HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: THE GOVERNMENT OF REPUBLIC OF NAMIBIA V JOHANNES TSHEEPO UUPINDI	**Case No:** HC-MD-CIV-ACT-CON-2018/04068
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	**Date of hearing:** 3 DECEMBER 2021
	Date of order: 9 DECEMBER 2021

Neutral citation: *The Government of Republic of Namibia v Uupindi* (HC-MD-CIV-ACT-CON-2018/04068) [2021] NAHCMD 585 (9 December 2021)

Results on merits:

Merits not considered.

The order:

Having noted the non-appearance on behalf of the Plaintiff and having heard **JEROME GAYA**, for the First Defendant and having read the documentation filed of record:

IT IS HEREBY ORDERED THAT:

1. The main interlocutory applications as well as the application for condonation are struck from the roll for failure to

comply with Rule 32(9) and (10).

2. The defendant is ordered to pay the first defendant's costs in respect of the respective applications. This cost to include the costs of one instructing and one instructed counsel. Such costs not be limited in terms of the provisions of Rule 32(11).

Further Conduct of the Matter:

3. The case is postponed to **03/02/2022** at **15:00** for Status Hearing (Reason: To allocate a new date for the continuation of the civil trial as the current date allocated clashes with the Trial Judge's Motion Roll week).

Reasons for orders:

Introduction

[1] The matter before me is a partly- heard matter that commenced on 8 November 2021 and is currently postponed to April 2022 for continuation.

[2] The action arose from a motor vehicle accident that occurred on 17 July 2016 between a government vehicle and three other vehicles.

Background

[3] The Government of Namibia initially instituted action against the drivers of two of the vehicles i.e. Mr Johannes Tsheepo Uupindi (first defendant) and Mr Pehovelo Leonard Mokanya (second defendant).

[4] During the course of the judicial case management proceedings (JCM) the plaintiff joined the driver of the third driver, Mr Abiud Metarere Kuverua, as the third defendant.

[5] As a result of being joined as a defendant he instructed a legal practitioner and actively partook in the case management process and all three the defendants were ready to proceed to trial on the date as scheduled. At the commencement of the trial the court raised the question with the plaintiff regarding the third defendant as the plaintiff failed to file amended particulars of claim in order to include the third defendant, in spite of him filing a plea to the plaintiff's claim. Plaintiff's counsel indicated that as it did not seek any relief against the third defendant it did not deem it necessary to

amend the particulars of claim. In essence the plaintiff intended to subpoena the third defendant as a witness.

[6] The court made it clear that the position of the plaintiff was an untenable one and as plaintiff's counsel agreed with the court in this regard the plaintiff proceeded to withdraw the action against the defendant. The plaintiff then summarily moved and application from the bar for leave to call the erstwhile third defendant as a witness, which also then implied that the pre-trial order dated 3 September 2020 had to be varied. The first defendant strongly opposed this application and the second defendant took a neutral stance in respect of the application.

[7] This was the first interlocutory application that arose in this matter.

[8] The next matter that arose mid-trial was an objection that was raised by the first defendant to the experts that the plaintiff intended to call in support of its claim. The first defendant raised the objection on the basis of the non-compliance with rule 29 of the Rules of Court and more pertinently that the qualification of the witnesses do not qualify them as experts. This brought about a further interlocutory application. The plaintiff brought an application on notice for these witnesses to be declared as expert witnesses. In this instance the second defendant took a neutral position.

[9] Therefore the combatants in the two interlocutory applications is limited to the plaintiff and the first defendant.

[10] The court therefore need to adjudicate two applications which can be summarised as follows:

a) Application for leave to be granted to the plaintiff to call the erstwhile third defendant as a witness in support of its case and in the event that the application is granted, also the variation of the pre-trial order to include the third defendant as witness to testify on behalf of the plaintiff; and
b) Application to call additional witness as expert witnesses and that the court declare Eugene Luwellin Camm and Levi Kapenda as expert witnesses as envisaged in rule 29 and in that instance a variation of the pre-trial order dated 3 September 2020.

[11] In respect of the latter application the court gave truncated but firm timelines for the plaintiff to comply with. The unfortunate reality is that the plaintiff failed to comply with the court order dated 12 November 2021 in respect of the filing of the second application and a multitude of documents were filed last minute. The plaintiff's legal practitioners failed to file the application in time and further failed to file their notes on argument as directed by court. This resulted in a condonation application.

[12] The condonation application was also opposed by the first defendant.

[13] As can be gleaned from the brief background in this matter the plaintiff's case has to date been presented to court

in a haphazard manner.

[14] The issues in the matter arose right from the start of the matter because the plaintiff filed its purported expert summaries and statements only a week before the commencement of the trial. The first defendant took issue with the late filing but as it would appear that the instructing legal practitioner, who attended court on 27 September 2021, when the court directed the date for the filing of the said statements, took no issue with it and the date for filing was set by court the court. I will thus accept that the judge at the time condoned the previous non-compliance with court order regarding the filing of the said expert statements.

Nature of the applications before court

[15] I can say without fear of disagreement that the applications are interlocutory in nature, both the application for leave to call the respective witnesses and declaring the relevant witnesses as experts, and the variation of the pre-trial order.

