Case No.: I. 1731/2000
Case No. I. 485/2001
Case No.: 1772/2001
Case No.: 1773/2001
Case No.: 1732/2000
Case No.: 1343/2000
Case No. 1342/2000

**BANK WINDHOEK LTD vs UWE KESSLER**

Hoff, J

2001/06/01

OPPOSED APPLICATION FOR SUMMARY JUDGMENT

Parties confined to summary judgment documents.
Court may however have regard to extrinsic evidence properly before court.
Applicant/plaintiff attempted to have an additional affidavit filed as extrinsic evidence by referring to it as a "discovery" or "replying" affidavit- such not permissible.
Applicant must stand or fall by his/her verifying affidavit.

Defence of prescription raised.
Interpretation of phrase "debtor is outside Republic". Not to be interpreted literally. The word impediment as it appears in section 13(l)(i) of Act 68 of 1969 not to be taken too literally.
Impediments range from the absolute to the relative.

*//; casu* there was no absolute bar to issue summons against respondent even where respondent was outside the Republic for two short periods.
Defence raised *bona fide* and good in law.
Application not granted.

CASE **NO.** I **1731/2000**
CASE **NO. 1485/2001**
CASE **NO.** I **1772/2001**
CASE **NO.** I **1773/2000**
CASE **NO.** I **1732/2000**
CASE **NO** I **1343/2000** A
CASE **NO** I **1342/2000**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**BANK WINDHOEK Ltd** **APPLICANT**

versus

**UWE KESSLER** **RESPONDENT**

**CORAM:** HOFF, J.

Heard on: **2001.03.26**

Delivered on: **2001.06.01**

**JUDGMENT**

**HOFF, J.:** This is an application for summary judgment in respect of the following cases:

1. Case number I **1342/2000** for payment in the amount of **N$31 492 96;**

2. Case number I 1343/2000 A for payment in the amount of N$34 391 96;

3. Case number I 1772/2000 for payment in the amount of N$12 694 42;

4. Case number I 1773/2000 for payment in the amount of N$18 730 21;

5. Case number I 485/2001 for payment in the amount of N$ 14 033 64;

6. Case number I 1732/2000 for payment in the amount of N$31 115 72;

7. Case number I 1731/2000 for payment in the amount of N$15 280 10.

In all the applications respondent filed similar affidavits and raised the same defence viz. that of prescription. Applicant gave notice of its intention to apply for summary judgment on 31 October 2000. The respondent delivered his opposing affidavit on 9 November 2000 and raised prescription as a defence. This application was thereafter set down for argument on 26 March 2001. On 16 March 2001 instructing attorney of applicant filed a document and referred to it as a "discovery affidavit."

In this document reference is made to certain passports of respondent which had apparently been discovered for the purpose of summary judgment argument. In an affidavit in support of an application for condonation of the late filing of heads of

argument by respondent in main application the instructing attorney for respondent confirmed that the passports mentioned had been provided to the applicant but categorically denied that the passports had been made available for the purpose of summary judgment proceedings.

Instructing attorney for applicant stated in his "discovery affidavit" that the reason he had deposed of that affidavit was to inform the Court that the "defendant did comply with the aforementioned agreement for discovery."

This "discovery affidavit" is also referred to as a "replying affidavit." In paragraph 10 of the "discovery affidavit" the following appears:

> "This replying affidavit has not been filed within fourteen days after the Defendant filed his affidavits in support of the condonation application. However, the agreement to discover was only reached during January 2001, and thereafter the Defendant only complied with the agreement on 14 March 2001. I accordingly pray for condonation of the late filing of this replying affidavit in as far as it is necessary."
>
> (Underlining mine).

The instructing attorney in this "replying affidavit" submitted that if one has regard to the information contained in the passports of respondent viz. that he had left Namibia for a short period then respondent cannot succeed in his defence of prescription since the

running of prescription had been delayed in terms of Section 13 (l)(b) of the Prescription Act, Act 68 if 1969.

