SUMMARY *REPORTABLE*

CASE NO.: A 241/2007

SANTA CRUZ PROPERTY (PTY) LTD AND ANOTHER

v

CONNIE HOLDERGARD BRUNIDO AND OTHERS

Heard on: 2009 June 22

Delivered on: 2009 July 2

PARKER, J

Practice - Applications and motions – Motion proceedings – Final interdict – Final interdict sought where bona fide and real disputes of facts exist on the papers – Approach laid down by this Court to deal with such application affirmed – Court dismissing application with costs on the basis that applicants knew or ought reasonably to have known that such disputes of facts exist and yet approached the Court by way of motion proceedings.

Practice - Rule 18 of Rules of Court – Rule relating to pleadings generally – Rule 18 (6) applicable to motion proceedings because affidavits in motion proceedings

are pleadings – Court deciding that applicants cannot rely on any agreement where rule 18 (6) requirements have not been complied with.

REPORTABLE

CASE NO.: A 1241/07

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SANTA CRUZ PROPERTY (PTY) LTD	**1ST APPLICANT**
AMAZONAS DUTY FREE TRADING (PTY) LTD	**2ND APPLICANT**

and

CONNIE HOLDEGARD BRUNIDO (PREVIOUSLY SNYDERS) IDENTITY NO. 741112000018	**1ST RESPONDENT**
THE REGISTRAR OF DEEDS NAMIBIA	**2ND RESPONDENT**
THE HELAO NAFIDI TOWN COUNCIL	**3RD RESPONDENT**

CORAM: **PARKER, J**

Heard on: 2009 June 22

Delivered on: 2009 July 2

JUDGMENT:

PARKER, J.:

[1] This matter started its life on 10 September 2007 with the filing of an urgent application (the 10 September 2007 application) which was scheduled to be heard on 28 September 2007. On 12 September 2007 the 1st respondent (hereinafter referred to simply as 'the respondent', seeing that the 2nd and 3rd respondents have not opposed the application) filed a notice of intention to oppose the application. The relief that was sought in the 10 September 2007 application was an interim order. The matter did not proceed on urgent basis or at all; the reason why the matter did not so proceed on 28 September 2007 is of no consequence for my present purposes.

[2] Thereafter, on 12 December 2007 the applicants filed an Amended Notice of Motion (the 12 December 2007 application); and in that application they have moved the Court for a final order in the following terms *verbatim et literatim*:

> 1.1. The First Respondent is hereby interdicted from selling, leasing, transferring or in any way disposing with or encumbering the following properties:
> 1.1.1 the property known as Stand No. 23, Oshikango, measuring 3000 square meters;
> 1.1.2. the property known as Stand No 24, Oshikango, measuring 6000 square meters;
> 1.2 The First Respondent is hereby interdicted from in any way disposing with or encumbering:
> 1.2.1 the property known as Stand No. 10B, Oshikango, measuring 8630.19 square meters; or
> 1.2.2. any rights, title or interest she or the Applicants may have in respect of such property by virtue of an agreement of sale entered into between herself and the Town Council of Helao Nafidi bearing the date 26 May 2006, and annexed to the replying affidavit of the Applicants as Annexure "XYZB".
>
> 1.3 The Registrar of Deeds, the Second Respondent, is ordered and authorized to note and register this Court Order as a caveat against the title deeds of Stand 23, 24 and lOB, Oshikango, mentioned above, which will remain so registered until the above Honourable

Court otherwise directs or until attorneys acting for the Applicants agree to the caveat being lifted.

1.4 The First Respondent is ordered to forthwith deliver to the Sheriff of the above Honourable Court all VAT invoices rendered by or received whatsoever nature generated by, received by, or pertaining to the business of the Second Applicant and any documents of the First Respondent or pertaining to the business of the First Respondent.

1.5 The First Respondent is ordered to repay an amount of N$ 140,000.00 to the Second Applicant.

2. That an order be granted in terms whereof:
2.1 The First Respondent is ordered to do all things necessary, and sign documents necessary to effect transfer and registration of the properties known as Stands No. 23 & 24, Oshikango, referred to above, into the name of the First Applicant, at her own cost.
2.2 The First Respondent is ordered to do all things necessary, and sign all necessary documents to effect transfer and register of the property known as Stand 1OB, Oshikango, into the name of the First Applicant at her own costs.
2.3 The Sheriff of the above Honourable Court is authorized to take necessary steps and sign necessary documents to effect transfer and registration of the aforesaid properties into the name of the First Applicant, should the First Respondent refuse to take such steps and sign such documents.

