

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON EXCEPTION

Case no: HC-MD-CIV-ACT-DEL-2020/04201

In the matter between:

HENNER DIEKMANN

PLAINTIFF

and

FREE PRESS OF NAMIBIA (PTY) LTD

FIRST DEFENDANT

TANGENI AMUPADHI

SECOND DEFENDANT

SHINOVENE IMMANUEL

THIRD DEFENDANT

TILENI MONGUDHI

FOURTH DEFENDANT

NDANKI KAHURIKA

FIFTH DEFENDANT

Neutral citation: *Diekmann v Free Press of Namibia (Pty) Ltd* (HC-MD-CIV-ACT-DEL-2020/04201) [2021] NAHCMD 317 (24 June 2021)

Coram: SIBEYA J

Heard: 04 June 2021

Delivered: 24 June 2021

Reasons 02 July 2021

Flynote: Practice – Exception – That particulars of claim do not disclose or sustain a cause of action of contempt of court – Exception based on non-compliance

with rule 74(1) which requires contempt of court proceedings to be brought on notice of motion – Plaintiff instituted action proceedings – Court to determine whether or not the particulars of claim lack the necessary averments to disclose or sustain a cause of action – The applicable law on exceptions restated – Excipient bears the onus of persuading the court that particulars of claim are excipiable – Rule 32(9) and (10) peremptory to interlocutory proceedings to attempt to amicably resolve disputes – Parties should know that they are engaged in rule 32(9) and (10) proceedings – Interpretation to determine whether the Legislature intended a provision to be peremptory or directory discussed – Common law principle that where real dispute of facts exist action proceedings to be instituted restated – Court of the view that the particulars of claim disclose or sustain a cause of action – No complexity in the interlocutory application on any justifiable reason for costs to exceed the capped amount in rule 32(11).

Summary: The defendants raised an exception to the plaintiff's particulars of claim contending that the particulars of claim do not disclose or sustain a cause of action – The plaintiff instituted action against the defendants for contempt of court following the defendants' alleged failure to comply with a court order – The said court orders provided that the defendants should issue a public apology, retract defamatory publications and remove defamatory articles from the website of Free Press Namibia – The plaintiff launched action proceedings in his quest to have the defendants declared to be in contempt of court – The defendants in turn raised an exception centered on non-compliance with rule 74(1) which states that contempt of court proceedings should be brought on notice of motion – Defendants contend that failure to launch the contempt of court proceedings renders the particulars of claim excipiable for failure to disclose or sustain a cause of action.

Held; that exceptions are interlocutory proceedings which requires compliance with rule 32(9) and (10) and parties should be aware that they are engaged in such proceedings in attempt to resolve the dispute amicably.

Held; further that in exceptions, the court must accept the facts alleged by the plaintiff as correct and that the excipient bears the onus of establishing that the

particulars of claim are expiable as on every interpretation available no cause of action is disclosed or can be sustained.

Held further; that the allegations set out in the particulars of claim reveal that the defendants failed to comply with a court order and therefore they should be convicted of contempt of court, clearly outlining the cause of action.

Held further; that the provisions of rule 74(1) are not couched in a negative form, contains no sanction and therefore supports the interpretation that the said provision is directory not peremptory.

Held further; that the established principle that where real disputes of facts exist action proceedings should be instituted, failing which the matter may be dismissed on the basis of launching applications proceedings where disputes of facts are foreseeable restated and rule 74(1) does not limit such common law principle.

Held further; that the plaintiff properly instituted action proceedings and the exception is dismissed for lack of merit.

Held further; that the exception is not complicated to require extensive work in opposition, as a result the costs awarded are subject to rule 32(11).

ORDER

1. The defendants' exception brought against the plaintiff's particulars of claim is dismissed.
2. The defendants must pay the plaintiff's costs of opposing the exception jointly and severally the one paying the other to be absolved subject to rule 32(11).
3. The matter is postponed to **20 July 2021** at **14:00** for a case planning conference.

4. The parties must file a joint case plan on or before 15 July 2021.

RULING

SIBEYA J:

Introduction

[1] This is an exception raised by the defendants against the particulars of claim where the plaintiff seeks a declaration that the defendants are in contempt of court for failure to comply with a court order. The defendants contend that the particulars of claim do not disclose or sustain a cause of action. The exception is opposed.

The parties

[2] The plaintiff is Henner Diekmann, an adult male legal practitioner practicing under the name of Diekmann Associates, situated at Lilliecron Street, Windhoek.

