



CASE NO: (P) I 3062/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOHANNES HERMANUS GABRIELSEN

PLAINTIFF

And

LEN COERTZEN

DEFENDANT

Heard on: 30 NOVEMBER 2010

Delivered: 29 JUNE 2011

JUDGMENT

UEITELE A J [1] This is an application brought by Len Coertzen (I will in this judgment refer to Mr. Coertzen as the defendant) in which application he seeks the following relief:

- “1 Granting leave to the applicant to file his supplementary opposing affidavit to the application for summary judgment filed on 30 September 2009 under the above case number [i.e. case number (P) I 3062/2009];
- 2 Ordering the applicant to pay the cost of this application (save for any cost of opposition).
- 3 Further and/or alternative relief.”

[2] The application is opposed by Johannes Hermanus Gabrielsen (I will in this judgment refer to Mr. Gabrielsen as the plaintiff).

[3] I find it appropriate to briefly sketch the background to this application. On 28 August 2008 the plaintiff instituted action (by issuing simple summons) against the defendant. In the summons the plaintiff claimed the following relief:

- “1.1 Payment in the amount of N\$ 51 580-00 (Fifty One Thousand Five Hundred and Eighty Namibia Dollars) in respect of goods sold and delivered and/or for services rendered on or about March 2009 by the Plaintiff to the Defendant at the latter’s special instance and request which amount is now due and payable, but the Defendant despite demand thereto, refuses and/or neglects to pay.
- 1.2 Interest on the aforesaid amount at the rate of 20% (twenty percent) per annum *a tempore morae* until date of final payment
- 1.3 Cost of suit.”

[4] On 23 September 2009, the defendant entered an appearance to defend and on 30 September 2009 the plaintiff delivered a notice of application for Summary Judgment. The application for summary judgment was to be made on 23 October 2009.

[5] On 20 October 2009 the defendant gave notice that he will oppose the application for summary judgment and delivered an opposing affidavit in support of his resistance of the application for summary judgment. On 23 October 2009 this Court ordered the hearing of the application be made on a date to be arranged with the Registrar.

[6] The plaintiff, on 12 November 2010, set down hearing of the application for summary judgment for 19 January 2010. On 17 December 2009 the plaintiff filed his heads of argument in respect of the hearing scheduled for 19 January 2010.

[7] On 13 January 2010 (that is, three days prior to the day scheduled for hearing arguments in respect of the application for summary judgment) the defendant delivered an application to file a supplementary opposing affidavit. On 15 January 2010, the plaintiff filed his notice to oppose the application to file a supplementary affidavit. The plaintiff objected *in limine* to the short service of the “Application for leave to file the Supplementary Opposing Affidavit.” This Court, however, and after argument in respect thereof, condoned the short service of the ‘Application for Leave to introduce a Supplementary Opposing Affidavit’ whereafter the matter was postponed *sine die*. A date was subsequently allocated and the Application for Leave to introduce a Supplementary Opposing Affidavit was argued before me on 30 November 2010.

[8] The issue that this Court is called upon to decide is whether it will or will not grant the defendant leave to file a supplementary opposing affidavit.

Summary of reasons advanced in support of the application and reasons advanced in opposition to the application

[9] The defendant, in support for the application for leave to file a supplementary opposing affidavit made the averments which I have summarized below:

- 9.1 On 20 October 2009 the defendant's legal practitioner of record (Mr. van Rensburg) was diagnosed with chicken pox and was then given leave from work from 19 October 2009 until 30 October 2009.
- 9.2 On 30 September 2009 the plaintiff "and during his above mentioned period of sick leave" (sic) gave notice of set down of application for summary judgment.
- 9.3 Due to the illness of Mr. van Rensburg, he (van Rensburg) could only consult with and obtain instructions from defendant via telephone.
- 9.4 At the time of the telephonic consultations, the defendant only informed Mr. van Rensburg that his defence to the plaintiff's claim was the fact that the defendant had already paid the plaintiff for all the services rendered by him "because at the time it was my (the defendant) honest belief that that was my only defence".
- 9.5 Mr. van Rensburg informed the defendant that he (Mr. Van Rensburg) telephoned his personal assistant and dictated to her the wording of the opposing affidavit in accordance with the above instructions. The opposing affidavit was then filed on 20 October 2009.
- 9.6 Mr. van Rensburg returned to work on 04 November 2009 and thereafter, he received a letter dated 10 November 2009 from the plaintiff's legal practitioners of record, which stated how the claimed amount of N\$51 581.00 (Fifty One Thousand Five Hundred and Eighty Namibia dollars) was calculated.
- 9.7 On 12 November 2009, defendant personally consulted with Mr. van Rensburg and it was then for the first time that defendant was

confronted with the details and figures contained in the letter dated 10 November 2009.

