

Practice Directive 61 "ANNEXURE 11"

IN THE HIGH COURT OF NAMIBIA

Case Title: Alex Mabuku Kamwi Kamwi // Law Society of Namibia	Case No: HC-MD-CIV-ACT-DEL-2019/01337
	Division of Court: High Court (Main Division)
Heard before: Honourable Mrs Justice Tomassi, J	Date of hearing: 17 October 2019
	Delivered on: 31 October 2019
	Reasons Delivered on: 24 January 2020
Neutral citation: Kamwi v Law Society of Namibia (HC-MD-CIV-ACT-DEL-2019/01337) [2020] NAHCMD 23 (24 January 2019)	
The order: Having heard Ms Grabers-Kirsten , counsel for the applicant, and Mr Alex Kamwi Kamwi , respondent In Person, and having read the documents filed of record: IT IS ORDERED THAT: <ol style="list-style-type: none">1. The First Defendant's application for security of costs in terms of Rule 59 is dismissed;2. No order is made as to costs.	
Reasons for orders:	
<p>[1] The first defendant brought an application before this court for plaintiff to provide security in the sum of N\$200 000. The application was opposed by plaintiff. This court gave the above order on 14 November 2019 and undertook to give reasons.</p> <p>[2] The first defendant's case, in a nutshell, is that plaintiff's particulars of claim is bad in law in that it does not disclose a cause of action against the defendants and that it is vexatious. Ms Garbers, counsel for the</p>	

first defendant, submitted that the amended particulars of claim is exipiable on 10 grounds *inter alia* that: there is no *lis* between the plaintiff and the defendants; and the action is brought prematurely given the fact that the prosecution against him is still on-going. She argued that in the circumstances of this case, the court has inherent jurisdiction to order him to pay security for costs.

[3] In support of her submissions she referred this court to: Erasmus¹ setting out the categories of litigants who may be ordered to pay security for costs and also defining when an action is vexatious, Herbstein and Van Winsen² on the issue of the court's inherent jurisdiction to stop or prevent a vexations action. She referred this court to various cases which supports the principle that the court may order an *incola* to pay security for costs to stop or limit a vexatious action as being an abuse to courts process.³

[4] Ms Garbers submitted that the plaintiff's claim is unfounded, vexatious, reckless and hopeless having regard to fact that the plaintiff instituted a similar action with similar allegations in this court against the Prosecutor- General for malicious prosecution. This court⁴, ruled in favour of the Prosecutor-General upholding a special plea that plaintiff's claim failed to set out a legal basis. The court concluded that plaintiff's claim was prematurely filed as the criminal proceedings have not yet terminated in his favour. According to Ms Garbers the current action is a "dead horse" which cannot be revived in any way.

[5] Mr Kamwi, acting in person submitted that he is a pensioner and he has no other income. He argues however that it would not be in the interest of justice to deny him access to the court merely because he cannot put up security for costs. He cited a previous order by this court dismissing an application for him to pay security for costs.⁵ He argued that it would be necessary for the court to make an announcement on the invalid, illegal and unlawful act and conduct of the defendants who are infringing and threatening his rights. He argued that he is entitled to a fair trial in terms of article 12(1)(a) of the constitution and that his right to a speedy trial is being threatened and infringed by the delay in finalising the matter. He referred this court to *Alexander v Minister of Justice (SA 32/2008) delivered on 9 April 2009* to support his right to approach this court to protect him from the unlawful interference with his Constitutional rights by the defendants who instigated the prosecutorial authority to revive the prosecution. This court, so he submits, will be wrong to

¹ Superior Court Practice B1-340 to B1342

² Civil Practice of the High court of South Africa - P410 par (D)

³ *Crest Enterprises (Pty) Ltd and Another v Barnett and Scholberg NNO 1986 (4) SA 19* (whether a trust should be required to furnish its opponent with security for costs; *Fitchet v Fitchet, 1987 (1) SA 450* - Court has an inherent jurisdiction to order Security for costs to stop or limit vexatious action. Financial ability of plaintiff to pay costs, relevant where proceedings are vexatious - *Ecker v Dean 1937 AD 254* - Plaintiff a un-rehabilitated insolvent - matter remitted to High Court for a decision on the issue as to whether the action was vexatious and if so for the exercise of that Court's discretion as to whether security should be ordered.

⁴ *Alex Kamwi Kamwi v S (HC-MD-CIV-ACT-OTH-2017/01050) [2017] NAHCMD 339 (28 November 2017)*

⁵ *Kamwi v Standard Bank Namibia (Ltd) and 2 Others, Case NO A101/2011 [2019] NAHCMD 113 (17 April 2019)*

decline to hear the case on the basis that it is not ripe for trial.

[6] Mr Kamwi admits that criminal proceedings were instituted against him during 2004. His trial was withdrawn, according to him, once and for all on 23 August 2007. He alleges that on 16 May 2016 it was reinstated at the instance of the defendants without compliance with procedures required at common law. There was thus a period of 9 years between the initial withdrawal and the recommencement of the criminal proceedings. His argument is that the revival of the criminal proceedings resulted from the defendants actions which was intended to bar him from being admitted and they are accordingly liable.