[3] The first defendant is Free Press of Namibia (Pty) Ltd, a company duly registered according to the laws of the Republic of Namibia with its principal place of business at 42 John Meinert Street, Windhoek-West, Windhoek and the owner and publisher of The Namibian Newspaper.

[4] The second defendant is Tangeni Amupadhi, adult male employed by the first defendant as an editor-in-chief of The Namibian Newspaper at the address of the first defendant.

[5] The third defendant is Shinovene Immanuel, an adult male employed by the first defendant as a journalist of The Namibian Newspaper at the address of the first defendant.

[6] The fourth defendant is Tileni Mongudhi, an adult male employed by the first defendant as a freelance journalist for The Namibian Newspaper and as editor-in-chief for the Southern Times, whose place of employment is at the corner of Schönlein and Jenner Streets, Windhoek-West, Windhoek.

[7] The fifth defendant is Ndanki Kahiurika, an adult female employed by the first defendant as a journalist for The Namibian Newspaper at the address of the first defendant.

Background

[8] The plaintiff instituted an action for defamation against the defendants. The action emanated from articles published in the print media and the online publication of The Namibian Newspaper. This court, differently constituted, found the articles defamatory against the plaintiff and ordered the defendants to, within 10 days, issue the plaintiff with a public apology, retract the defamatory publications and remove the defamatory articles from the first defendant's website. Plaintiff contends that the defendants had not complied with the court order during the *dies* specified and is therefore in contempt of court.

[9] The defendants filed an exception where they claim that the particulars of claim do not disclose or sustain a cause of action. The basis of the exception is that the action was not instituted in accordance with the rules of court which prescribes the process to be engaged in contempt of court proceedings.

[10] At the outset it should be clarified that the defendants do not argue that the particulars of claim are vague and embarrassing but rather that the particulars of claim do not disclose or sustain a cause of action.

[11] The defendants' case for the exception is heavily reliant on the lack of strict compliance with rule 74(1) which provides that contempt proceedings should be brought on notice of motion. Defendants contend that failure to institute contempt proceedings on notice of motion renders the particulars of claim excipiable on that

basis alone. Consequently, the defendants submit that the exception should be upheld with costs.

[12] The plaintiff attempts to repel the exception by restating the old principle that rules are made for the court and not the court for the rules. The plaintiff states further that the choice of action proceedings and not motion proceedings was premised on a foreseeable dispute of fact which renders the use of motion proceedings undesirable in such circumstances. Consequently, the plaintiff calls on the court to dismiss the exception with costs.

[13] The task that this court is therefore seized with is to determine as to which of the parties is on the correct side of law and who is offside, so to speak.

Rule 32(9) and (10)

[14] The plaintiff claims that the defendants failed to comply with rule 32(9) and (10) as a result, the exception should be struck off the roll with costs. Mr Heathcote, who appears for the plaintiff, submitted that the defendants ignored rule 32(9) and (10) and focused on amending the case plan in order to pave way for an exception to be made. Mr Boesak, for the defendants, submitted to the contrary that the provisions of rule 32(9) and (10) were substantially complied with. In this regard, Mr Boesak relied on the letter dated 21 January 2021 addressed to the legal practitioners for the plaintiff.

[15] Parties are *ad idem*, correctly so, that exceptions are interlocutory proceedings. The said rule 32(9) and (10) which applies to interlocutory proceedings provides that:

‘(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 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 privileged information.’

[16] Our courts have stated time without number that rule 32(9) and (10) is peremptory and requires strict compliance in interlocutory proceedings. This is the *ratio decidendi* in *Mukata v Appolus*.¹

[17] The question for determination is whether the parties complied with rule 32(9) and (10) in these exception proceedings. To resolve the impasse between the parties on whether rule 32(9) and (10) was complied with, it is vital to unravel the action which is said to constitute compliance with rule 32(9) and (10).

[18] The letter relied on by the defendants in their quest to prove compliance with rule 32(9) and (10) and which letter Mr Boesak commenced and rested his arguments on this subject provides as follows:

- ‘1. We refer to the above matter as well as the Parties Joint Case Plan dated 19 November 2020 and the Case Plan Order dated 22 November 2020.
2. Consequent to our client’s reconsideration of your client’s particulars of claim, our client takes the view that your client’s particulars of claim are expiable. Consequently, it would not be appropriate to plead thereto. We attach our clients’ draft exception hereto, marked “A”.
3. As a consequence of the above, our clients seek your client’s acquiescence to the variation of the Case Plan as follows:
 - 3.1 The first to the fifth defendants are to deliver their exception on 22 January 2021.
 - 3.2 The first to the fifth defendants are to deliver their heads of argument on ...
 - 3.3 The plaintiff is to deliver his heads of argument on ...