9.8 In response to the details contained in that letter, the defendant informed Mr. van Rensburg for the first time about the oral agreement and all the payments which defendant has allegedly made in respect of such oral agreement, whereupon Mr. van Rensburg informed defendant that he in fact had a counterclaim to plaintiff's claim.

10 The plaintiff opposed the application for leave to file a supplementary affidavit and filed an affidavit in support of the opposition. In the answering affidavit, plaintiff made the averments which I have summarized below:

10.1 Defendant had time between 30 September 2009 and 21 October 2009 to consult with his legal practitioner and to file an affidavit opposing the application for summary judgment.

10.2 Defendant does not give any explanation or endeavor to explain what transpired between 30 September 2009 and 20 October 2009 and why a proper and substantial affidavit could not have been prepared prior to 20 October 2009.

10.3 The defendant was not diligent enough in having left the preparation for the opposing affidavit until the last day without giving any explanation why consultations and the drafting of the opposing affidavit could not have been done prior to 20 October 2009, when Mr. van Rensburg fell ill.

10.4 No new evidence came to light or was discovered which was not available since the original opposing affidavit was delivered, which was not within the defendant's knowledge or under his control at the time and which could not have been produced or set out in the original opposing affidavit.

10.5 Defendant has not complied with the necessary requirement of showing 'good cause' in that he has failed to have given a reasonable explanation for his delay to enable the Court to establish his *bona fide* in an application for condonation.

11 It is against those reasons that I am called upon to either grant leave to the defendant to file an additional affidavit or refuse the leave sought. I will look at the legal principles applications relating to summary judgments and thereafter apply those principles to the facts as discerned from the affidavits and then exercise my discretion.

The legal principles

12 The practise relating to summary judgments is governed by Rule 32 of the High Court Rules. Rule 32(3) provides as follows.

- “(3) Upon the hearing of an application for summary judgment, the defendant may -
- (a) give security to the plaintiff to the satisfaction of the registrar for any judgment including costs which may be given; or
 - (b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or herself or of any other person who can swear

positively to the fact that he or she has a *bona fide* defence to the action, and such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefore.”

13 Rule 32(3)(b) has been subjected to many comments and judicial interpretations. From the comments and judicial interpretations, the following have emerged:

13.1 Strydom J.P. (as he then was) said the following in the case of ***Kelnic Construction (Pty) Ltd v Cadilu fishing (Pty) Ltd*** 1998 NR 198 at page 201 C-F.

“There can be no doubt that summary judgment is an extraordinary remedy, which does result in a final judgment against a party without affording that party the opportunity to be heard at a trial. For this reason Courts have required strict compliance with the rules *and only granted summary judgments in instances where the applicant’s claim is unanswerable*”. {My Emphasis}

13.2 In the case of ***Commercial Bank of Namibia Ltd v Transcontinental Trading*** 1991 NR 135 at page 143 E-I, Hannah AJ. (as then was) said:

“First it is necessary to consider what it is that a respondent to an application for summary judgment has to do in order successfully to resist such an application. In terms of Rule 32 (3) he may either give security to the plaintiff for any judgment which may be given *or satisfy the Court by affidavit...that he... has a bona fide defence to the action,* and such affidavit shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor”.

14. Rule 6(5)(d)& (e) of the High Court Rules provide as follows:

“(5) (d) Any person opposing the grant of an order sought in the notice of motion shall:

- (i) within the time stated in the said notice, give applicant notice, in writing, that he or she intends to oppose the application, and in such notice appoint an address

within 8 kilometers of the office of the registrar at which he or she will accept notice and service of all documents;

- (ii) within 14 days of notifying the applicant of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant documents; and
 - (iii) if he or she intends to raise any question of law only he or she shall deliver notice of his or her intention to do so, within the time stated in the preceding subparagraph setting forth such question.
- (e) Within 7 days of the service upon him or her of the affidavit and documents referred to in subrule (5)(d)(ii) the applicant may deliver a replying affidavit, and the court may in its discretion permit the filing of further affidavits. {My emphasis}

15 From the reading of Rule 6(5)(e) it is clear that the ordinary rule is that three sets of affidavits are allowed, i.e. the supporting affidavits, the answering affidavits and the replying affidavit and the court may in its discretion permit the filling of further affidavit. Also see the South African case of **Juntgen T/A Paul Juntgen Real Estate v Nottbusch** 1989 (4) SA 490 (W) where Fleming J said:

“Generally a Court has a discretion, which is inherent to the just performance of its decision-reaching process, to grant that relief which is necessary to enable a party to make a full representation of his true case. Amplification and rectification should be equally accessible in summary judgment proceedings.”

