

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON RECUSAL APPLICATION AND EXCEPTION

Case No: HC-MD-CIV-ACT-OTH-2018/00470

In the matter between:

BELINDA GAROES

PLAINTIFF

and

DANA BEUKES

FIRST DEFENDANT

DANGOLOSIA KAFUTA KONJENI

SECOND DEFENDANT

MAXTON KAPULE SHITILIFA

THIRD DEFENDANT

SETH WILLIAMS

FOURTH DEFENDANT

NATIONAL HOUSING ENTERPRISE

FIFTH DEFENDANT

Neutral Citation: *Garoes vs Beukes* (HC-MD-CIV-ACT-OTH-2018/00470) [2019]
NAHCMD 63 (22 March 2019)

CORAM: PRINSLOO J

Heard: 08 March 2019

Delivered: 22 March 2019

ORDER

- a) The application for recusal is refused.
 - b) The exception is upheld.
 - c) The action is therefore dismissed.
 - d) No order as to costs
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RULING IN TERMS OF PD 61 OF THE PRACTICE DIRECTIVES

Background

[1] This court in a judgment dated 15 October 2018 delivered a ruling on an exception raised by the defendants against the plaintiff's particulars of claim which was upheld.¹ The plaintiff proceeded to amend her particulars of claim, which was still excipiable in the defendant's (excipient's) view and it accordingly delivered the exception for determination. The matter was again set down for argument of the exception, subsequent to the filing of the amended particulars of claim, on which date the plaintiff brought an application for my recusal. In light of the recusal application the matter was postponed for the parties to file amplified heads of argument in dealing with the recusal application specifically and the matter was set down for the hearing of both the application for my recusal as well as on the exception raised.

¹ *Belinda Garoes vs Dana Beukes* (HC-MD-CIV-ACT-OTH-2018/00470) [2018] NAHCMD 324 (15 October 2018).

[2] In the current proceedings as with the previous proceedings the plaintiff insisted on conducting these proceedings without the assistance of a legal practitioner. Before I can deal with the legal issues, I feel duty bound to again state that whereas a person is allowed to appear in person in Court, it is inadvisable to do so in certain circumstances, and this is such a matter.

Recusal application

[3] The application for recusal did not conform to any recognised form or substance as set out by the Rules of the High Court². I attempted to construe the plaintiff's application as generously as possible as she is a lay litigant and does not have the skill and precision as a legal practitioner to draft an application of this nature and therefor in effect condoned the non-compliance of the plaintiff and allowed her to argue her application in this regard.

[4] The plaintiff brought her application on the following grounds, which I must add was not substantiated by an affidavit as required in terms of Rule 65(1). I quote verbatim:

- 'a) The judge helps the 1st defendant's lawyer
- b) She ignores the application at bar
- c) She ignores the motion of the plaintiff
- d) She ignores what I say in court
- e) She chooses a side
- f) She works against the law. At Namibia Art 12 (B)
- g) She gave empty promises about court order date 01 October 2018
- h) She abused my rights in court
- i) She refused to
- j) She insults my intelligence at a certain level
- k) I look insane in front at the court

² Practice Direction 49(3) read with Rule 65 of the Rule of Court.

THEREFORE

- a) The judge president must come and give Judgement against the defendant
- b) According to the court order date 01 October 2018, the judgment against the defendant
- c) On the plaintiff request this notable court in the favour at the plaintiff see(not of bar)'

[5] The first defendant, with the above, filed heads however the second to the fifth defendants took no active roles in the exception hearing and the recusal hearing. It would appear that they were not served with the summons in this matter.

The applicable legal principles

[6] The Namibian Supreme Court, in the *Christian v Metropolitan Life Namibia Retirement Annuity Fund*³ stated that; quoting from the SARFU⁴ judgment:

'The test for recusal is "whether a reasonable, objective and informed person would on the correct facts reasonably apprehended that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case⁵." The test is "objective and the onus of establishing it rests on the applicant⁶." '

[7] The allegations made by the plaintiff does not appear on the papers before me as there was no affidavit filed in support of the averments made in her notice of 'requeusing' (sic).