[16] Rule 32(9) and (10) concern 'Interlocutory matters' and applications for directions, that is *all* matters, so long as they answer to the epithet *'interlocutory'*. (Italicized and underlined for emphasis) The rules do not exempt any interlocutory matters.'[1]

Compliance with rule 32(9) and (10)

[17] In *Studio Eighty Eight Clothing (Pty) Ltd v Bezuidenhoudt & 2 Others* Geier J stated as follows:

' The provisions of rule 32(9) and (10) are clear and unambiguous; and so no words should be added by implication to the language of rule 32(9) and (10) in order to give those provisions sense and meaning in context. The sense and meaning in context of those provisions are abundantly clear. And one can find the true extent and meaning of the rule from the rules of court only. See *Namibian Association of Medical Aid Funds v Namibian Competition Commission* (A 348/2014 [2016] NAHCMD 80 (17 March 2016), para 12. Thus, considering the use of the word 'must' in rule 32(9) and (10), there is not one iota of doubt that rule 32(9) and (10) 'are peremptory, and non-compliance with them must be fatal'.

[18] There was no attempt on the part of the plaintiff comply with the provisions of rule 32(9) and (10). In respect of the first application moved from the bar is common cause that there was no attempt whatsoever to resolve the matter

[1] *Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (15 March 2015), para 6) (HC-MD-LAB-MOT-REV-2020/00207) [2021] NALCMD 44 (29 September 2021).

amicably. In respect of the second application the plaintiff takes the stance that the first defendant would in any event not agree with to the application. This is a very unfortunate view for the plaintiff to take because it would appear that the plaintiff is now choosing when to comply with the rules and when not to. I must make it clear rule 32(9) and (10) is not discretionary for the parties when dealing with an interlocutory. It is peremptory.

[19] In *Namibia Airports Company vs IBB Military Equipment And Accessory Supplies Close Corporation*[2] I concluded as follows, and remain firm in my position :

'[27] There is no extra-ordinary or peculiar circumstances in the matter in casu which would cause this court to overlook the blatant disregard to comply with rule 32(9) and (10).

[28] The fact that the court graciously condoned the non-compliance in the *Kondjeni* and *Seelenbinder* matters do not set a precedent for condoning non-compliance with the relevant rule. In each of these cases the learned judge clearly addressed the importance of the rule and motivated his decision. He also cautioned against non-compliance and repeatedly stated that compliance with the provisions of rule 32(9) and (10) is peremptory. In my considered view it will cause chaos and make a mockery of the Rules of Court if parties can choose when they would comply with these rules and when not.

[29] In *Kambazembi Guest Farm CC t/a Waterberg Wilderness v The Minister of Lands and Resettlement*[3] Parker AJ in a strong worded ruling state the following in respect of compliance with Rule 32(9) and (10):

'[4] In my view, the provisions of rule 32(9) and (10) are as clear as day and they are unambiguous; and so, I do not think one is entitled to add any words to them by implication to attain a purpose which is outwit the intention of the rule maker. It has been said:

"Plainly, words should not be added by implication into the language of a statute unless it is necessary to do so as to give the paragraph sense and meaning in context."

(*Rally for Democracy and Progress v Electoral Commission* 2009 (2) NR 793 (HC), para 7)'

[20] The next issue that I wish to briefly address under the heading of compliance with rule 32(9) and (10) in respect

[2] (HC-MD-CIV-ACT-OTH-2017/01488) [2019] NAHCMD 496 (30 October 2019)

[3] *Kambazembi Guest Farm CC t/a Waterberg Wilderness v The Minister of Lands and Resettlement* (A 21/2015) [2016] NAHCMD 118 (21 April 2016).

of condonation applications. In respect of the condonation application the plaintiff also did not comply with rule 32(9) and (10) and appears to take the view that it would not be required of them as the court did not clearly set it out in the directions given to the parties on 12 November 2021.

[21] In this regard I would like to again refer to the Studio 88 case wherein Geier J considered the two schools of thought on the issue of compliance of rule 32(9) and (10) in respect of condonation application and I agree with my Learned Brother in his analyses and find that if there is non-compliance with rule 32(9) and (10) in respect of condonations such application stand to be struck for non-compliance of the rules.

Conclusion

[22] As the main focus of this ruling is on the issue of rule 32(9) and (10) I do not deem it necessary to discuss the remainder of the legal points raised by the plaintiff. The only remaining issue is therefore the issue of costs.

[23] The way in which the plaintiff, as the *dominus litis*, is conducting the litigation in this matter leaves much to be desired. If the plaintiff's legal practitioners complied with this court's orders as far back as 2020 then the interlocutory applications could have been avoided. If the plaintiff actively engaged its opponents regarding the interlocutory applications the arguing of the said applications might have been avoided as well.

[24] It should be born in mind that the parties are not litigating on equal footing when it comes the respective financial positions of the litigants. The first defendant is defending this matter from personal funds vis-à-vis the Namibian Government. It would thus be in the defendant(s) best interest and in the spirit of the overall objectives of the Rules of Court to limit interlocutory applications like the ones before me, presented in a slapdash manner. It is costly for the first defendant who has counsel instructed on the matter.

[24] I am of the view that the court need to show her displeasure by mulcting the plaintiff with an appropriate costs order. The plaintiff is strongly advised to get its house in order before further cost orders may follow its way.

[25] My order is therefore as set out above.

Judge's signature	**Note to the parties:**

	Not applicable.
Counsel:	
Plaintiff	**First Defendant**
Ms Ihalwa On the instructions of Government Attorneys	Mr Muhongo On the instructions of Fischer, Quarmby and Pfeifer