REPUBLIC OF NAMIBIA NOT-REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 44/2013

In the matter between:

VERITAS KAPITAL (PTY) LIMITED **PLAINTIFF**

And

O'BRIAN BARRY DAVIDS **1ST DEFENDANT**

PAMELA JOSEPHINE DAVIDS **2ND DEFENDANT**

Neutral citation: *Veritas Kapital (Pty) Limited v Davids* (I44-2013) NAHCMD 203 (2 September 2015)

Coram: MILLER AJ

Heard: **24 November 2014**

Delivered: **2 September 2015**

Flynote: Practice – Exception - Allegation that exception bad in law and does not disclose a cause of action - Implications of the provisions of rule 32 (9) and (10) on applications for exception.

ORDER

1. The exception is struck with costs, such costs to include the costs of one instructed and one instructing counsel.

2. The matter is postponed to **24 September 2015** at **15h30** for a status hearing.

JUDGMENT

MILLER AJ:

[1] This is an exception by the plaintiff to a plea filed by the defendants. In all, it contained five grounds, all of which related to the defendants' aforesaid plea. For purposes of this judgment, I do not deem it necessary to reproduce the description of the plaintiff's complaints as it will become apparent herein below. Suffice it to say that the plaintiff's exception is founded on the allegation that the plea is bad in law in that it does not disclose a proper defence.

[2] In response to the exception, the defendants, as they are entitled to do, have opposed the exception.

[3] The exception was set down for hearing and argued on 24 November 2014. It is imperative to mention quite early in the judgment that after argument had been delivered on the exception, this Court, *mero motu*, raised the question whether the provisions of rule 32 are applicable to the instant mater. And if so, what steps have the parties taken to amicably resolve the issue? In view of the above, I thereupon invited both counsel to submit their written propositions on the issues raised by the Court. Such

written submissions are now before me and I am thankful to counsel for their helpful submissions.

[4] The defendants were represented by Mr Mouton and the plaintiff was represented by Ms De Jager.

[5] Rule 57 provides:

> '(1) Where a pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or a defence, the opposing party may deliver an exception thereto within the period allowed for the purpose in the case plan order or in the absence of provision for such period, within such time as directed by the managing judge or the court for such purpose on directions in terms of rule 32(4) being sought by the party wishing to except.
>
> (2) Where a party intends to take an exception that a pleading is vague and embarrassing he or she must, within 10 days of the period allowed to do so, by notice afford his or her opponent the opportunity of removing the cause of complaint.'

[6] Rule 32 provides:

> '(4) In any cause or matter any party may make application for directions in respect of an interlocutory matter on which a decision may be required, either by notice on a managing judge's motion court day or at a case management conference, status hearing or pre-trial conference.
>
> (9) In relation to any proceeding referred to in this rule a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication by the court.

(10) The party bringing any proceeding contemplated in this rule must, before instituting the proceeding, file with the registrar details of the steps taken to have the matter resolved amicably as contemplated in subrule (9), without disclosing privilege.'

[7] The submission made by Ms De Jager, for the plaintiff, in her written argument is that rule 32 is not applicable to the plaintiff's current exception since the plaintiff's exception was not delivered pursuant to directions given by the managing judge or the court for the purpose of delivering an exception on directions in terms of rule 32(4) being sought by the plaintiff.

[8] Counsel elaborates on this point in paragraph 9 of her written submission. There, counsel states that the plaintiff's exception was delivered in the following circumstances and I quote:

'9.1 On 25 March 2014 the above honourable court upheld a previous exception raised by the plaintiff in respect of the defendant's plea which resulted in the defendants' plea being set aside and the defendants being ordered to rectify the cause of the plaintiff's complaint within 14 days of 25 March 2014.

9.2 Pursuant to the aforesaid order, the defendants delivered their plea on 28 April 2014.

9.3 Meanwhile, on the same day (28 April 2014), the parties were given notice of a status hearing to be held on 12 May 2014.

9.4 At the status hearing on 12 May 2014, the plaintiff indicated that, in terms of the repealed rules, the plaintiff would have been entitled to deliver a replication or exception on or before 21 May 2014 and that the plaintiff would want to take such further step. The above named managing judge thereupon granted the plaintiff an opportunity to consider taking the next step which step had to be taken before 21 May 2014.

9.5 Pursuant to the aforesaid order, the plaintiff delivered its current exception on 21 May 2014.

[9] Counsel submitted that it is clear from the facts cited above that the parties were never called upon for a case planning conference by the managing judge. Moreover, it is also clear that the plaintiff's exception was a pleading delivered in response to the defendant's plea pursuant to an order of this court. In view of the stated facts, the plaintiff's exception is therefore not an interlocutory matter as envisaged in terms of rule 32. And for that reason, sub-rules (9), and (10) do not bind the plaintiff who has launched an exception in pursuit of the court order, as rule 32 only applies to applications for directions in respect of interlocutory proceedings and not every interlocutory proceeding.