[8] The application for recusal is based on a lack of insight in respect of the Rules of Court and court procedure and the insistence of the plaintiff to be granted default judgment in this matter. For example, the plaintiff is insisting that the defendants should be barred from partaking in the court proceedings, in spite of the fact that the court,

³ 2008 (2) NR 753 (SC) at 769 (paragraph 32)

⁴ President of the Republic of South Africa v South African Rugby Football Union 1999 (4) 147

⁵ Ibid at 177 A-C

⁶ Ibid at 175 B-C

during the sanctions hearing condoned the First Defendant's non-compliance with the court order in term of Rule 56 of the Rules of Court. A further example is the statement of the plaintiff that the court makes empty promises with reference to the court order dated 01 October 2018 which read:

'1 The case is postponed to 15/10/2018 at 15:00 for Delivery of Judgment hearing (Reason: Ruling Reserved).'

[9] The ruling was indeed delivered on 15 October 2018 and full written reasons were given on 17 October 2018⁷, yet the plaintiff argued that if the court undertake to give a judgment it must do so.

[10] The pinnacle of the plaintiff's lack of insight must be her complaint during argument that she feels offended that the court refers to her as a lay litigant. It would appear that the plaintiff regards the terminology as derogatory.

[11] I do not deem it necessary to deal with each and every of the issues raised in the plaintiff's notice but would refer in conclusion to *S v Dawid*⁸ wherein O'Linn J remarked as follows:

'But when alleging actual bias, the least that a court can expect is a good reason based on clear facts for such allegation, particularly in view of the fact that there is a presumption of integrity and competence in favour of judges.'

[12] All that is before this court are bold statements. There were no good reasons advanced by the plaintiff as to why I should recuse myself from this matter. The plaintiff was unable to discharge the onus resting on her that this court has not or will not bring an impartial mind to the adjudication of the matter and therefor the application for my recusal is refused.

⁷ *Belinda Garoes vs Dana Beukes* (HC-MD-CIV-ACT-OTH-2018/00470) [2018] NAHCMD 324 (15 October 2018)

⁸ 1990 NR 206

Exception

[13] As I have dealt with the issue of recusal it would be appropriate at this juncture to consider the exception raised on behalf of the first defendant.

[14] The first defendant excepts to the plaintiff's particulars of claim on the basis that it does not disclose a cause of action and further that it lacks the averments necessary to sustain such a cause of action. The first defendant submitted that the plaintiff's particulars of claim is bad in law and prayed that the plaintiff's action be dismissed with costs. The plaintiff in turn was of the opinion that the first defendant should not be allowed to except again to her particulars of claim.

[15] In her amended particulars of claim the plaintiff alleges that certain erven in Okahandja were allocated to her by the Town Council on 01 April 2010 for the development of a pre-primary education facility. The plaintiff submitted that the erven were paid for by her and therefor she became the lawful owner of the said erven. The plaintiff further pleaded that the first defendant's office registered the erven in the names of the second to the fifth defendants' names and four houses were built on these erven.

[16] The plaintiff then proceed to plead the following (repeated verbatim):

'(13) The plaintiff was supposed to build a pre-primary school.

(14) The costs (price) of the building is 200 million (all costs) everything included.

4.4 (15) The owner suffers 8 years to get donations of year plans and year cost which is N\$ 133 850 200-00) 1 Billion 33 Million 850 Thousand 200 Hundred

(16) Because at the first defendant office, our communities' children is suffering from:
*Malnutrition *Education

(17) The damages of the second, third, fourth and fifth defendant has built houses. The damage of the land who belongs to the plaintiff and the costs is 8 million.

(18) **Damages of personal injuries:**

- My children are water head babies and are suffering due to lack of neppies.

- I was suffering with no place to open a pre-primary education facility for the community.
- The plaintiff is suffering socially and economical for now and for the past 8 years

Earning of income

- Lot of donation donors left
- We lost donors of Germany Mrs. Susan at Wupertal in Germany.
- Our future lost my years plans and dreams to look forward

Therefore, plaintiff's claims:

- (1) The first defendant's office must give the half of the erf claimed with their deed of transfer to the plaintiff.
- (2) The register of deed office must pay the plaintiff 500 million for all the suffering of 8 years.
- (3) Cost of suit
- (4) Further and/or alternative relief.'

