

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

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| 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: 29 September 2020 |
| | Delivered on: 19 October 2020 |
| Neutral citation: Kamwi v Law Society of Namibia (HC-MD-CIV-ACT-DEL-2019/01337) [20209] NAHCMD 476 (19 October 2020) | |
| The order: Having heard Ms Garbers-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 amended particulars of claim dated 12 June 2020 is hereby set aside;2. The plaintiff must comply with the court order of 09 June 2020 by filing the amended particulars of claim filed on 20 June 2019 together with annexure MCW5 attached to the amended particulars of claim dated 12 June 2020 on or before 30 October 2020;3. The plaintiff must pay the defendants' cost of one instructing and one instructed counsel limited in terms of the provisions of Rule 32 (11).4. The matter is postponed to 4 November 2020 for further conduct of the matter | |

Reasons for orders:

[1] This is an application by the defendant to have the amended particulars of claim dated 12 June 2020 be set aside as an irregular step.

[2] On 04 June 2019 the court ordered the plaintiff to file his notice to amend his particulars of claim on or before 21 June 2019 and the defendant to file opposing papers on or before 03 July 2019.

[3] On 20 June 2019 the plaintiff filed his notice of amendment. He simultaneously filed the amended particulars of claim with annexures. On 27 June 2019 the defendants gave notice of their intention to oppose. The plaintiff thereafter filed an application for amendment on 3 July 2019. The plaintiff applied for an order that:

- (a) the court grants him leave to amend his particulars of claim as per the amended particulars claim he filed and uploaded on e-justice on 20 June 2019; and
- (b) the amended claim filed and uploaded on e-justice on 20 June 2019 and the amendments for correct numbering of paras (e) which should be below 15 (ii); 17 to be 16 and prayers 9 to be 7; 10 to be 8; and 11 to be 9 are to be considered Amendments to the Particulars of claim

[4] On 27 March 2020 the defendants filed a status report indicating that they do not intend to further oppose the application for the amendment. It however transpired on 09 June 2020 when the matter was enrolled for hearing the interlocutory, that the court still had to make a determination in terms of Rule 57 (5). The court therefore granted leave to the plaintiff to file his amended particulars of claim. In paragraph 7 of the plaintiff's amended particulars of claim he makes reference to an annexure attached to the original particulars of claim i.e. MCW2 which is an extract of the district court record. The court requested plaintiff to file the page of the court record following MCW2. There was no objection by the defendants but counsel for the defendant's stressed that they do not agree to any further amendments of the amended particulars of claim. The court cautioned the plaintiff not to file any other documents.

[5] On 15 June 2020 the plaintiff filed the amended particulars of claim. The defendants filed a notice of motion giving notice of their intention to bring an application for an order to have the amended particulars of claim dated 12 June 2020 be set aside as an irregular step. The affidavit of their legal practitioner was attached in support of the application. The plaintiff filed an answering affidavit opposing the application. The defendants in turn filed a replying affidavit.

[6] In the affidavit filed in support of the application, the deponent makes the averment that the plaintiff did not file the amended particulars of claim which was attached to his notice of intention to amend filed on 20 June 2019 (referred to the “old” amended particulars of claim) but filed a completely new particulars of claim (referred to as the “new” amended particulars of claim). A copy of the new amended particulars of claim was attached to the affidavit as annexure WWG1. Certain handwritten notes appear in the margin of the document and some of the paragraphs are underlined inter alia paragraph 4, 5(a) & (b), 6, 7 and 8. The defendants’ complaint is that: (a) the wording in the new amended particulars of claim differs totally from the old amended particulars of claim from paragraphs 4 onwards; (b) the prayers have been reduced from 11 to 9 prayers and the wording of the prayers is completely different; and (c) new annexures were attached.

[7] The correspondence exchanged between the defendant’s Legal Practitioner and plaintiff was attached to the affidavit. Plaintiff insisted that defendants must be specific as to which paragraphs are referred to. The Defendants insisted that all the paragraphs have been amended and are numbered differently with new annexures attached which were not previously included. Defendant’s Legal Practitioner makes the averment that the plaintiff failed to comply with Rule 32 (9) and (10) and Rule 52 and as such the step of amending his amended particulars of claim without following the prescribed procedure, is prejudicial to the defendants since it would necessitate careful analysis resulting in enormous additional legal costs and that the conduct of the plaintiff amounts to litigation by ambush.

[8] Ms Garbers, counsel for the defendants, submitted that the defendants have clearly set on in the founding affidavit that they are prejudiced by the plaintiff’s non-compliance with the procedural steps set out in rules 32 (9) and (10) and rule 52 of the rules of court. She submitted that it is not necessary in terms of Rule 21 for the defendant to have specified the particulars of the irregularity in their notice of motion as they opted not to file a notice but an application. She submitted that the court may only condone the irregular step if good cause is shown and the plaintiff failed to show good cause why the court should condone the irregular step. She argued that the plaintiff acted mala fide and that he is abusing the court process to, despite the court’s clarification still proceeded with filing of a totally different amended Particulars of Claim. She urged the court to set aside the irregular step with costs to include that of one instructing and one instructed counsel.

[9] The plaintiff, appearing in person, stated in his affidavit that the defendants failed to specify in the notice the particulars of the irregularity alleged as well as the prejudice claimed to be suffered as a result of the alleged irregular step and thus failed to comply with the provisions of Rule 61 (2). He submitted that their

application for this reason alone stands to be dismissed. He further stated that the founding affidavit fails to specify the particulars of the irregularity from paragraph 4 onwards as well as the prejudice the defendants will suffer as a result of the correct numbering of the prayers which in content and substance did not change. He argued that the legal practitioner of the defendants could not identify clearly and definitively the said new amendments as alleged and that the court is not entitled to rely on grounds not raised in the founding affidavit. He submitted that the court has a discretion to overlook the irregularity in procedure which does not work out any substantial prejudice. In respect of the cost he argued that he should be paid the same costs as if he had employed another lawyer.