¹ 2015 (3) NR 695 (HC).

3.4 The case is postponed to ... for the hearing of first to the fifth defendants' exception.

4. In the event that your client is in agreement with the above proposal, kindly sign and forward us the draft status report attached hereto, marked "B".'

[19] It requires no magnifying glasses to notice that the above letter makes no reference to rule 32(9) and (10). The said letter further does not deal with the purpose of the rule in question.

[20] I hold the view that rule 32(9) demands of the parties to have settled intention to attempt to resolve their dispute. This requires the parties to demonstrate commitment towards attempt to resolve the dispute. Parties must therefore genuinely attempt to resolve disputes amicably. This is the interpretation accorded to rule 32(9) in *Bank Windhoek Limited v Benlin Investment CC*.²

[21] The challenge in *casu*, is the distinct views of the parties on the compliance of or lack thereof with rule 32(9) and (10). For rule 32(9) and (10) proceedings to be complied with, it must be apparent to the parties that what they are engaged in is a rule 32(9) and (10) process. Like any meaningful discussion, parties should be well informed of the content and purpose of the discussion and the possible desired outcome. A party should not be left second guessing as to the nature of the process engaged in.

[22] The defendants' aforesaid letter neither makes reference to settlement suggestions nor demonstrate genuine attempt to engage the plaintiff in order to seek an amicable solution to the interlocutory matter sought to be raised. To the contrary, the letter appears to convey a message far apart from the provisions of rule 32(9) and (10).

[23] The defendants' letter informs the plaintiff of a change of stance in the manner in which the defendants approach the action. The defendants simply state that they

² 2017 (2) NR 403 (HC). See also *Standard Bank Namibia limited v Marah Kaatjee Ngavetene* (HC-MD-CIV-ACT-CON-2020/04370) [2021] NAHCMD 45 (17 February 2021) para [17] - [18].

have decided to raise an exception to the plaintiff's particulars of claim and proceed to suggest dates of filing the exception. Needless to state that the draft exception was annexed to the letter signifying the solid intention of the defendants to raise the exception. The only input requested from the plaintiff in the said letter, was for the plaintiff to indicate whether he agreed to the content of the letter or not, if so, to sign and forward the draft status report.

[24] It is apparent from the aforesaid letter that the defendants were hellbent on raising the exception. This much is deduced from the letter which suggests the dates for filing the exception, filing of heads of argument and hearing the exception. There is no suggestion, let alone an attempt by the defendants, to resolve the exception amicably between the parties. A further confirmation of the non-existence of the rule 32(9) proceedings is the fact that no rule 32(10) report was filed.

[25] In the premises, I find that contrary to the submission by Mr Boesak, there was no substantial compliance with the provisions of rule 32(9) and (10). I could therefore order the exception struck from the roll on the said basis, but in the exercise of my discretion, I have opted to deal with the merits of the exception in order to put the interlocutory application to rest.

The law on Exceptions

[26] Rule 57(1) which regulates exceptions provides that:

'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.'

[27] The Supreme Court in *Van Straten NO and Another v Namibia Financial Supervisory Authority and Another*³, laid down the following regarding exceptions

³ 2016 (3) NR 747 (SC).

based on the ground that no cause of action can be sustained on the particulars of claim:

'[18] Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff's pleadings are taken as correct.⁴ In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.⁵ Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable.'⁶

[28] The excipient bears the *onus* of establishing that a pleading is excipiable.⁷

Application of the law to the facts

[29] As alluded to above, the defendants based their exception on failure to institute the action in terms of rule 74(1). The said rule provides that:

- '74. (1) A party instituting proceedings for contempt of court must do so by way application (sic) on notice of motion to the person against whom the contempt of court is alleged.
- ...
- (3) The applicant must in a founding in a founding affidavit distinctively set out the grounds and facts of the complaint on which the applicant relies for relief in his or her application for contempt of court.'

[30] Mr Boesak submitted that considering that the rule maker made use of the word 'must' in rule 74(1), such word is peremptory and any person who sought to institute contempt of court proceedings should proceed on notice of motion. He stated that the plaintiff's particulars of claim are therefore excipiable.

