CASE NO.: [P] I 1332/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA
PLAINTIFF/APPLICANT

and

UVHUNGU – VHUNGU FARM DEVELOPMENT CLOSE CORPORATION **DEFENDANT/RESPONDENT**

CORAM: **HINDA AJ**

Heard on: 04 August 2009

Delivered on: 14 August 2009

JUDGMENT

HINDA AJ:

[1] This is an opposed application for summary judgment. On 16 April 2009 the applicant, the Government of the Republic of Namibia, instituted action proceedings against the respondent, Uvhungu–Vhungu Farm Development Close Corporation for an order ejecting the defendant and all those who claim on its behalf from the property of the Plaintiff at the Vhungu

– Vhungu Agricultural Project situated 10km East of Rundu, Republic of Namibia and return of all movable and immovable assets entrusted to the respondent in terms of annexure "A", alternatively an order cancelling the management agreement dated 21 July 2003, a copy of which is attached to the summons and marked "A". An order ejecting the respondent and all those who claim on its behalf from the property of the applicant at the Vhungu – Vhungu Agricultural Project, situated 10km East of Rundu, Republic of Namibia and the return of all movable and immovable assets entrusted to the respondent in annexure "A". Costs of suit and further and/or alternative relief.

[2] On 23 April 2009, the respondent entered an appearance to defend the action to which the applicant delivered a Notice of Summary Judgment application on 11 May 2009 supported by the verifying affidavit deposed to by the incumbent Permanent Secretary of the Ministry of Water, Agriculture and Forestry of the applicant. On 12 May 2009, a day after the summary judgment application was delivered; the respondent filed a Request for Further Particulars – *cum* – Exception to the particulars of claim. The respondent proceeded to file the notice to oppose the summary judgment application on 13 May 2009 and the opposing affidavit on 26 May 2009. The application was set down for hearing on 29 May 2009 but was removed and set down 04 August 2009. The respondent raised a number of defenses, objections and points *in limine.*

[3] In this judgment I intend to set out in summary form the material allegations in the applicant's particulars of claim, study the defences raised

by the respondent in the opposing affidavit, asses its soundness in the light of the arguments advanced by the applicant and conclude whether the defences are in accordance with rule 32(3)(b).

[4] On 03 August 2009, one day before commencement of oral argument in order to clear what appeared to me as a potential impediment I asked counsel to consider and address on whether the appeal against a spoliation order granted by this court in favour of the respondent in any way impedes this court to hear this application for summary judgment. Having considered the submissions by counsel I am of the opinion that the pending appeal is irrelevant for purposes of this application.

[5] The following material averments are set out in the applicant's particulars of claim. On 23 July 2003, applicant and the respondent entered into a written management agreement (the agreement) a copy of which is annexed to the particulars of claim marked "AN1". The agreement was signed on applicant's behalf by the Permanent Secretary, Ministry of Agriculture, Water and Rural Development and on behalf of the respondent by Mr. C.J. Lewis, its member.

[6] Paragraph 4 of the particulars of claim sets out the following material terms of the agreement:

[6.1] The land upon which the Project is located as well as all assets bought by the Project or donated by the Government of the Republic of Namibia including all the assets in existence at the time of the signing of the agreement shall remain the property of the Government of the Republic of Namibia and no right, title or interest shall vest in any fashion or form with the defendant (Service Provider). It is equally apparent that the assets, at the time of the conclusion of the agreement are set out in sub clauses 3.1.1 – 3.3.6, inclusive, of the agreement;

[6.2] The respondent would provide management services for the project and would manage all aspect of the project on sound business principles.

[6.3] Applicant would hand over management and control over to the respondent and would pay to the respondent an amount of N$ 500 000, 00 for the project to commence operations payable in terms of the agreement.

[6.4] Respondent would manage all aspect of the project on sound business principles and would be responsible for:

[6.4.1] the commercial production, storage, processing, marketing, sale of agricultural products produced by the project with the view to ensure sustainable agricultural

economic activity in the region, resulting in food production and employment creation.

[6.4.2] the respondent has to ensure that the project becomes self-sustaining with regard to operations and maintenance costs;

[6.4.3] the respondent would act as a service provider to local community and irrigations farmers for purposes of agricultural production;

[6.4.4] applicant was in terms of clause 13.2 of the said management agreement entitled to cancel the agreement after an investigation by the investigating Committee if the project made losses of two consecutive periods of six months.

[6.5] In terms of clause 17.2 the written agreement constitutes the whole agreement between the parties

[6.6] In terms of clause 17.10 the respondent has no claim against the applicant in respect of any improvements made to the project or at the project during the currency of the agreement unless expressly agreed between the parties in writing, subject

to the further provisions of the agreement pertaining to an amendment and addition to it.