Mr Heathcote who appeared on behalf of the applicant argued that the travel documents i.e. the passports of respondent, although they are extrinsic evidence, are properly before Court and if one has regard to the passports then the running of prescription has been delayed since the respondent had been outside Namibia during the relevant period.

He argued that the ordinary rules of interpretation must be applied in determining the phrase "outside the Republic" and that "outside" does not refer to domicile as submitted by Mr Mouton who appeared on behalf of the respondent.

Applicant and respondent both filed heads of argument late and both gave notices of an intention to apply for condonation of the late filing of the heads of argument. Each application was supported by an affidavit explaining the reasons why heads of argument could not be filed timeously. At the hearing the parties agreed that condonation in respect of their respective applications may be granted.

The court condoned the late filing of heads of argument.

In my view there are two issues to be decided in this application.

Firstly, whether the travel documents annexed to the "discovery/replying affidavit" of the instructing attorney of applicant can be said to be properly before this Court, and

Secondly, if they are properly before this Court, how the phrase "outside the Republic" as embodied in Section 13 (l)(b) of the Prescription Act, Act 68 of 1969 should be interpreted.

Regarding the first issue

It is trite law that in an application for summary judgment litigants are confined to summary judgment documents viz. the summons, the notice of intention to defend, the notice of application for summary judgment, the plaintiffs verifying affidavit and defendants opposing affidavit.

The plaintiff is precluded from annexing any evidence to his affidavit and may not file supplementary affidavits nor a replying affidavit.

Referring to Rule 32 (4) the following appears on p.442 G in the case of *Nepet (Pty) Ltd v Van Aswegen's Garage* 1974 (3) SA (OPD):

> "The Rule, according to my judgment, is peremptory by nature and does not permit of any other or further affidavit by the plaintiff. . . . ."

This is the general rule to which there is an exception. A court may have regard to extrinsic evidence which is properly before court. Where a defendant applies for condonation of the late filing of his opposing affidavit the plaintiff may in his affidavit opposing the application deal with the defence on the merits and may thus file an affidavit in this regard. In *South African Breweries Ltd v Rygerpark Props (Pty) Ltd* 1992 (3) SA 829 at 833 A-D the following is stated:

> "In the normal case where the existence of a *bona fide* defence is sought to be shown the respondent is at liberty, in answer, to seek to prove that the applicant has no *bona fide* case. To deny a respondent that opportunity is to deny him a hearing on any essential part of applicant's case. The crisp question that arises in this case is whether, in an application for condonation for failure to comply timeously with Rule 32, a Court should decline to allow a plaintiff to go into the merits. Though to allow him to do so would be to permit him to do in the summary judgment proceedings what he is not permitted to do in the summary judgment proceedings, it seems to me that it would be wrong to refuse permission on the basis of Rule 32 (4). A defendant cannot call in aid a Rule which only applies if he has brought himself within its terms. If he is not within its terms, he must apply for condonation and this is an indulgence which is in the Court's discretion. It would be wrong in my view to fetter that discretion by laying down that a respondent is not entitled to found its opposition on proof that the defence alleged is not *bona fide* at all. What I think can be said, however, is that, where a respondent in summary judgment condonation proceedings seeks so prove an

> absence of *bona fides* by the filing of affidavits on the probabilities, he runs a very real risk that he will be mulcted in costs should the attempt fail. The stage of summary judgment is not an appropriate stage at which to go into the merits. An applicant will accordingly be at a considerable disadvantage should respondent be permitted a full scale reply and I am satisfied that it is only in rare cases that this should be allowed. However, because there may be cases where the *bona fides* of a defence can be effectively destroyed even a summary judgment state, the right to oppose on this ground cannot in principle be denied a plaintiff."

Another instance where the court can have regard to extrinsic evidence is where prior to the application for summary judgment further particulars have been requested and provided. Further particulars which do not constitute evidence form part of plaintiffs summons are an integral part of plaintiffs papers and may be considered by the court in the resolution of the application. See *Hire Purchase Discount Co* v *Ryan Scholz* 1979 (2) SA (SECLD) 307 C-F.

