

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case Title: <i>Temptations Fashion T/A Temptations v Etzold-Duvenhage</i>	Case No.: HC-MD-CIV-ACT-OTH-2020/02366
	Division of Court: High Court (Main Division)
Heard before: Honourable Lady Justice Rakow	Date of hearing: 24 November 2020
	Delivered on: 8 December 2020
Neutral citation: <i>Temptations Fashion T/A Temptations v Etzold-Duvenhage</i> (HC-MD-CIV-ACT-OTH-2020/02366) [2020] NACHMD 581 (8 December 2020)	
The Order: Having heard Ms Olivia Ndahafa Kanyemba-Usiku , the second Plaintiff (the Respondent herein) in person and Mr Du Pisani , on behalf of the Defendant (the Applicant herein) and other documents filed of record: IT IS ORDERED THAT:	

1. The scandalous, vexatious and irrelevant matter contained in paragraphs 12, 13, 14, 15, 30, 34, 41.1, 42.2, 42.3, 42.4, 43.2, 43.4, 44.1, 44.2, 45.4 of plaintiffs' answering affidavit to the security for costs application are ordered to be struck out.
2. Paragraphs 24, 29, 32, 33, 35, 41.2 and 46.1, are ordered to stand.
3. The costs of the application awarded to the defendants limited in terms of Rule 32 (11).
4. The matter is postponed to 10 February 2021 for hearing of the security for costs application.

Reasons for orders:

Introduction

[1] The plaintiffs are Temptations Fashion T/A Temptations a close corporation duly incorporated in terms of the Close Corporations laws of the Republic of Namibia and Ms Olivia Ndahafa Kanyemba-Usiku, the second plaintiff. The second plaintiff was granted leave to appear on behalf of the first plaintiff in these proceedings.

[2] The Defendants are the law firm Etzold-Duvenhage and its partners Mr Ulrich Etzold, Ms Hannalie Duvenhage and Ms Kelina Mushore, cited as the second, third and fourth defendants.

[3] The defendants were the legal practitioners of record for SANNAMIB INVESTMENTS (PTY) LTD, which obtained default judgment against the plaintiffs and subsequently a warrant of execution against the property of the plaintiffs. The defendants exercised a rent interdict and attached the property of the plaintiffs.

[4] The plaintiffs instituted action against the defendants jointly and severally for the loss sustained as a result of them being deprived of their product by the exercise of the rent interdict, which includes loss of profit, loss of future income, trauma, etc, which amount to N\$

65 000 000.

[5] The defendants defended the action and filed an application for security for costs as they believe that the plaintiffs will not be in a financial position to satisfy an order as to costs in the event that the plaintiffs' action is dismissed. The plaintiffs opposed this application and filed an answering affidavit thereto.

[6] What currently serves before me is an application by the defendants to strike out portions of the plaintiffs answering affidavit in that it contains scandalous or vexatious and irrelevant averments.

The Defendant's position:

[7] The defendants seek to strike out the undermentioned portions of the answering affidavit of the plaintiffs/respondent in the defendants' application for security for costs in that they constitute scandalous or vexatious matter in that they are abusive or defamatory of the defendants or convey an intention to harass or annoy, or constitute irrelevant matter which do not apply to and cannot contribute one way or the other to the decision whether or not the first plaintiff should provide security for costs:

1.1.1 Paragraph 12;

1.1.2 The words "Due to their misconduct" in the second sentence and the words "they have illegally locked up" in the third sentence of paragraph 13;

1.1.3 The words "Due to their misconducts" in paragraph 14;

1.1.4 The words "because it was obtained fraudulently" at the end of the second sentence of paragraph 15;

1.1.5 Paragraph 24;

1.1.6 The last four sentences of the first paragraph 29;

1.1.7 The second paragraph 29;

1.1.8 Paragraphs 30, 32 to 35 and 41.1;

1.1.9 The second sentence of paragraph 41.2;

1.1.10 Paragraphs 42.2, 42.3 and 42.4;

1.1.11 Paragraph 43.1;

- 1.1.12 The second sentence of paragraph 43.2;
- 1.1.13 The fourth and fifth sentences of paragraph 43.4;
- 1.1.14 All of paragraph 44.1 following after the words “The content of this paragraph is true”;
- 1.1.15 The last sentence of paragraph 44.2;
- 1.1.16 The first and second last sentence of paragraph 45.4;
- 1.1.17 The second last sentence of paragraph 46.1.

[8] The Defendants also seek costs of this interlocutory application.

[9] According to the defendants, the prejudice that the defendants stand to suffer is that the averments made by the plaintiffs intend to harass or annoy in that they impute or imply dishonesty, criminality, lack of integrity, perjury, abuse of power and court process, improper conduct and motive, unprofessionalism, incompetence and underhandedness on the part of the defendants, and if not responded to can cause harm to the defendants. The defendants further contend that these averments are in any case irrelevant to the application for security of costs.

[10] Furthermore, the legal costs of having to consult and respond to irrelevant matter is similarly prejudicial and will result in unnecessarily lengthy and costly litigation.