[10] On that score, counsel submitted that the plaintiff's exception should be upheld with costs. Counsel also urged me to set the defendants' plea aside and direct the defendants to remove the cause of complaint within 14 days of the granting of the order in its favour.

[11] However, Mr Mouton contended in the negative and claimed that the exception should be dismissed on the ground that the plaintiff failed to comply with the mandatory requirements set by rule 32. In support of this submission, counsel relies on the wording of sub-rules 32(9) and (10) and states that in all cases of interlocutory nature, irrespective whether of the court's directions or not, a party intending to bring such an application, is required to comply with the peremptory prescriptions of the said rule. From this it flows that non-compliance with the requirements of rule 32(9) and (10), is fatal, so counsel submits.

[12] According to counsel, rule 57(1) and (2) read together with rule 32(9) and (10) are aimed at curtailing the necessary launching of interlocutory applications as the wording thereof is aimed at affording the parties the opportunity to resolve the issues (differences) first amongst themselves without first rushing to court and only when the

differences between the parties, remains unresolved, should the court be saddled with the effort to resolve such issues.

[13] It was submitted that rule 32(1) empowers the managing judge to give directions in respect of an interlocutory proceeding which a party has initiated or intends to raise with regard to the date and time of hearing of the matter, times for filing of heads of argument and generally the speedy finalization thereof. In that regard, it is clear on the papers that the managing judge has given directions to what is stipulated above, particularly the date and time of hearing the exception, and the time on which respective heads of argument had to be filed.

[14] On that score, counsel alleges that it is incorrect for the plaintiff to allege that rule 32 is not applicable to the plaintiff's exception merely because the said exception was not delivered pursuant to directions given by the managing judge or the court as envisaged by sub-rule 4 of rule 32. It is also incorrect for the plaintiff to allege that rule 32 only finds application if and when a case planning conference is called by the managing judge. Irrespective of whether the parties were called for a case planning conference or not, they are still required by the rules of this court to endeavour to resolve the issue between them before rushing to court. Unfortunately this was not done.

[15] In conclusion, counsel claims that it is common cause that the plaintiff has not complied with the above requirements and for that reason, the plaintiff's exception is premature and fatally defective and should be dismissed with costs.

[16] In a recent judgment of this court, in *Mukata v Appolus*[1], Parker AJ, when considering whether rule 32 only applies to applications for directions in respect of interlocutory proceedings and not to every interlocutory proceeding, held that 'Rule 32 contemplates two types of proceedings, namely, applications for directions in respect of interlocutory applications and interlocutory applications. The learned Judge further held

[1]*Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (12 March 2015).

that the clause 'The party bringing any proceeding contemplated in this rule (ie rule 32)' in subrule (10) refers to both applications for directions in relation to interlocutory applications and interlocutory applications.'

[17] Notwithstanding that I am not concerned with an application for summary judgment as it was in the *Mukata* case, those findings, are of equal application to this case. In my respectful view, I am unable to divine from the text of Rule 32 (9) and (10) a foundation for the conclusion articulated by Parker AJ.

[18] In this proceedings, it is clear that the plaintiff has failed to comply with rule 32(9) and (10). In such premises, I agree with submission made by the defendants to the effect that the plaintiff's exception is fatally defective because it failed to comply with the peremptory requirements set by the rules of this court and should be dismissed.

[19] This is not the end of the twist to the tale in this matter. After this court reserved judgment to 9 April 2015, the applicant (plaintiff in the main action) on 20 March 2015, launched an interlocutory application in which it sought for condonation for non-compliance with rule 32(9) and (10) in respect of its exception delivered on 21 May 2014 and that the ruling currently scheduled for 9 April 2015 be postponed, pending finalization of this application. The applicant also sought certain additional orders.

[20] This interlocutory application is also opposed by the respondents (defendants in the main action).

[21] In my view, it was incumbent on the applicant to seek condonation while the present application was heard and judgment was to be delivered. In this matter, the exception must be determined on the papers filled.

[22] Having reached the conclusion above, I make the following order:

1. The exception is struck with costs, such costs to include the costs of one instructed and one instructing counsel.

2. The matter is postponed to **24 September 2015 at 15h30** for a status hearing.

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Miller, AJ

Acting

APPEARANCES

PLAINTIFF: B De Jager

Instructed by Theunissen, Louw & Partners, Windhoek

FIRST & SECOND DEFENDANT: C J Mouton

Instructed by Mueller Legal Practitioners, Windhoek