[17] The first defendant's counsel submits that the exception must be upheld and the current action dismissed on the grounds that the plaintiff's particulars of claim cause serious and real prejudice to the first defendant. Counsel further submit that the particulars of claim cause embarrassment to the first defendant as she is unable to make out the meaning thereof.

[18] Counsel is further of the view that the question on whether or not the plaintiff can adduce any evidence at trial to disclose a cause of action would be met with an emphatic no. Counsel submit that on all reasonable constructions/interpretation of the plaintiff's particulars of claim and all reasonable evidence that may be led on the pleadings, no cause of action can be disclosed.

[19] Counsel is of the view that it would be prejudicial and unfair to the first defendant to advance his/her defence on the strength of the plaintiff's particulars of claim, which lack the necessary averments to sustain a cause of action. Counsel submits that the prejudice is premised on the lack of clarity and precision in the plaintiff's particulars of claim that makes it unreasonably difficult for the first defendant to determine the case in

which he/she has to meet and the evidence which might be relevant to that case. On this point, counsel submits that the grounds of exception should therefore be upheld.

The applicable legal principles

[20] I have in my previous ruling referred to *Hangula v Motor Vehicle Accident Fund* 2013 (2) NR 358 (HC), which still remains apposite. Damaseb JP made the following observations with respect to exceptions as follows:

[16] In adjudicating an exception the court must accept the correctness of the facts as alleged by the plaintiff. The test that I must apply is this: notwithstanding the truth of the facts alleged, do those facts in law establish any sufficient case? If they don't, the exception is good and must be allowed.

[17] It was held in *Denker v Cosack and Others* that the remedy of exception is only available where an exception goes to the root of a claim or defence and that the main purpose of an exception that a claim does not disclose a cause of action is to avoid leading unnecessary evidence at the trial. In that case Hoff J held that an excipient has a duty to persuade the court that, upon every interpretation that the particulars of claim can reasonably bear, no cause of action is disclosed and further that the court, for the purposes of an exception, takes the facts as alleged in the pleadings as correct.'

[21] As before, the excipient does not know what case to meet. Is it a case for ejectment, payment of land or damages? The plaintiff does not attach any proof of her ownership or entitlement to the erven concerned.

[22] The pleadings are supposed be formulated in that they should be concise, lucid, logical and clear but from the reading of the particulars of claim of the plaintiff, it appears to mishmash statements with no legal basis what-so-ever. The current particulars of claim is worlds apart from the requirements of Rule 45(5), which reads as follows:

'(5) Every pleading must be divided into paragraphs, including subparagraphs, which must be consecutively numerically numbered and must contain **a clear and concise statement of the material facts on which the pleader relies for his or her claim**, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply and in particular set out -

(a) the nature of the claim, including the cause of action; or

(b) the nature of the defence; and

(c) such particulars of any claim, defence or other matter pleaded by the **party as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet.**' (emphasizes provided)

[23] The judgment delivered by this court on 15 October 2018 is quite clear and the position remains. The plaintiff was granted an opportunity to amend her particulars of claim but it remains excipiable.

[24] It is again unfortunate and quite clear that the plaintiff failed to adhere to the rules of court when she filed her amended particulars of claim. Again, even though the plaintiff is a lay litigant, for her to successfully advance her claim, the plaintiff must adhere to the rules of court. In fact, it is the same position the court requires of any litigant before it to ensure adherence to the rules of court when submitting its claim for adjudication. The argument that lay litigants are not legally trained only obtains leniency from this court to a certain point, but this court, as any other court, must be guided by the rules of court and law and cannot by its own undertaking, do and allow whatever it pleases without checks and balances. A court does not make law by itself but merely implements it as the law provides.

[25] I therefore make the following order:

- a) The application for recusal is refused.
- b) The exception is upheld.
- c) The action is therefore dismissed.
- d) No order as to costs

JS PRINSLOO
Judge

APPEARANCES:

PLAINTIFF:

In-Person

FIRST DEFENDANT:

Aina Ndungula

Government Attorneys