[10] Rule 61 (2) provides that the application must be on notice to all parties and must specify in the notice the particulars of the irregularity alleged as well as the prejudice claimed to be suffered as a result of the alleged irregular step.

[11] In *Veldman and Another v Bester* 2011 (2) NR 581 (HC) the court when considering a similar application under the old High Court Rule 30, held that it appeared expressly from rule 30(2) (now rule 62(2)) that an application in terms of rule 30 was to be brought 'on notice'; that such application did not require supporting affidavits unless the particular circumstances required it but should the circumstances require supporting affidavits, and indeed a full exchange of affidavits, such rule 30 application would necessarily have to be brought on notice of motion, the 'short form', form 2(a), to ensure a fair procedure. More recently in *Namibia Competition Commission v Namib Mills (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2017/00061) [2019] 465 (7 November 2019) the court held that it is not a procedural requirement for an applicant in terms of rule 61 to file an affidavit accompanying the notice and that the procedure is meant to be short and devoid of a back and forth in term of filing affidavits, consistent as it should be, with the overriding principles of judicial case management.

[12] I am of the view that the circumstances in this matter do not necessarily require that the application be brought on notice of motion but it is not wrong to do so nor does it render the application fatally defective. The crucial requirements are that the applicant sets out the particulars of the irregular step as well as the particulars of the prejudice suffered.

[13] The irregular step is filing of an amended pleading without following the procedures prescribed by the rules. The question is did the defendant make out a case on the papers that the plaintiff filed an amended particulars of claim without following the procedure.

[14] The plaintiff referred this court to the decision in *Nelumbu and Others v Hikumwah and Others* 2017 (2) NR 433 (SC) where the court held that the affidavits must contain all the averments necessary to sustain a cause of action or a defence and that when reliance was placed on material contained in annexures, the affidavits must clearly state what portions in the accompanying annexures the deponent relied on.

[15] The defendants aver that from paragraphs 4 onward of the new amended particulars of claim differ totally from the old amended particulars of claim. The court ordered the plaintiff to file his amended particulars of claim i.e. the amended particulars of claim which was attached to his notice of intention to amend and filed on 20 June 2019. If the plaintiff filed a totally different pleading, it would mean that he did so circumventing the procedural requirements to amend the amended particulars of claim as prescribed by the rules. This averment sets out the irregular step.

[16] The next question is whether the defendants set out the particulars of the irregular step. The affidavit filed in support of the application fails to specify or give details of the differences. The plaintiff submitted, correctly so, that it is not for the court to peruse the entire document to determine if there are changes but that it was the applicant's duty to provide the particulars. The affidavit is further silent on the notes and underlining on the annexure to the affidavit.

[17] The differences however are patently obvious. Some parts of the old amended particulars of claim has been amended by:

- (a) Deletions, (e.g. deletion of the words "as their practice against me whenever I apply for enrolment" in paragraph 4 and the entire paragraph 6);
- (b) Insertions/additions (e.g. by adding the words "within her administrative function in paragraph 5(a); additions to almost all the prayer; and
- (c) Substitutions (e.g. the words "the charge(s), all statements of witnesses and all documentary evidence above upon which the charge(s) were based was withdrawn" criminal in paragraph 7 of the old amended particulars of claim was substituted with the following words in paragraph 6 of the new amended particulars of claim: "the case and all information and documents which the offence was based (sic) were withdrawn".
- (d) Filing of additional annexures not ordered by the court.

[18] The correction of the paragraph numbering formed part of the plaintiff's application for amendment and same cannot be regarded as irregular.

[19] In view of the overriding objectives of case management I would accept the obvious i.e. that the

plaintiff's new amended particulars of claim differs substantially from the old particulars of claim.

[20] The defendants stated that the new amendments would require close scrutiny which would take several hours to establish all the amendments affected without following the stipulations of rule 52 and as such constitutes litigation by ambush. A party who wishes to amend a pleading must give notice to other parties to the proceedings of its intention to amend and furnish particulars of the amendment. The old amended Particulars of Claim consists of 26 and the new amended Particulars of Claim consists of 24 paragraphs. Without the advantage of a notice of intention to amend it would be an onerous task to decipher all the amendments to the old documents to say nothing of its import.

[21] I am satisfied that the irregular step taken by the defendant would be prejudicial to the plaintiff and the amended particulars of claim dated 12 June 2020 stands to be set aside.

[22] I see no reason why the cost should not follow the result in this matter nor do I deem it necessary to order costs beyond the limit prescribed by rule 32 (11).

[23] In the result the following order is made:

1. The amended particulars of claim dated 12 June 2020 is set aside;
2. The plaintiff must comply with the court order of 9 June 2020 by filing the amended particulars of claim filed on 20 June 2019 together with annexure MCW5 attached to the amended particulars of claim dated 12 June 2020 on or before 23 October 2020;
3. The plaintiff must pay the defendants' cost of one instructing and one instructed counsel limited in terms of the provision of Rule 32 (11).
4. The matter is postponed to 27 October for further conduct of the matter.

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| Judge's signature: | Note to the parties: |
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| Counsel: | |
| Applicants | Respondents |
| Ms. H Garbers-Kirsten On Instructions of the Law Society | Mr. A Kamwi Kamwi In person Windhoek |

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