16 In the case of **Empire Fresh Meat Supply (Pty) Ltd v Ilic** 1980 (4) SA 23 (W) Preiss J said:

“Rule 32 (3) (b) requires a defendant who wishes to satisfy the Court by affidavit to deliver such affidavit before noon on the Court day but one preceding the day on which the application is to be heard. Although it was a matter of some doubt initially in this Division as to whether a Court had power to receive a supplementary affidavit the position has been put beyond doubt in a series of cases commencing with such decisions as **Berks v Birjou**

Investment Co (Pty) Ltd 1961 (1) SA 225 (W) and *Gani v Crescent Finance Corporation (Pty) Ltd* 1961 (1) Sa 222 (W)”.

Applying the legal principles to the facts of this case

17 In the present case the plaintiff issued summons out of this Court claiming an amount of N\$ 51 580-00, the defendant then entered a notice to defend the action. After the defendant entered a notice to defend the action, the plaintiff gave notice of his intention to apply for summary judgment. The defendant opposed the application for summary judgment and filed an affidavit in support of its opposition to the application for summary judgment.

18 On the date (i.e. 23 October 2009) scheduled for the hearing of the application for summary judgment, this Court order that the matter be postponed to a date to be arranged with the Registrar. A date was arranged and the hearing was scheduled to take place on 19 January 2010.

19 As I indicated in the introduction of this judgment three days prior to the day scheduled for hearing arguments in respect of the application for summary judgment the defendant delivered an application to file a supplementary opposing affidavit. The plaintiff opposes that application.

20 Mr. Mouton, who appeared on behalf of the plaintiff, opposed the granting of the leave on the ground that the defendant did not, in his affidavit, comply with the requirements of reopening a case. He said:

“14 It Is respectfully submitted that a Defendant who, having had his chance, wants to add to his case (Opposing Affidavit in Summary Judgment applications) must more than

justify a mere postponement. He must also, amongst other considerations, touch upon the question as to why the evidence was not timeously produced when he had the opportunity of doing so and also the other requirements for the re-opening a party's case. See: **Juntgen t/a Paul Juntgen Real Estates v Nottbusch 1989 (4) SA 490**

- 15 The Applicant/Defendant herein did not touch upon the requirements for the reopening of a party's case and certainly did not deal with the requirements that the Applicant, for the privilege of re-opening, must show that he has used proper diligence in endeavoring to procure the evidence now set out in the proposed Opposing Affidavit. See : **Herbstein & Van Winsen, fourth Edition, The Civil Practice of the Supreme Court of South Africa page 675**".

21 I have no difficulty in accepting the legal principles propounded by Mr. Mouton, but I have a difficulty to apply those principles to the facts of the present case. My reading of the **Juntgen** case is that the *dicta* quoted by Mr. Mouton only finds application where a defendant applies for a postponement of the hearing of a summary judgment application, to enable him or her to amplify or rectify a defective affidavit. See the following passage from judgment of Flemming J at page 494 paragraphs F-H:

"I have so far referred to such an application as being one for 'postponement'. That it is inseparably linked to the obtaining of permission to produce further evidence becomes apparent therefrom that the granting of the postponement makes no sense if that permission is refused. The process of postponing for the purpose of filing additional affidavits in any application, accordingly also in a summary judgment application, really amounts to what in a trial is called a reopening of the case of the party concerned. An analysis of affidavits makes it possible to infer what is in dispute and in that sense the dispute is defined, but the affidavits at the same time constitute the presenting of the evidence of a party. A defendant who, having had his chance, wants to add to his case must do more than justify a mere postponement. He must also, amongst other considerations, touch upon the question as to why the evidence was not timeously produced when he had the opportunity to do so and the other requirements for reopening a party's case". { My Emphasis}

22 In the present case the defendant is not asking for a postponement to enable him to file a supplementary affidavit, he is seeking the indulgence of the court to file a supplementary affidavit. I endorse the sentiments (quoted in paragraph 15 of this judgment) of Flemming J, when he said that Courts have general discretion to allow amplification and rectification of affidavits in summary judgment proceedings.