⁴ *Marney v Watson & another* 1978 (4) SA 140 (C) at 144F.

⁵ *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F-G followed by the High Court in *Namibia Breweries Ltd v Henning Seelenbinder, Henning & Partners* 2002 NR 155 (HC) at 158H-J. (*Seelenbinder*).

⁶ *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-G; see also *Seelenbinder* at 159A.

⁷ *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C) at 395D.

[31] The particulars of claim reveal that:

- a) The defendants were directed by the court on 31 October 2019 to, within ten days of service of the order:
 - i. Issue the plaintiff with a written and public apology, regarding the articles published on 06 May 2016 and 25 August 2017;
 - ii. Retract the aforesaid publications or portions thereof relating to the plaintiff; and
 - iii. Take steps to remove the said articles from first defendant's website and instruct all search engines where such articles were published to remove same.
- b) The defendants were served with the said court order on the 12th and 18th November 2019 respectively.
- c) The ten days within which the defendants were obliged to comply with the court order lapsed on 02 December 2019. Defendants failed to comply.
- d) As a result, the defendants are in wilful contempt of the order.
- e) Plaintiff prays for a declaration that the defendants are in contempt of court and that they be convicted accordingly, after which an appropriate penalty be imposed following hearing evidence in mitigation and aggravation of sentence.

[32] The above averments plainly set out the basis of the allegations for the wilful disregard of the court order and the related call for the defendants to be convicted of contempt of court as a result. A consideration of the above averments of the particulars of claim reveals the cause of action as clear as day. I therefore do not agree with the submission of the defendants that the allegations in the particulars of

claim discloses no cause of action. Similarly, I hold the view that the averments contained in the particulars of claim can sustain a cause of action.

[33] During oral arguments, the court put a question to Mr Boesak whether strictly speaking, the complaint of the defendants relate to the plaintiff engaging into a possible irregular proceeding compared to the allegation that the particulars of claim disclose no cause of action or a sustainable cause of action. Mr Boesak responded that the plaintiff engaged in an irregular step or proceeding which supports the exception raised as the cause of action based on an irregular step cannot be sustained.

[34] An irregular step or proceeding is regulated by rule 61. This rule empowers a party who is of the opinion that another party in the same matter engaged in an irregular step or proceeding to apply to the court to set aside such step or proceeding. When an application for irregular step or proceeding is launched, it must appear *ex facie* and in substance that the application is one of irregular step or proceeding. The present matter is in any manner or form nowhere near an application for an irregular step or proceeding.

[35] The question that remains to be answered is, does the use of the word 'must' in rule 74(1) mean that the provisions of rule 74(1) are peremptory contempt of court proceedings, ie all contempt of court proceedings should be brought on notice of motion and no other. Mr Boesak submitted that the use of 'must' in rule 74(1) is peremptory requiring strict compliance. Mr Heathcote submitted contrariwise.

[36] The Supreme Court in *Torbitt and Others v International University of Management and others*⁸ quoted with approval the following test laid down in *Sutter v Scheepers*⁹, in determining whether the Legislature intended to render a provision mandatory or directory:

- '1. The word "shall" when used in a statute is rather to be considered as peremptory unless there are other circumstances which negative this conclusion.

⁸ (SA 16/2014) [2017] NASC 8 (28 March 2017) para [28].

⁹ 1932 AD 165 at 173-174.

2. If a provision is couched in a negative form, it is to be regarded as a peremptory rather than directory mandate.
3. If a provision is couched in positive language and there is no sanction in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.
4. If when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.'

[37] The reading of Rule 74(1) lays bare that such rule is not couched in a negative form and on the premise of the *Sutter* case, the use of the word 'must' in the said provision constitutes a directory and not a peremptory mandate. Rule 74(1) contains no sanctions attached to it for non-compliance, which is further indicative of the provision being directory not peremptory.

[38] Notwithstanding the above interpretation, it is settled law that motion proceedings are intended to resolve disputes based on facts which are common cause between the parties. Where real disputes of facts are foreseeable, action proceedings should be instituted. If the applicant opts to proceed by notice of motion despite foreseeing the real dispute of facts, the application may be dismissed on the basis of the approach taken.¹⁰

[39] I am of the firm view that the submission by Mr Heathcote that dispute of facts arise in this matter holds credence. This finds support from the particulars of claim which alleges that there was an apology which the plaintiff labels conditional and made by The Namibian Newspaper. The Namibian Newspaper was not amongst the defendants ordered by the court to apologize. The defendants in this matter had not rendered any apology, so the particulars of claim allege. The plaintiff stated that the

¹⁰ *New African Methodist Episcopal Church in the Republic of Namibia and Another v Kooper and Others* 2015 (3) NR 705 (HC) para [40]. See also: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

said apology of The Namibian Newspaper therefore constituted no apology from the defendants. A real dispute is foreseeable as to whether the said apology made allegedly by The Namibian Newspaper is an apology made by the defendants in compliance with the court order or not.