[6] Mr Kamwi relied extensively on the case of *National Director Of Public Prosecutions And Others v Freedom Under Law (67/14) [2014] ZASCA 58 (17 April 2014)* to support his argument that the initial withdrawal was a final withdrawal. The withdrawal of the criminal proceedings, according to his understanding of this case, means that the criminal proceedings ended in his favour. He argues that the defendants were required, in terms of the principal of legality, to have the matter judicially reviewed before they could have instigated the prosecution to revive the matter.

[7] The law as stated by Ms Garbers correctly reflects the considerations which ought to apply when considering the issue of security of costs. The fact that the plaintiff is unable to pay the costs alone does not entitle the opposing parties to demand security of costs but the court may order an *incola* plaintiff to pay security of costs if the action is vexatious. This is to stop or limit vexatious proceedings. In *Namibia Financial Institutions Supervisory Authority v Christian and Another*⁶ the court held that the courts enjoyed an inherent power at common law to strike out (pending) claims that were vexatious in the sense that they were 'frivolous, improper, and instituted without sufficient ground, to serve solely as an annoyance to the defendant.

[8] The action of the plaintiff is for malicious prosecution. It is well established that the plaintiff is required to make the factual allegations that the respondents set the law in motion; (instigated or instituted the proceedings); that it acted without reasonable and probable cause; and that it was actuated by an indirect or improper motive (malice) In *Lederman v Moharal Investments (Pty) Ltd 1969 (1) SA 190 (A)* at page 197 D – E Jansen JA stated the following in respect of the first requirement:

'Whatever the underlying principle may be, the following statement by GARDINER, J., in *Waterhouse v Shields*, 1924 CPD 155 at p. 160, appears to be a true reflection of the position:

'The first matter the plaintiff has to prove is that the defendant was actively instrumental in the prosecution of

⁶ 2011 (2) NR 537 (HC)

the charge. This is a matter more difficult to prove in South Africa, where prosecutions are nearly always conducted by the Crown, than it is in England, where many cases are left to the private prosecutor. Where a person merely gives a fair statement of the facts to the police, and leaves it to the latter to take such steps thereon as they deem fit, and does nothing more to identify himself with the prosecution, he is not responsible, in an action for malicious prosecution, to a person whom the police may charge. But if he goes further, and actively assists and identifies himself with the prosecution, he may be held liable. 'The test,' said BRISTOWE, J., in *Baker v Christiane*, 1920 W.L.D. 14, 'is whether the defendant did more than tell the detective the facts and leave him to act on his own judgment.'

It is the position of the plaintiff that the Defendant's did more than tell the detective by instigating the revival of the case after it has been withdrawn. This he alleged was done after the expiry of a period of 9 years. According to him nothing was done by the prosecuting authority to reinstate the case during this period until he applied to be admitted as a legal practitioner thus alleging a lis between the parties.

[9] This brings me to the requirement that the criminal proceedings must be terminated in favour of the Plaintiff i.e a verdict of not guilty or where the Prosecutor- General has declined to prosecute. *National Director Of Public Prosecutions And Others v Freedom under Law*, *supra* the case cited and relied upon by the plaintiff does not support the plaintiff's argument for purposes of this action. That court considered an appeal of the high court which, inter alia, set aside a decision to withdraw criminal prosecution. The appeal court considered judicial review of a decision to withdraw the charge in terms of 6 (a) (provisional withdrawal). This is not a review of the withdrawal and reinstatement of criminal proceedings and there is no need for this court to express itself on this issue. The Plaintiff's claim of violations and threats to his constitutional rights in respect of the revival of the matter and the review of the decision to reinstate the prosecution may be considered in a different application eg. a permanent stay of prosecution⁷. It however is not relevant in the current claim for malicious prosecution and neither is it authority for compelling the defendants to take the matter on review. The criminal matter as it stands, remains on-going.

[10] The plaintiff already approached this court on the same facts citing the same authorities. The ruling made in that case in my view, is sound. The case cited in support of plaintiff's submission that the case was withdrawn once and for all does not support his argument. The fact that the criminal proceedings are still on-going is fatal to his claim and it renders his claim excipiable. It follows then that the outcome of this case would be same. The plaintiff persisted, without reasonable grounds, with this action against the defendants. The outcome of this case would be no different from the first case and plaintiff's persistence herein can only be described as vexatious.

⁷ See *Namoloh v Prosecutor-General of Namibia* (HC-MD-CIV-MOT-GEN-2017/00404) [2019] NAHCMD 65 (29 January 2019)

[11] I dismissed the application of the defendants and the rationale for doing so was to afford the plaintiff the opportunity to oppose the exception and to fast track the matter without causing further delays in hearing the exception. However, having considered the matter carefully, it became apparent that I ought to have ordered the Plaintiff to pay security for costs in order to limit the abuse of the court process and to avoid the defendants being dragged down a cul-de-sac.

Judge's signature:	Note to the parties:
	None.
Counsel:	
Applicants	Respondents
Mr Alex Mabuku Kamwi Kamwi The Applicant in person	Mr W Van Greunen Of Kopplinger Boltman