3. That the First Respondent is ordered to pay the costs of this application on a scale as between attorney and client.

4. That further and/or alternative relief be granted.

[3] The applicants made an about-face as to the relief sought in the 12 December 2007 application. While the relief that was sought in the 10 September 2007 application was an interim order, as aforesaid, the relief that is sought in the 12 December 2007 application (that is,

the present application) is a final order, consisting of a final prohibitory interdict (paras 1.1 and 1.2 of the Amended Notice of Motion) and mandatory interdict (paras 1.3, 1.4, 1.5, 2.1, 2.2 and 2.3 of the Amended Notice of Motion). It follows that the Court has been moved by Notice of Motion in the instant application to grant final interdict; and so I proceed to deal with this matter on that basis, as I should. Mr. Du Plessis represents the applicants and Mr. Heathcote the respondent.

[4] Regarding the trite approach that this Court when considering an application for a final interdict or a final relief ought to follow, it has been stated – authoritatively, in my opinion – by this Court, *per* Muller AJ (as he then was), after reviewing the authorities in *Clear Channel Independent Advertising v Transnamib Holdings* 2006 (1) NR 121 at 129H-130G, thus:

> … when considering a final interdict or a final Order, the approach of our courts is based on what is normally called 'the *Stellenvale* rule'. The *Stellenvale* rule is of course based on the general rule stated by Van Wyk, J in the case of *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C). This approach was followed by several decisions and qualified in the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635A.

Indeed, the *Stellenvale* rule approach had been succinctly set out by this Court some 12 years earlier in *Kauesa v Minister of Home Affairs and others* 1994 NR 102 at 108G-H.

[5] In the light of the authorities, I accept Mr. Du Plessis's submission that the applicants are entitled to seek relief by way of notice of motion. But, as Mr. Heathcote correctly submitted, it must also be remembered that if the litigant who seeks relief by way of notice of motion *has reason to believe* that *facts essential* to the success of his or her claim will probably be disputed, he or she chooses that procedural form at his or her peril, for the Court in the exercise of its

discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application. (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T), followed in *Stellenvale Winery* supra and *Transnamib Holdings* supra)

[6] In the instant case, I find that the success of the applicants' claim lies in the existence of an agency agreement between the applicants and the respondent. In this regard, taking a cue from Rule 18 (6) of the Rules of Court which deal with 'pleadings *generally*', I would expect the applicants to do the following; that is, *to state* in the founding affidavit, which, together with other affidavits, constitutes pleadings in motion proceeds (*Stipp and another v Shade Centre and others* 2007 (2) NR 627 (SC); *Hewat Beukes t/a MC Bouers and others* Case No.: A 388/09 (Unreported)) whether the contract is written or oral and when, where and by whom it was concluded; and if the contract is written to annex to the affidavit a true copy thereof or of the part relied on in the affidavit. And in my opinion, 'to state' in Rule 18 (6) means to set it out in a clear way and precisely; that is, in the instant case, to set out in a clear way and precisely the matters referred to in that sub-rule. *In casu*, what is stated in the applicants' founding affidavit does satisfy the rule 18 (6) requirements. Moreover, the applicants have not discharged the onus cast on them to sufficiently prove the existence of any such agreement and the terms thereof. I find Mr. Du Plessis's 'evidence from the Bar', concerning the existence of such agreement which, according to him is partly written and partly oral, to be outwith the application of the said Rule 18 (6); and so, with the greatest deference, I take no cognizance of counsel's 'evidence'. Accordingly, I hold that the applicant cannot rely on an agency agreement in these proceedings.

[7] But that is not the end of the matter: Mr. Du Plessis submitted that the applicants rely also on the respondent's breach of her fiduciary duty as a director of the 1st applicant; and this appears to be stated in para 5.2 of the founding affidavit.

[8] In that statement, the applicants aver that by purchasing Stands 10B, 23 and 24, Oshikango, the respondent violated 'her mandate and duties as director'. Based on that statement, Mr. Du Plessis submitted that the respondent thereby breached her fiduciary duty as a director of the 1st applicant because as Mr. Du Plessis put it, the object of the 1st applicant was to acquire and hold property; and that meant to acquire and hold the three Stands. To this end, so the applicants aver, the full amount of the purchase price of the Stands 'was provided to the First Respondent to enable her to purchase the properties' (i.e. the three Stands); and, furthermore, that the total amount of money received by the respondent in this regard was N$513,659.00 'to enable her to purchase the aforesaid three properties for the First Applicant.' Specifically, according to the founding affidavit, the total amount was provided by Nelio Correia Dinis not in one lump sum but in various amounts. All these are contained in various statements in the applicants' founding affidavit, particularly paras 6.10, 6.11, and 6.12.