[7] The respondent delivered an affidavit in terms of rule 32(3)(b) of the Rules of the High Court of Namibia, the relevant part of which reads:

> *"(3) Upon the hearing of an application for summary judgment the defendant may-*
>
> *(a) …*
>
> *(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"*
>
> *(my emphasis)*

[8] I now proceed to set out and consider the respondent's defences as set out in the opposing affidavit.

[9] The first objection to the particulars of claim is that the particulars of claim are excipiable for vagueness and also because it does not disclose a cause of action. The respondent has set out this objection in its Request for Further Particulars – *cum* – Exception delivered on 12 May 2009, a day after the Notice and affidavit in the application for summary judgment was delivered by the applicant.

[9.1] The issue that arises from this objection is whether this court may take into account the Request for Further Particulars – *cum* – Exception to assess the validity of the respondent's defence on this aspect. 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 plaintiff's verifying affidavit and defendant's opposing affidavit. *See Bank Windhoek V Kessler 2001* NR 234 HC at 237 A-B.

[9.2] However, one instance where the court may have regard to extrinsic evidence is where prior to the application for summary judgment further particulars have been requested and provided. As a matter of fact the Further Particulars were requested after the application was delivered and it is also trite that the applicant is precluded from filing any other document except the verifying affidavit. Furthermore, the further particulars requested for was not delivered and cannot be part of the extrinsic evidence that this court may consider. Thus, this objection is without merit.

See *Bank Windhoek v Kessler (supra)* at Pages 237 J-238 A

[10] The second objection raised by the respondent is that the annexure to applicant's particulars of claim is marked "AN1" instead of "A" as indicated in applicant's particulars of claim. Is this objection a *bona fide* defence to

applicant's claim as envisaged by the relevant rule? The applicant's answer in this regard is that the respondent does not make issue that "AN1" is not the copy of the agreement entered into between the parties. This objection when considered against the agreement is cosmetic than real and does not pass the muster of a defence, let alone a *bona fide* defence.

[11] The respondent further claims that applicant's particulars of claim do not disclose a cause of action because the provisions of clause 12 of the management agreement were not complied with.

[12] Clause 12 deals with breach of agreement and the rights of the parties upon such breach. The applicant submitted that this part of the defence is also without any foundation whatsoever. The procedure followed in this case is clearly pleaded in the applicant's particulars of claim with particular reference to paragraphs 5, 7 and 8.1 of applicant's particulars of claim.

[13] The clause of the agreement relevant for termination is clause 13.2. Clause 13.2 gives the applicant the right to investigate the situation as regards net losses made by the Project and to terminate the agreement if found justified by officials designated by the Ministry to do the investigation.

[14] It does not deal with minor breaches of the agreement that can be rectified but with the very essence of the agreement; - its raison *d'etre*: - that is to create a viable agricultural project that would benefit local communities. Failure to achieve this objective defeats the whole purpose of the agreement

and it is submitted that that is the reason for existence of clause 13.2, giving the option to the applicant to terminate the agreement due to unsustainable losses. This discretion is vested solely in the applicant.

Respondent's reliance on clause 12 is therefore misplaced, not bona fide, and is also once again merely made for purposes of delay.

[15] The next issue by respondent is that the formulation in applicant's particulars of claim of paragraphs 4.1, 4.2, 4.3, 4.4 to 4.7 and 4.11. It remains hazy what the real objection is. I understood the objection as a complaint that there is no foundation for the averments contained in those paragraphs in the agreement. For the sake of completeness I shall restate the paragraphs as set out by the applicant indicating the source of the information in the relevant similar paragraphs in the agreement.

[15.1] paragraph 4.1 of applicant's particulars of claim is a paraphrasing of paragraph 4 of the written agreement between the parties;

[15.2] paragraph 4.2 of applicant's particulars of claim where it is alleged that applicant would hand over management and control of the project to the respondent appears at numerous instances in the agreement as follows. In the preamble the following is stated:

"The Ministry being desirous of obtaining and maintaining the services of the service provide in regard to the management and related activities of and pertaining to the Uvhungu – Vhungu agricultural project;

the service provider being amicable to conclude an agreement with the Ministry in regard thereto;"

(ii) paragraph 1 of the management agreement dealing with the purpose of the agreement state the following:

(iii) clause 3 records the infrastructure that was in existence at the time of signing of the agreement for purposes of handing over of the management of these assets to the respondent.

(iv) clause 5 enumerates the objectives of the project and in sub- clause 5.1 the following is stated:

"5.1 Managing all aspects of the Project on sound business principles;"

(v) clause 6 dealing with the responsibility of the respondent enumerates a number of such responsibilities and in clause 6.1 the following is stated:

"6.1 The Service Provider shall ensure that the Project objectives detailed in clause 5 hereof are met".

thus clearly indicating that the project objectives are the responsibilities of the Service Provider."