Mr Heathcote argued that there is no numerous clauses when documents can be said to be properly before court and submitted that by virtue of *inter alia* the condonation application for the late filing of heads of argument applicant is entitled to refer to the travel documents. It was also submitted that the travel documents were properly before court because of the agreement to discover them and furthermore that even if the parties were not *ad idem* regarding the discovery of the travel documents it was irrelevant

because the documents had been placed in possession of applicant and could therefor be referred to in this application.

He then submitted that the *bona fides* of respondent had been destroyed since respondent said that prescription was never interrupted, but if regard is had to the travel documents and the fact that he had been outside the Republic, then prescription had been delayed.

I do not agree that the contents of supporting affidavits in condonation applications for late filing of heads of argument can be regarded as extrinsic evidence which in turn would entitle a litigant to use it in an attempt to destroy a defence or the *bona fides* of a respondent since heads of argument are required in terms of rules of practise and not in terms of Rules of Court promulgated in terms of the High Court Act and heads of argument serve a different purpose than Rules of Court. Furthermore applicant filed his "discovery/replying affidavit" in terms of Rule 35 (14) a week prior to the notice given by respondent of his intention to apply for condonation of the late filing of heads of argument.

Rule 35 (14) reads as follows:

> "After appearance to defence has been entered, any party to any action may, for purposes of pleading, require the other party to make available for inspection within 5 days a clearly specified document or tape recording in his or her possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof."
>
> (Underlining is mine).

Applicant attempted to have this affidavit filed as extrinsic evidence by referring to it as a "discovery" or "replying affidavit."

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It is clear from the wording of the Rule 35 (14) that it has only application in action procedures and for purposes of pleading and that it cannot be used in application procedures where litigants are restricted to a limited number of affidavits. At the stage the of filing of this affidavit there was nothing to discover and nothing to reply to by applicant.

The respondent had in my view brought himself within the terms of Rule 32 (3) and applicant is therefore bound by Rule 32 (4) and no further evidence may be adduced by applicant.

Applicant *in casu* must stand or fall by his verifying affidavit.
See *M.A.N. Truck Bus (SA) (Pty) Ltd* v *Singh and Another* (1) 1976 (4) SA NPD 264.

Regarding the submission that the parties had agreed to the discovery of the travel documents the following appears on pi 10 A-B in *TrustBank of Africa Ltd v Hansa and Another* 1988 (4) SA 102.

> "Nor is it within the province of contractual arrangements to alter the intentions of and limits laid down in Rule 32. If Rule 32 does not permit evidence to prove liability or to prove that some one has determined liability, the parties cannot by

contract create different procedural rights. They have no contract with the Rule-maker or the Court."

In my view the discovery or replying affidavit of applicant to which copies of passports have been attached are not properly before court, it cannot be labeled extrinsic evidence and I cannot have regard thereto in the resolution of this application.

Regarding the second question

It was submitted on behalf of applicant that the legal effect of the phrase "debtor is outside the Republic" was that the period of prescription had been delayed.

It is common cause that from the information contained in the passports of respondent that he had entered Zambia on 3 November 1999 and returned to Namibia on 5 November 1999 and again entered Zambia on 24 June 2000 and returned to Namibia on 28 June 2000.

Section 13 (l)(b) of the Prescription Act Act 68 of 1969 provides as follows:

"13. Completion of prescription delayed in certain circumstances - (1) If-

(a) -----

(b) the debtor is outside the Republic (including the territory of South-West Africa); or

(c) - -

(d) - -

(e) - -

(f) ….

(g) - -

(h) —; and

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)-"

The effect of Section 13 (l)(b) is therefore "that where more than one year remains of the original period of prescription after the impediment has ceased to exist, the period of prescription will terminate on the date when it would have terminated in the absence of any relevant impediment. Where less than a year remains of the original period of prescription after the impediment has ceased to exist the period of prescription will be extended and prescription will not take effect before one year has elapsed after the impediment has ceased to exist."

See Extinctive Prescription by M M Loubser p 117.

See also *Owner of the MV Lash Atlantico* v *Owner of MV Maritime Prosperity* 1994 (3) SA 157D-CLD.

