CASE NO.: I 1159/09

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NADIA NARINE LOUW **PLAINTIFF**

and

XAIN QUAZ CAMP CC **DEFENDANT**

CORAM: **HEATHCOTE, A.J**

Heard on: **28 JUNE 2011**

Delivered on: **06 JULY 2011**

JUDGMENT

HEATHCOTE, A.J:

[1] It appears to me that the ease with which important legal principles contained in one document, can be copied and pasted into another document,

has given rise to a new legal phenomenon; legal principles are copied (and pasted), more than they are read or applied.

[2] In this case, a number of elementary legal principles are involved. Let me begin by listing them;

> [2.1] firstly, when an application is lodged, the draft affidavit may not contain evidence which the drafter would like it to contain, even if the deponent to be, has no knowledge about such evidence. It is not the drafter's affidavit, it is the deponent's;
>
> [2.2.] secondly, once a draft affidavit is completed, the drafter or some other legal practitioner, should sit his/her client down and explain to him/her the meaning of any legal nomenclature contained in the draft, and indeed, the possible dire consequences which may ensue if an untruth is told;
>
> [2.3] thirdly, affidavits may not contain tactical denials. After all, the drafter must realize that the client, who will sign the affidavit, will do so while under oath. Allegations must be answered to the point. The laconic phrase often found in answering affidavits; ***"every allegation which is not dealt with is disputed"*** leaves much to be desired. It arranges a fall

back position which can only damage the truth, and create general confusion.

[2.4] fourthly, affidavits must contain facts. Although language is powerful, the truth cannot be allowed to succumb to oratorical flourishes. Facts are not the same as linguistic labels or legal submissions. In this case, eg. the plaintiff says she is impecunious, but nowhere in the affidavit does the plaintiff describe from which facts can such a conclusion be drawn;

[2.5] fifthly, in an application for condonation, two essential requirements must be dealt with (i.e. the merits of the matter and the explanation why some process was filed late). When dealing with the merits of the matter it is really of no use to the court if the deponent simply says ***"I refer to my pleadings"*** or even, ***"I respectfully invite the court to visit file x and read what is stated there by me"***. A general incorporation by reference of documents (which are not annexed to the affidavits), makes the adjudication of cases so difficult that litigants should know that, such a practice will, except perhaps in the most exceptional circumstances (which circumstances I cannot fathom for the moment), simply be ignored as it does not constitute admissible evidence under oath. Moreover, when documents are annexed and incorporated, it is of no use if the deponent does not draw the reader's attention to specific portions of the document

which he or she wants to incorporate and rely upon. If that is not so, the opponent can be ambushed, and article 12 of the Constitution be rendered a hollow guarantee.

[2.6] Lastly, (although not applicable to counsel in this matter) but as a general rule of practice, I wish to add this; heads of argument are very helpful and useful, but the difficulty lies in the application of the mind and the application of the facts to the legal principles involved. It is of course helpful, for instance, to be reminded in heads of argument what the principles are which find application when a court determines whether a prima facie case has been made out in an application where an interim interdict is sought. Those principle can be shortly summarized; **(1)** applicant does not have to show his right on a balance of probabilities; **(2)** the right may be *prima facie* established, though open to some doubt; **(3)** the manner to deal with this issue is to **(3.1)** take the facts set out by applicant, together with the facts set out by respondent which applicant cannot dispute. **(3.2)** It is then that the inherent probabilities are considered to see whether applicant, on those facts, can obtain final relief at the trial. **(3.3)** Lastly, and only then, are the facts set up by respondent considered etc.

[3] The exercise just described requires careful consideration of the affidavits and the facts alleged therein. It is of little use if counsel does not endeavour to

assist the court in his/her heads of argument to give practical effect to the legal principle involved. It is frustrating, to say the least, for the applicable legal principle to be copied (and pasted) by the applicant from other legal documents, and then simply to submit that a *prima facie* case has been made out; just to read in respondent's heads of argument that no such case has been made out. After argument is heard, the judge is then required to wade through voluminous documents to apply the facts to the legal principles involved. It delays the handing down of judgment, and makes jurisprudence poor(er).

[4] I will now quote the Webster v Mitchell-principle, and it will be seen, for heads to be really helpful, the quote below needs to be read more than once; and thereafter applied to the facts;

> *"In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain a final relief at a trial. The facts set up in contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed. In considering the harm involved in the grant or refusal of a temporary*

interdict, where a clear right to relief is not shown, the Court acts on a balance of convenience".

[5] Turning now to this case; it is common cause that plaintiff instituted action for damages against defendant. When plaintiff's legal practitioners withdrew shortly before the trial, the matter was postponed. Prior to the withdrawal of plaintiff's legal practitioners, they received an application in terms of which defendant sought to compel plaintiff to provide further particulars for trial purposes.

[6] After the trial was postponed, defendant obtained an order compelling the plaintiff to provide the further particulars, failing which defendant could approach the court again for dismissal of the plaintiff's claim. This order was served on plaintiff personally, but by then, she already engaged new lawyers. She faxed the court order (compelling her to provide the further particulars) through to her new lawyers, but little was done. Then the defendant lodged this application for dismissal of plaintiff's claim. A few days before the matter was to be heard, plaintiff then lodged a condonation application. Subsequently she filed a further affidavit, asking for condonation because she misrepresented a material fact in her affidavit in support of her condonation application. At best, plaintiff's excuses (particularly those of her representatives), for not complying with the rules and the court order. In turn, when this application was heard, material particulars have not been provided by the Plaintiff yet.

[7] Unless plaintiff's condonation application succeeds, defendant would be entitled to have plaintiff's claim dismissed.

[8] In considering whether condonation should be granted to plaintiff, it must be established whether she had shown good cause. Part and parcel of that enquiry is to determine whether she has a *bona fide* claim on the merits. As I have already indicated, the merits of plaintiff's claim should have been set out in her affidavits. That was not done. The only reference (under oath) to the merits of her claim is on page 183 (out of 246 pages) and is this;

> *"I,/Applicant/Plaintiff, have indeed a bona fidei and well founded claims and/or actions against the Respondent/Defendant herein, based on the Particulars of claim, especially the alternatively (sic) claim contained therein."*

[9] The portion I have quoted in paragraph 8 above, does not contain any admissible evidence. It provides no facts. It contains only labels. It does not even incorporate the pleadings with specific reference to specific portions. It is inadmissible.

[10] Where a court has no admissible evidence dealing with the merits of a claim or defence, the court cannot even begin to exercise a discretion in a judicial

manner, with specific reference to the merits of this kind of condonation application. I am accordingly duty bound (by law) to find against the plaintiff. Just as it is of no use for counsel to quote legal principles in their heads of argument, but then not to apply them, it is also of no use for a court to quote the legal principles involved, and then not to apply them. If that is done, the law will become so uncertain that it is not helpful to legal practitioners and litigants anymore.

[11] I accordingly make the following order:

[11.1] The plaintiff's application for condonation is dismissed with costs, including the costs of one instructing and one instructed counsel.

[11.2] Plaintiff's action is dismissed with costs, including the costs of one instructing and one instructed counsel, such cost to include the cost incurred by defendant in lodging the application to dismiss plaintiff's action.

Dated at WINDHOEK on this 5th day of JULY 2011.

_____

HEATHCOTE, A.J

ON BEHALF OF THE PLAINTIFF:

METCALFE ATTORNEYS

ON BEHALF OF THE DEFENDANT:

FRANCOIS ERASMUS & PARTNERS