(vi) clause 6.3 reinforces this by stating:

"6.3 Subject to clause 5 hereof, the Service Provider shall:"

(vii) Finally the tenor of the agreement clearly demonstrates and illustrates that it is a management agreement, and by its very nature entails the handing over of management and control of the project or the assets of the project to the respondent for purposes of working towards achieving the objectives of the management agreement. It is submitted therefore that this claim by the respondent that paragraph 4.2 does not appear anywhere in the agreement has no foundation.

[15.3] paragraph 4.4 of the particulars of claim clearly appears from clause 5.1 of the agreement. This is reinforced by paragraphs 6.1 and 6.3 of the agreement.

[15.4] Paragraph 4.5 of applicant's particulars of claim clearly appears from paragraph 5.2 of the agreement. It also appears from paragraph 1.2 and is reinforced similarly by paragraphs 6.1 and 6.3 of the agreement.

[15.5] Paragraph 4.6 of applicant's particulars of claim appears from paragraph 5.3 and 6.1 and 6.3 including all the sub-paragraphs of the agreement.

[15.6] Paragraph 4.7 of the particulars of claim appears from paragraph 5.4 of the agreement.

[15.7] Paragraph 4.9 of applicant's particulars of claim appears from paragraph 13.2, in particular 13.2.1 of the management agreement.

[15.8] Paragraph 4.11 of applicant's particulars of claim appears from paragraph 17.10 from the management agreement.

[15.9] It is therefore clear that this part of the claim by the respondent is spurious and its sole purpose clearly is the delay of these proceedings. There can be no bona fides in the defence raised.

[16] Again there is no real defence to applicant's cause of action as required by the Rule 32(3)(b). All the paragraphs referred to above appear in one or the other form in the agreement, annexed to applicant's particulars of claim.

[17] Respondent correctly takes the point that impermissible evidence has been attached to the supporting affidavit in the application for summary judgment. The two documents that are attached and objected to, are, the report of the committee that was appointed in terms of clause 13.2 of the management agreement recommending the termination of the management agreement and a letter by the applicant's legal representatives dated March 2009. I agree with respondent that both these documents should not have been attached to the verifying affidavit and I will ignore that.

See: *Bank Windhoek Ltd v Kessler supra* at 237 A – 239 B

The letter objected to rears its head as part of the respondent's papers in the form of "CJL5". In this context it affirms notice of cancellation and the appointment of the investigation committee.

[18] The next defence raised by the respondent is that of *lis pendens*. The respondent contends that because the applicant's urgent application for ejectment in January 2009 should have been struck and not dismissed and the application has not been withdrawn by applicant, which application is pending. It is an unassailable fact that the said application was dismissed for want of urgency and not struck. To crown it, neither party nor the court, *mero motu*, invoked Rule 44 to vary the judgment which remains. This defence does not pass muster. Another defence that the respondent had raised, in the alternative, was one of r*es judicata*. Respondent's counsel sensibly, in my view, abandoned reliance on this defence in oral argument.

[19] Applicant's next defence is arbitration. It is apparent from the agreement that its termination must, *inter alia*, be preceded by a procedure that accounts for the fact that there are "the net losses over consecutive two six months periods followed by the finding and recommendation by the investigation committee. It is indisputable that the applicant appointed an investigation committee that recommended termination of the agreement. Thus the applicant complied with the prescripts of clause 13.2 of the agreement. Against this defence is not *bona fide* and fails. There is no case made out on the papers to sustain the argument that clause 12 survived the termination agreement, as no such provision was made in the arbitration clause.

See: *North West Provincial Government and Another v Tswaing Consulting CC and Others* 2007 (4) SA 452 (SCA) at 457I- 458B

[20] The respondent's next claim is that the applicant seeks inappropriate relief in that the movable property requested for delivery is not specified. The applicant contends that the moveable property is specified with sufficient particularity in clause 3 of the agreement. I agree and find this defence also without merit.

See Smit Kruger Incorporated v Benvenuti Tiles (Pty) Ltd 1999 (2) ALL SA 242 (C) at 247

[21] The respondent's defence on the merits may be summarized as follows. The respondent contends that the appointment of the investigation committee was fast tracked, its recommendation for termination of the agreement was a foregone conclusion, that one of its members was a judge in his own cause and that the respondent would never have had a fair opportunity to make representations prior to the cancellation of the management agreement. The respondent avers further that it has complied with its obligations in terms of the agreement but that the applicant has failed to honor its obligations. Furthermore the respondent contends that the management agreement imposes reciprocal obligations on the parties which the applicant failed to comply with. These failures are attributed to the failure on the applicant's part to constitute the steering committee.