It is common cause that the period of prescription *in casu* in terms of Section 11 (d) of Act 68 of 1969 is three years.

It is further common cause that the cause of action arose and prescription began to run on or during April 1997 alternatively 18 July 1997 and that summons had been issued against respondent on 11 October 2000.

It was submitted on behalf of applicant that the impediment referred to in Section 13 (l)(d) of the Prescription Act ceased to exist when the respondent returned to Namibia on 5 November 1999 and/or 28 June 2000 and that prescription would accordingly only be completed on 5 November 2000 and 28 June 2001 respectively.

It was argued that the ordinary meaning should be attached to the word 'outside' and that it should be interpreted literally. I do not agree with this submission. I also do not agree that the words "outside the Republic" has reference only to a change of domicile as had been submitted on behalf of respondent. I however agree with the submission by Mr Mouton that had the intention of the legislature been to restrict debtors from leaving the borders of Namibia for short periods of time it would have meant that prescription is delayed against every citizen who had been away for a short period for holiday and or business purposes and that such a contention would create immense practical complications in establishing whether a claim in a particular instance has prescribed or not.

The effect of the submission on behalf of applicant means that even if a debtor is outside Namibia for a few hours and then returns to Namibia then prescription may be delayed. This in my view is an absurd situation and it must be kept in mind that there is a presumption that the Legislature does not intend an absurdity.

In his treatise "Extinctive Prescription M M Loubser said the following on p 113-114:

> "The policy objective ... to ... the delayed completion provisions is that extinctive prescription should operate equitably and not as a blunt instrument for rigid enforcement of a time bar."

In *Murray and Roberts Construction (Cape) (Pty) Ltd* v *Upington Municipality* 1984 (1) SA 571 (A) at 578 B the following is stated:

> "It is accepted in the (1969 Prescription) Act that there are circumstances in which it would be unfair to require of the creditor that he institute proceedings within the time normally allowed. <u>This unfairness arises in the main where it is impossible or difficult for a creditor to enforce his rights within the time limit</u>."
> (Underlining mine).

It is also in my view apposite to have regard to the dictum of Marais JA in *ABP 4x4 Motor Dealers (Pty) Ltd* v *IGI Insurance Company Ltd* 1999 (3) SA 924 at 930 I-J to 931 A:

> "Next to be observed is that the use of the word 'impediment' in ss (l)(i) is not to be taken too literally and interpreted as meaning an absolute bar to the institution of legal proceedings. While some of the circumstances set forth in ss (l)(a) to (h) give rise to an absolute bar, other do not....
>
> The word 'impediment' therefore covers a wide spectrum of situations ranging from those in which it would not be possible in law for the creditor to sue to those in which it might be difficult or awkward, but not impossible, to sue. In short, the impediments range from the absolute to the relative."

Applicant's principal place of business is situated in Windhoek and the respondent is ordinarily resident in Windhoek. I conclude that the two short periods of 2 days each during which respondent had been 'outside' Namibia cannot be regarded as impediments within the meaning of Section 13 (l)(b) of the Prescription Act. It could furthermore not have been impossible, difficult or awkward for applicant to sue respondent under the circumstances. There was no absolute bar to issue summons.

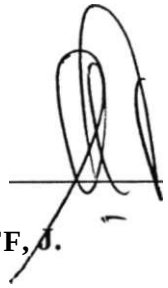
The defendant/respondent filed an affidavit opposing the application for summary judgment in which he disclosed his defence of prescription as well as the material facts on which the defence is based.

It is trite law that in order to resist an application for summary judgment a defendant must in his affidavit disclose a defence which is *bona fide* and good in law. *Maharay v Barclays National Bank* 1976 (1) SA 418 A.

I am of the view that the respondent succeeded in showing, that if proved at the trial, the defence raised would constitute a defence to applicants actions.

My ruling is therefor as follows:

1. The applications for summary judgments are hereby dismissed.
2. Defendant is granted leave to defend the actions.
3. Costs to be costs in the cause.



**HOFF, J.**