



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

CASE NO.: I 471 /2010

In the matter between:

FIRST NATIONAL BANK OF NAMIBIA

APPLICANT

and

B V INVESTMENT NO 264 CC

FIRST RESPONDENT

F W SCHROEDER

SECOND RESPONDENT

CORUM: **UNENGU, AJ**

HEARD ON: 2012.03.27

DELIVERED ON: 2012.03.27 (*Ex tempore*)

JUDGEMENT:

UNENGU, AJ: [1] After listening to submissions from both counsel and also having read the records filed or the information filed of record, it is very, very clear that Mr. Schroeder, after being afforded the opportunity to address the issues at hand, decided not to.

[2] What you was saying is, only, either in respect of the Exception that, no it was not served on you after it was removed from the roll. You did not receive any notice

again from the other party? But it was time and time again, pointed out to you that, yes, it was not his duty or the duty of the other party to place it back on the roll.

[3] In fact that was the Managing Judge's duty to place it on the roll and there is ample substance in the submission of Mr. Schickerling that it was indeed placed on the roll and you were present on the day when this was supposed to come for hearing.

[4] On one occasion you decided not to come and refused and that was an opportunity granted to you to come and listen to what you were supposed to do, but you decided not to come to Court. So, you stayed away until you were forced to come to Court by serving the documents on you. So, if you were honest enough and considered the issues before you would have addressed the issues in the Exception, that would have been better for you to do, but you did not do so.

[5] The Exception is very, very clear, if you have listened to Mr. Schickerling's argument. He said, in your own document you indicated that the information on which you based your action you said the information was obtained from the record of the 1st Defendant, First National Bank. How did you obtain that? We do not know how it was obtained. And that is very difficult for you here to link First National Bank to the publication of that particular article. How did you know that they are the parties who provided the information to the person who wrote the article? It is not clear here. Those are the issues you were supposed basically to tell this Court.

[6] So, I think the Exception is founded. See in your particulars of claim they do not have enough, sufficient averments to sustain your claim or the cause of action in this matter. I really do not have a problem to uphold the Exception for lack of averments to sustain the cause of action brought against the 1st Defendant in this matter and that is my order.

[7] The Exception is upheld as I said here, in the result therefore, we reject the submissions made by the Plaintiffs. Plaintiffs fail and I make the following Order:

1. The Exception is upheld and the claims of the Plaintiffs against 1st Defendant are hereby dismissed with costs.
2. Jointly and severally, the one paying the other to be absolved,
3. Such cost to include the costs of one instructing and one instructed Counsel.

[8] Maybe I am not very sure about you have requested, is it costs for two Counsel ? In the Application that is correct than. Of course of one instructing and one instructed Counsel.

[9] And then, thereafter you came again and raised points *in limine* without even informing the other party that you are going to raise points *in limine*. That was out of the Rules of the Court and he has to answer to these points *in limine* you have raised. And from that you said the heads of argument will be filed later and he has to answer on those. And I have also granted the 1st Defendant in this matter costs on points *in limine*, 1 and 2, and also the cost because I dismissed those points *in limine* of yours.

[10] When it comes to *rule nisi*, it is the same as I said. I think your submissions are not well considered Mr. Schroeder. The only issue here is that, you were not satisfied that the instructed counsel or his instructing counsel had no authority to bring this application before Court. You have pointed out to this fact that there was no such authority. There is ample authority pointing out that, they had power of Attorney and that the power of Attorney is inclusive. They were authorised, they had the mandate to bring this application on behalf of their client, but despite that, you did not bother to go into the merits of the application. All what you said is that you are objecting to the *locus standing* of the instructed and instructing counsel to bring this Application on account that they did not have the necessary authority. All that is rejected and I shall discharge the *rule nisi* regarding the following prayers. And of course I have to go according to the order of the 13th of December 2011, before my Brother Justice Ndauendapo, that is in respect of prayers 3.1, 3.1.1, 3.1.2 then 3.1.3 as well 3.4 which were are discharged.

[11] However, the following prayers in the same ruling by my Brother Ndauendapo, J are confirmed, namely prayers 3.2, 3.3 and prayer 5. Prayer 3.2 is ordering and directing that the Respondents pay the applicant's costs for the application dated 4th October 2011, jointly and severally, the one paying the other to be absolved. Prayer 3.3 ordering and directing that the Respondents pay the Applicants' wasted costs for the Application dated 23rd November 2011, jointly and severally, the one paying the other to be absolved.

[12] With regard to prayer 5, the Respondents pay the costs of the application jointly and severally, the one paying the other to be absolved on a scale as between attorney and own client.

[13] Therefore, the following order is made:

1. That the respondent's' point *in limine* that the 1st Defendant's Exception was not served on the respondent and not enrolled for 24 January 2012 is dismissed with costs;
2. That the respondent's point *in limine* raised in their Heads of Argument served and filed on 17 January 2011 to the effect that the wrong parties are cited and that no one of the parties are before court is dismissed with costs;
3. That the respondents' second point *in limine* raised in their Heads of Argument served and filed on 17 January 2011 to the effect that the Rule 30 Application was abandoned and that no exception is before court is dismissed with costs;
4. That the respondents' third point *in limine* raised in their Heads of Argument served and filed on 17 January 2011 to the effect that the 1st Defendant's exception was filed late and out of time and that an application for condonation was required is dismissed with costs;
5. That the 1st Defendant's exception is upheld;
6. That the respondents' claim against the 1st Defendant is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

[14] Yes those are the Orders I have read to you Mr. Schroeder. I think we have come to the end of the proceeding of today. Thank you very much. The Court Adjourns.

UNENGU, AJ

ON BEHALF OF THE APPLICANT:

ADV SCHICKERLING

ON INSTRUCTIONS OF:

VAN DER MERWE-GREEFF INC

ON BEHALF OF THE RESPONDENT:

MR SCHROEDER

IN PERSON