by:	**BD Basson Inc.**