23 It is common cause that the exercise of the discretion must be made judiciously. In the exercise of the discretion I thus take into consideration:

- (a) The Constitutional injunction contained in Article 12(1)(a) namely that: “In the determination of their civil rights and obligations or any criminal charges against them, all persons ***shall be entitled to a fair*** and public hearing by an independent, impartial and competent Court or Tribunal established by law; and
- (b) The purpose and aim of Rule 32 of the High Court rules.

24 In the ***Juntgen*** case (*supra*) Flemming J articulated (at page 492 G-H) the aim of the Rule as follows:

“The object of the procedure is to distinguish the man who has no more interest in the defence of the suit than the delay which it can win for him, from the party who believes that he is able to ward off the plaintiff's claim by virtue of facts (which constitute a legal defence) which he honestly desires to pursue to the point of a decision thereon.”

25 In the case of ***Gani v Crescent Finance Corporation (Pty) Ltd*** 1961 (1) SA 222 (W), Kuper, J at page 223 G opined that the equivalent of our Rule 32 ‘*was introduced in order to enable a plaintiff to obtain judgment in ***cases where a****

defendant had merely entered appearance for the purpose of delay {My Emphasis} also se ***Gruhn v M Pupkewitz and Sons (Pty) Ltd*** 1973 (3) SA 49 (A) at 56G.

26 I thus proceed and ask myself the question, whether the defendant will receive a fair trial if I were to refuse him an opportunity to supplement his original affidavit? I am of the view that the answer will depend on the purpose of him seeking the supplementation. If the purpose is to delay the plaintiff in his claim, then it will be fair to refuse the indulgence and to refuse the supplementation of the original opposing affidavit, but if the aim is to demonstrate that he has a *bona fide* defence to the plaintiff's claim then defendant would not have received a fair trial if I were to deny him the indulgence. See the comments of Flemming J in the ***Juntgen*** case (*supra*) where he said:

“It follows that, because of the scrutiny of the *bona fides* of the defendant in respect of the defence to which he lays claim, a defendant may find that his affidavit is inadequate. He may have forgotten to tell his attorney of an important fact or may have missed the significance thereof. Attorneys, like other humans, make errors which are called omissions. The attorney's view on what is adequate may differ from what counsel or the Court thinks. A defence may develop subsequent to the signing of the affidavit. *It has all the potential to cause injustice if the Court's discretion to allow improvement of defective attempts is to be hampered by an application of the dictum in the Joubert case in any literal meaning thereof.*” {My Emphasis}

27 In the case of ***Berks v Birjou Investment Co (Pty) Ltd 1961 (1) SA 225*** (W) Kuper J said the following:

“Sub-rule (3) [of Rule 32] it is provided: *'Upon the hearing of an application for summary judgment the defendant may...(c) satisfy the Court by oral evidence of himself or of any other person who can swear positively to the facts that he has a bona fide defence to the action . . .'*;

and in sub-rule (4) it is provided:

'No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in sub-rule (2) hereof nor may either party cross-examine any person who gives evidence viva voce or by affidavit: ...provided that the Court may put to any person who gives oral evidence such questions as it considers may elucidate what the defence is.'

It is clear therefore, that the filing of the affidavit by the defendant is not to be regarded in all cases as being the final step which cannot be amplified in any way by the defendant. **It is clear that what was envisaged was that the Court should ascertain what in effect the defence was**”.

{My Emphasis}

28 In the present case, I have had the opportunity to look at the supplementary affidavit sought to be introduced. I am of the view that the affidavit discloses a defence, the defendant did not ask for and would not gain any delaying of the plaintiff.

29 It is clear that an injustice would be caused if defendant is not given leave to defend as a result of a refusal of the additional affidavit and an application for summary judgment being an extraordinary remedy, I do not think that it would be right to close the mouth of the defendant or to shut the court's doors and not give him an opportunity to supplement his affidavit.

30 In the result I make the following order.

30.1 The defendant is granted leave to file the supplementary affidavit.

ON BEHALF OF THE PLAINTIFF:

MR C J MOUTON

INSTRUCTED BY:

FRANCOIS ERASMUS & PARTNERS

ON BEHALF OF THE DEFENDANT

MR. P CI BARNARD

INSTRUCTED BY:

VAN DER MERWE –GREEFF INC