'Not Reportable'

CASE NO.: I 887/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CLASSIC ENGINES CC **Plaintiff**

and

REINHOLD HASHETU NGHIKOFA **Defendant**

***CORAM*:** **PARKER J**

Heard on: 2012 January 19

Delivered on: 2012 February 3

JUDGMENT

PARKER J: [1] The defendant represented by Mr Grobler has brought an application on notice of motion and seeks the relief in terms appearing in the notice of motion. The plaintiff filed a notice of intention to oppose the application. But at the commencement of the hearing of the application, Mr Van Zyl, counsel for the plaintiff, appeared and informed the Court that the plaintiff was no longer opposing the application not because the application has any merit but only

because the plaintiff did not want the hearing of the application to stand in the way of the expeditious determination of the matter, that is, the dispute between the parties. Nevertheless, Mr Grobler was asked to argue his application because the fact that, for the reason given, the plaintiff was not opposing the application and has not filed opposing papers do not mean that the Court is precluded from hearing the application and deciding in terms of rule 6(5)(f) of the Rules.

[2] This is a recusal application, and the basis of the application is encapsulated in the following passages in the founding affidavit by – significantly – Mr Grobler, counsel for the defendant. Mr Grobler says:

> 'I do not agree with the above "findings" of the Honourable Judge, but the judgment is unfortunately interlocutory and the defendant is not entitled to appeal against the said judgment at this stage.
>
> On behalf of the Defendant I want to submit at the hearing of the matter that the Plaintiff's claim should have been a claim for damages based on the LEX AQUILIA and not for contractual damages.
>
> In the circumstances there will be potential prejudice to the Defendant if the merits are heard by the Honourable Judge Parker who already found that the Plaintiff's claim is based on contractual damages.
>
> From the above extracts of the judgments it is clear that the Honourable Judge was of the opinion that the claim of the Plaintiff was based on breach of contract and at the hearing of the matter on the merits the Honourable Judge will be bound by his own judgment.'

Is this a good enough reason for a judge to recuse himself or herself from the hearing of a matter on the merits? I think not.

[3] To start with; Mr Grobler does not advance one single reason of substance – not one iota of reason of substance – why in his opinion the defendant will be denied justice, that is, why and in what manner 'there will be potential prejudice to the defendant', if I heard the merits of the matter, after hearing the exception which is an interlocutory matter. With respect, all that Mr Grobler harped on with great verve is that 'there will be potential prejudice' because, as I see it, he as counsel for the defendant does not agree with the conclusion of the Court. Mr Grobler is entitled to disagree with the judgment, just as every counsel is entitled to disagree with a judgment of the Court. He holds a contrary view; that is his entitlement. But, with respect, Mr Grobler misses the point. What the Court was called upon to determine in the 19 July 2011 hearing was only this: the defendant's exception that the plaintiff's particulars of claim are 'vague and embarrassing'. And so what I was called upon to do then was basically to test the exception as framed by the defendant against the law in order to determine whether the particulars of claim as they stand are excipiable – nothing more; nothing less.

[4] After hearing arguments from both Mr Grobler and Mr Van Zyl and in a six-page judgment, I found – based on reasoning and conclusions – that the defendant had not established that the statements in the pleadings referred to in the exception are vague and embarrassing within the meaning of rule 23(1) of the Rules. Consequently, I dismissed the exception with costs. I did not hear the merits of the case. My judgment then is interlocutory; that much Mr Grobler appreciates and accepts. My judgment and the order I made therein is, therefore, not conclusive of the dispute or conclusive of the final rights of the parties which a decision in due course is to make (*Samco Import & Export CC and Another v The Magistrate of Eenhana and Others* Case No. A 25/2009).

[5] *In casu*, the plaintiff is yet to prove its case as set out in its Particulars of Claim. No evidence on the merits on which the plaintiff relies to prove its case was placed before the Court. All that the interlocutory judgment does is to hold that the Particulars of Claim attacked by the defendant are not excipiable. And what is more; I do not know of any principle of law or rule of practice – and no binding authority was referred to me by Mr Grobler in that behalf – to the effect that a judge who hears an exception and dismisses it is, thereby, solely for that reason precluded from hearing the matter on the merits. With the greatest deference to Mr Grobler; I find Mr Grobler's argument to be *reductio ad absurdum* on the following basis. Suppose, after the trial of the matter in due course, I decided that the plaintiff has failed to prove its claim and so find for the defendant. Would the plaintiff be entitled to say or can the plaintiff be heard to say that there has been a failure of justice on the basis that since I had earlier on at the interlocutory stage dismissed the defendant's exception, I should have, solely for that reason, found for the plaintiff on the merits? I do not think so.

[6] For the aforegoing reasoning and conclusions, I find that the application is with respect, simplistic and lacking in merit. Accordingly, the application falls to be dismissed.

[7] In the result, I make the following order:

(1) The application is dismissed with costs, and such costs shall include costs occasioned by the employment of one instructing counsel and one instructed counsel.

(2) (a) In terms of rule 37(3) of the Rules the initial case management conference shall take place at **09h00** on **Thursday, 16 February 2012** before the **Hon. Mr Justice Parker** in open court, and the parties and the legal representatives (if applicable) must on or before *10 February 2012* submit to the managing judge a case management report pursuant to rule 37(4) of the Rules.

(b) The attention of the parties and legal representatives (if applicable) is drawn to subrules (4), (5), (14) and (16) of rule 37 of the Rules.

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PARKER J

COUNSEL ON BEHALF OF THE PLAINTIFF:

Adv. C Van Zyl

Instructed by: GF Köpplinger Legal Practitioners

COUNSEL ON BEHALF OF THE DEFENDANT:

Mr Z J Grobler

Instructed by: Grobler & Co.