[9] No attempt has been made to satisfy the rule 18 (6) requirements or to provide a modicum of evidence of the agreement referred to in the above-quoted para 6.11.1. All that we have is the *ipse dixit* of the applicants. In this regard, I conclude that Annexures NCD 17, NCD 18 and NCD 19, attached to the applicants' founding affidavit, add no weight at all. If anything at all, they create more heat than light as respects the point under consideration.

[10] The respondent disputes all the above averments by the applicants. She disputes that the 1st applicant was incorporated for the sole purpose of purchasing and holding the Stands (i.e. 10B,

23 and 24, Oshikango). Her contention, which is not far-fetched or untenable, is that the 1st applicant was established with the object of acquiring 'new properties' and not to acquire and hold Stands 10B, 23 and 24, Oshikango, specifically. In the absence of the Memorandum and Articles of Association of the 1st applicant the issue as to when the 1st applicant was formed cannot be decided on the papers. This is significant because the respondent states in her opposing affidavit that she had already bought 'the properties' (i.e. Stands 10B, 23 and 24) ten months prior to 'the alleged meetings' of the directors of the 1st applicant. And, according to the Helao Nafidi Town Council, the vendor of those Stands, the sale of the Stands to the respondent was concluded in the first quarter of 2005. I, therefore, find that there is a bona fide and real dispute of fact as to whether the 1st applicant was formed to purchase and hold Stands 10B, 23 and 24 specifically.

[11] The respondent denies also that she received N$513,659.00 for the sole purpose of using it to purchase the Stands for and on behalf of the 1st applicant. I do not find this denial also to be far-fetched and untenable, considering the rather unclear and not so straightforward arrangement under the alleged agreement (referred to in para 6.11 of the applicants' founding affidavit). In this regard, I find that the so-called 'Memorandum of Agreement' between the 1st respondent and Nelio Correia Dinis (Annexure NCD 21 to the applicants' founding affidavit) to be of no moment for my present enterprise; not to mention that a document purporting to be an agreement cannot be relied on in a court of law where the parties have not signified their agreement of the terms contained therein by affixing their respective signatures thereto. Accordingly, I take no cognizance of Annexure NCD 21: it adds no weight.

[12] From the aforegoing, I find that the respondent does not admit any of the essential facts averred by the applicants. And I have already found that the respondent's denials are not so far-

fetched or clearly untenable that I am justified to reject them merely on the papers. That being the case, I conclude that the respondent's denials raise real and bona fide disputes of facts that cannot be resolved on the papers. In sum, in my opinion, the colour of disputes of facts is so genuine and so real and so material that no amount of '*Plascon-Evans* Paint' can change that colour. The conclusions I have reached dispose of prayer 1 (including prayers 1.1, 1.1.1, 1.1.2, 1.2, 1.2.1, 1.2.2 and 1.3; but excluding 1.4 and 1.5) and prayer 2 (including prayers 2.1, 2.2 and 2.4) of the Amended Notice of Motion.

[13] I now proceed to deal with the matter of the N$140,000.00 which is the subject of prayer 1.5 of the Notice of Motion. Nelio Correia Dinis states in the applicants' founding affidavit that '$140,000.00 (I take it to be N$) was stolen by the First Respondent from the Second Applicant's funds without any explanation', and this application is also made 'for the purposes of reclaiming such amount.' The respondent admits using the N$140,000.00; but she denies stealing it; and this is significant. Moreover, she is prepared to pay whatever amount is outstanding once the books (I take it to be books of account) have been prepared. Thus, the respondent admits using the N$140,000.00; she does not, however, admit stealing the money; and she says she is prepared to pay it back once the books of account are prepared and the correct amount is identified. To bring an application, as the applicants have done, for an order to reclaim the amount is simply not proper. To start with, there is no evidence that the 'writing up' of the books of account adverted to by the respondent has been done. In their replying affidavit the applicants aver that there 'is no necessity for the books to be "written up" first before the amount is owing, since the respondent admits her indebtedness, and they rely on Annexure NCD 20 to the applicants' founding affidavit.