[22] The applicant's response to these averments was that it had complied with its obligations because it arranged regular meetings and information sessions with the relevant local authorities to ensure, as far as reasonably possible, the continuity of the project and that it had deposited the amount of N$ 500 000, 00 into the current account. It contends that it was under no further obligation to eject any further amount. Needless to say, It is indisputable that the applicant injected in access N$ 9 000 000, 00. The applicant contends further that it followed the prescripts of clause 13.2 of the agreement to its letter and spirit when it cancelled the agreement because of none or poor performance by the respondent.

[23] What did the parties agree to in 2003 on the issue of termination of the agreement? The answer to this question lies in clause 13.2 of the agreement.

> *"In the case where the Service Provider makes a nett loss, in terms of the calculation of the 'nett profit' as described under CLAUSE 9, for two successive six months periods, the Ministry shall be entitled to investigate the situation and to terminate the contract if found justified by the officials designated by the Ministry to do the investigation."*

[24] The respondent does not dispute that the applicant appointed a committee to investigate as required in clause 13.2. It is common cause that the applicant notified the respondent about its intention to appoint the committee and to terminate the agreement. This is evident from the letter by applicant's legal representatives to the respondent dated 23 January 2009 and annexed as "CJL5" to the respondent's papers.

[25] The thrust of the respondent's defence on the merits appears to be that applicant has predetermined the question of terminating the agreement and that the result of the investigation and the decision to termination were foregone conclusions.

[26] The applicant submitted that these claims by the applicant have not been denied by the respondent except for a rather tenuous denial of losses since October 2006. It is clear that such a denial cannot stand in the absence of the implementation of the profit sharing formula. There simply were no profits to distribute. It is only reasonable for applicant to wish to terminate this agreement on the basis that its objectives were not met and to this end to institute an investigation.

[27] The respondent claims that applicant had reciprocal obligations to the Project, more particularly to make more capital investments of unspecified amounts in the project to make the Project viable. There simply is no bass for this claim in the management agreement.

[28] It is submitted that the respondent's defence on the merits has no foundation whatsoever and was merely entered for the purposes of delay, does not appear in the agreement and was not made bona fide.

[29] It is common cause that the applicant's claim is for ejectment. All that the applicant needs to allege is ownership of the land and that the

respondent is in possession thereof, which the respondent does not deny in this case.

See: *Graham v Ridley,* 1931 T.P.D. 476; *Aktar v Patel* 1974 (4) SA 104 (T) at 109 G –H

[30] It is trite that once an owner has made these allegations it is for the occupier to state on what basis it claims to retain possession. That much the respondent has not come out and explicitly deny.

See: *Krugersdorp Town Council v Fortuin* 1965(2) SA 335(T) at 335 G, 336 B-H.

[31] The respondent also took issue with the deponent who deposed to the verifying affidavit on applicant's behalf. It is a fact that the agreement was signed by the Permanent Secretary of the Ministry of Agriculture, Water and Rural Development during 2003. The deponent is the current Permanent Secretary of the said Ministry. Furthermore, the deponent averred that he had personal knowledge of the facts as he was involved in the termination of this agreement. Again this defence must fail.

[32] I have weighed the respondent's positive averments against the applicant's allegations in the particulars of claim to which the agreement is attached. I am unable to find anything that is inherently credible in the respondent's answer which, if proved, would support a defence which is good

in law that would oblige me to dismiss the application and to give respondent leave to defend the action. I hold, therefore that on the papers before me that the applicant has proved its ownership of the land which respondent occupies and that the respondent has failed to satisfy this court that it has a *bona fide* defence in the action as required by rule 32(3)(b) of the Rules of the High Court of Namibia. In the circumstances I am satisfied that it will serve no useful purpose to allow the defendant to defend the action.

[33] In the result there shall be summary judgment for the applicant in the following terms:

[33.1] I confirm that the management agreement dated 21 July 2003, a copy of which is attached to the summons and marked “AN1” had been properly cancelled;

[33.2] the respondent and all those who claim on its behalf the property of the applicant at the Vhungu – Vhungu Agricultural Project, situated 10km East of Rundu, Republic of Namibia are hereby ejected;

[33.3] the respondent is ordered to return all the movable and immovable assets entrusted to the respondent as set out in clause 3 of annexure “AN1”.

[33.4] costs of suit, including costs of one instructing and two instructed counsel on a party and party scale.

HINDA AJ

Counsel on behalf of the Plaintiff/Applicant:	Adv N. Arendse SC
Assisted By:	Adv G Narib
Instructed By:	Conradie & Damaseb
Counsel on behalf of the Defendant/Respondent:	Adv J. Schickerling
Assisted By:	Adv A van Vuuren
Instructed By:	Theunissen, Louw & Partners