[40] Rule 74(1) did not limit the application of common law in any manner. I therefore hold the view that the legal position is that in cases of real disputes of facts, action proceedings should be instituted and this, further reigns supreme in the face of rule 74(1). The plaintiff was therefore justified, in my view, to institute action proceedings considering, *inter alia*, the real disputes of facts.

[41] Mr Boesak further submitted that motion proceedings are beneficial to the defendants as all facts and evidence will be revealed in the founding affidavit, which informs the defendants of the case they have to meet at an early stage of the proceedings as opposed to action proceedings. He placed reliance on *Nelumbu and Others v Hikumwah and Others*¹¹ where Damaseb DCJ emphasised that affidavits in motion proceedings comprises of both pleadings and evidence.

[42] While the decision in *Nelumbu* sets out our legal position regarding the contents of affidavits, Mr Heathcote submitted that motion proceedings cannot, in the present matter, be in better standing compared to action proceedings.

[43] I cannot appreciate the benefits of motion proceedings said to exist in this matter which outweighs action proceedings. The defendants further failed to demonstrate clear prejudice which they would suffer as a result of these proceedings being brought on action instead of motion proceedings. I find the suggestion that motion proceedings are better placed in contempt of court proceedings than in action proceedings lacks merit.

Conclusion

¹¹ 2017 (2) NR 433 (SC) para [40] – [41]. See also: *Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC) 634 where it was held that an applicant in motion proceedings must ensure that all pleadings and evidence are included in the founding affidavit in order to alert the opposing party of the case he or she has to meet and adduce evidence in affidavits to answer thereto.

[44] In view of the foregoing findings and conclusions, I hold the view that the exception raised by the defendants against the plaintiff's particulars of claim is literally bad in law. In the premises, the exception falls to be dismissed.

Costs

[45] The parties had disparaging views as to whether the costs to be awarded to a successful party should be limited in accordance with rule 32(11) or not. Rule 32(11) provides that:

'Despite anything to the contrary in these rules, whether or not instructing and instructed legal practitioners are engaged in a cause or matter, the costs may be awarded to a successful party in any interlocutory proceeding may not exceed N\$20 000.'

[46] Mr Heathcote submitted that if successful, in opposing the exception, the plaintiff should be awarded costs not limited to rule 32(11) as the plaintiff should not be out of pocket in an exception which was not properly raised. The reading of rule 32(11) provides that the court retains a discretion whether to limit the costs in an interlocutory application to N\$20 000 or not. That notwithstanding, the higher scale in interlocutory applications above the capped amount must be applied for and motivated convincingly in order to be awarded.

[47] In *South African Poultry Association v The Ministry of Trade and Industry*¹² it was stated that a clear case must be established that a party deserves to be awarded costs above the cap provided for in the rules. The party seeking such higher scale bears the onus.

[48] The defendants only raised one issue in support of their exception, that is the non-compliance with rule 74. I hold the view that this is a simple exception which bears no complexities strictly speaking. It is therefore not expected that the plaintiff will go all out to oppose the said exception. As a result, I am not persuaded that the plaintiff deserves costs above the amount capped in rule 32(11).

¹² (A 94/2014) [2014] NAHCMD 331 (07 November 2014), paragraph 67.

[49] In the result, it is ordered that:

1. The defendants' exception brought against the plaintiff's particulars of claim is dismissed.
2. The defendants must pay the plaintiff's costs of opposing the exception jointly and severally the one paying the other to be absolved subject to rule 32(11).
3. The matter is postponed to **20 July 2021** at **14:00** for a case planning conference.
4. The parties must file a joint case plan on or before 15 July 2021.

O S Sibeya
Judge

APPEARANCES:

PLAINTIFF: R HEATHCOTE SC (with him C E VAN DER WESTHUIZEN)
Instructed by Etzold-Duvenhage, Windhoek

DEFENDANTS: W BOESAK
Instructed by ENSAfrica|Namibia, Windhoek