The Plaintiff's position:

[11] The plaintiff is adamant that the averments complained of are not scandalous, vexatious or irrelevant and do not cause any prejudice to the defendants. Ms Kanyemba-Usiku states that in the event that the averments are presumed to be scandalous, vexatious or irrelevant and cause prejudice to the defendant, the extent thereof was not canvassed in the application to strike out. She further contends that the court is indeed learned enough and equipped with the necessary skills to not be derailed by irrelevant averments, and thus in essence this application is unnecessary.

[12] The plaintiff is further of the opinion that the passages referred to cannot be struck

out as they constitute evidence that will be proven at trial.

Strike out

[13] Rule 58 sets out the following two requirements for a successful application to strike out:

- ‘(a) the pleading should contain averments that are scandalous, vexatious or irrelevant, and,
- (b) the applicant will be prejudiced in the conduct of his/her defence if the offending averments are not struck out.’

[14] Rule 70(4) further provides that:

‘The court may, on application made to it, order to be struck out from an affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs on the scale as between legal practitioner and client, but the court may not grant the application unless it is satisfied that the applicant will be prejudiced in his or her case if it is not granted.’

[15] This court in *Vaatz v Law Society of Namibia*¹ laid out the following principles with regards to applications to strike out;

‘Scandalous matter is allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.

Vexatious matter is allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.

Irrelevant matter is allegations which do not apply to the matter in hand and do not contribute in one way or the other to a decision of such matter.

The phrase “prejudice to the applicant’s case’ does not mean that the innocent party’s chances of success will be reduced if the court allows the offending allegations to stand. It is substantial less than that and how much less will depend on the circumstances of the case. If retaining the alleged offending matter would have the result of side-tracking the innocent party from the main issue or

¹ 1991 (3) SA 563 (Nm) at 566D (1990 NR 332 at 334J – 335B).

defame them, such matter is prejudicial to the innocent party and, ergo, must be struck.'²

If a party is required to deal with scandalous or vexatious matter, the main issue could be side tracked but if such matter is left unanswered, the innocent party may well be defamed, the retention of such matter would therefore be prejudicial to the innocent party.'³

[16] For the sake of brevity, I will not restate the paragraphs complained of verbatim, I will merely list some of the words that are the cause of the complaint and the relevant paragraphs.

[17] In regard to paragraphs 12, 13, 14, 15, 30, 34, 41.1, 42.2, 42.3, 42.4, 43.2, 43.4, 44.1, 44.2, 45.4 which contain inter alia the words; ' their misconducts, obtained fraudulently, their mafia behaviours, the defendant failed terribly to adhere to the disciplinary code of conduct, there are so many offenses, the defendant unlawfully locked up stock, covering up their own mess ups, sworn to untrue affidavits and can be charged with perjury and fraud, so many embarrassing defects, impeaching themselves, the fights are unnecessary had they performed their mandate properly, it is useless and unethical to oppress someone's life, tricks to keep me out of court, due to their criminal activities, the application is mala fide unjust and unnecessary', contain scandalous, vexatious and irrelevant matter and those portions stand to be struck out.

[18] I agree that from the reading of the abovementioned portions of the answering affidavit by plaintiffs, an inference can be drawn that the defendants conduct their litigation in an illegal and improper manner and that they generally tend to abuse court process. This can be seen from the averments that the defendants lack integrity and that they misled the court when they 'unlawfully' obtained the default judgment against the plaintiff. These averments appear to be personal attacks on the defendants and no evidence has been provided to support same, I am therefore of the opinion that they are indeed scandalous and vexatious and prejudicial to the defendants' case. The averments are also irrelevant to the application for security for costs and should as result stand to be struck out.

² P T Damaseb. *Court Managed Civil Procedure of the High Court of Namibia*. 2020 at 165.

³ *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566D (1990 NR 332 at 334J – 335B) at 334.

[19] In regard to paragraphs 24, 29, 32, 33, 35, 41.2 and 46.1, they may to some extent contain irrelevant matter, however it also contains content which the defendants can merely respond to in relation to the security for costs application and I see no prejudice to be suffered if these paragraphs were to be retained. I am therefore of the opinion that these provisions are neither vexatious nor irrelevant and must stand.

Order

[20] In the premises, I make the following order:

1. The scandalous, vexatious and irrelevant matter contained in paragraphs 12, 13, 14, 15, 30, 34, 41.1, 42.2, 42.3, 42.4, 43.2, 43.4, 44.1, 44.2, 45.4 of plaintiffs' answering affidavit to the security for costs application are ordered to be struck out.
2. Paragraphs 24, 29, 32, 33, 35, 41.2 and 46.1, are ordered to stand.
3. Costs of this application granted to the defendants limited in terms of Rule 32 (11).
4. The matter is postponed to 10 February 2021 for hearing of the security for costs application.

Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Applicant	Defendants
L Du Pisani	Ms Olivia Ndahafa Kanyemba-Usiku
Instructed by: Etzold-Duvenhage Windhoek	The second plaintiff in person Windhoek