[14] If the applicants knew on 27 July 2007 that the respondent had stolen N$140,000.00 from the 2nd applicant, it is inexplicable why the applicants should wait for about six months without demanding the N$140,000.00 from the respondent, and then launch notice of motion proceedings for the purpose of claiming the repayment of the amount by the respondent. This approach, in my opinion, smacks of abuse of process of the Court, especially if regard is had to the fact that the applicants knew or ought to have reasonably known that there was a bona fide dispute of fact as to whether the applicant had stolen the money or she had authority to use it, as she says she had by relying on Annexure NCD 15 (para 7), annexed to the applicants' own founding affidavit. In any case, in my opinion, there is a genuine and real dispute of fact as to whether the respondent stole the money, as the applicants contend, or that the respondent had authority to use the money, as the respondent contends; and further, as to whether the N$140,000.00 is the final figure, as the applicants contend, or the books of account ought to be prepared first to enable the final figure to be ascertained, as the respondent contends. From all this, I conclude that the denials by the respondent raise material and bona fide dispute of fact (bar her admission of having used the money) and also that the statements in her opposing affidavit thereanent the money is not so far-fetched or clearly untenable that this Court is justified in rejecting them merely on the papers. This conclusion disposes of prayer 1.5.

[15] I pass to deal with prayer 1.4 of the Amended Notice of Motion. According to the applicants, the bulk of the 2nd applicant's 'documents' generated after February 2007 is 'still in the possession of the respondent.' This statement is contained in para 6.16 of the applicants' founding affidavit where they state also that 'to date (i.e. 6 September 2007) nothing has been received from her (the respondent).' In para 6.16 of the respondent's opposing affidavit filed and served on the applicants on 16 October 2007, the respondent states, 'As already explained I will release the documents.' At the hearing of the application on 26 June 2009, that is some 20

months thereafter, the Court is not told whether the documents have been released; and if not released, the reason for the failure to do so.

[16] In this regard, I must, in the strongest terms, decry the conduct and attitude of the respondent as respects the documents. Why burden the Court, which is already overloaded with work, to decide on an issue that one of the parties is prepared to resolve outside the surrounds of the Court? This is so, particularly where the respondent *in casu* had indicated some 20 months ago that she would release the documents. And as I have said, we are not told in June 2009 whether she has released the papers, and if she has not, the reason for her failure to do what she herself had stated on affidavit that she would do. We are also not told what efforts the applicants have made since October 2007 to get the respondent to do what she herself had said she would do.

[17] Be that as it may, it is not in dispute that the respondent has the 'documents': but, that is not good enough as far as this Court is concerned. The fly in the ointment is that the said documents are not clearly and sufficiently identified on the papers. That being the case, it will not be a proper exercise of judicial discretion to make an order for the release of 'documents' that are not clearly and sufficiently identified on the papers. The word 'documents' in prayer 1.4 and in the applicants' founding affidavit is as amorphous as it is vacuous: it matters the least that the 'documents' are stated to be financial bookkeeping documents of the 2nd applicant and 'documents' pertaining to the business of the 2nd applicant.

[18] From all the above conclusions and reasoning, I hold that there are bona fide and material disputes of facts and further that the applicants knew or ought reasonably to have known that. Relying on the authorities, I held in *Hendrik Christian v Metropolitan Life Retirement Annuity*

Fund and others Case No. A376/2008 (Unreported) that it is fundamental to all notice of motion proceedings that if a litigant knows in advance that there will be a material dispute of fact, the litigant cannot go by way of motion and affidavit. If he or she nevertheless proceeds by way of notice of motion he or she runs the risk of having his or her case being dismissed with costs. Mr. Du Plessis invited me to refer the matter to trial if I find that there are disputes of facts which cannot be resolved on the papers. In view of the authorities, I must respectfully but firmly decline the invitation: the present is a proper case where I should dismiss the application with costs, as I do. Thus, on this point, I accept Mr. Heathcote's submission.

[19] In view of all the aforegoing conclusions and reasoning and the determination I have already made, it is otiose to consider the requirements for the grant of final interdict referred to me by Mr. Du Plessis in his submission, or to deal with any other arguments and submissions.

[20] In the result the application is dismissed with costs on party and party scale, such costs to include costs attendant upon the employment of instructing counsel and instructed counsel.

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Parker, J

ON BEHALF OF THE APPLICANTS:	Adv W J Van Der Merwe
Instructed by:	LorentzAngula Inc
ON BEHALF OF THE 1ST RESPONDENT:	Adv R Heathcote
Instructed by:	Shikongo Law Chambers
THE 2ND AND 3RD RESPONDENTS:	No appearance