REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

Ruling

Practice Directive 61

Case Title: KONDJASHILI KAFITA SHIPOKE (PLAINTIFF/RESPONDENT) VS LAIMI NDAILIKANA SHIPOKE (BORN HANGADA) (DEFENDANT/APPLICANT)	**Case No:** HC-MD-CIV-ACT-MAT-2022/00161 **Division of Court:** HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE JUSTICE SIBEYA	**Date of hearing:** 26 SEPTEMBER 2022 **Delivered on:** 13 OCTOBER 2022
Neutral citation: *Shipoke v Shipoke* (HC-MD-CIV-ACT-MAT-2022/00161) [2022] NAHCMD 550 (13 October 2022)	

The order:

1. The defendant's application for an order to grant the parties leave to draft a stated case that is in compliance with rule 63 is struck from the roll for constituting an incompetent relief.

2. The defendant must pay the costs of the plaintiff including costs of one instructing and one instructed legal practitioner capped by rule 32(11).

3. The interlocutory application is removed from the roll and finalized.

4. The main matter is postponed to 10 November 2022 at 08:30 for a status hearing and parties must file a joint status report on or before 07 November 2022.

Reasons for the order:

SIBEYA J:

Introduction

[1] This is an interlocutory application instituted by the defendant, on notice of motion, in a divorce action. Notwithstanding the fact that in the interlocutory application the defendant is the applicant and the respondent is the plaintiff, I shall for convenience and clarity refer to the parties as in the main action as the plaintiff and the defendant respectively. On 23 June 2022, the defendant launched interlocutory proceedings on notice of motion where she, inter alia, sought the following relief:

'1 …
2 …
3 An Order whereby the parties are granted leave to draft a stated case that is in compliance with Rule 63;
4 Costs of Suit (only in the event of the application being postponed);
5 Further and/or alternative relief as the Honourable Court may deem appropriate.'

[2] The application is opposed by the plaintiff.

[3] The plaintiff is represented by Ms Garbers-Kirsten while the defendant is represented by Ms Shikale.

Background

[4] The plaintiff and the defendant are married to each other and undergoing divorce proceedings in the main action. The divorce action was referred for court-connected mediation where it was subsequently reported that the matter was partially successful.

The parties, thereafter, through their legal representatives, informed the court that they intended to draft and file a statement of agreed facts regarding a live dispute between them in respect of their marital regime. The parties were married in the Ohangwena Region where the Native Administration Proclamation 15 of 1928 finds application. By then, Ms Williams appeared for the plaintiff while Ms Chinsembu (the defendant's erstwhile legal representative) appeared for the defendant.

[5] As a considerate institution, this court granted the parties their wish and postponed the matter for the parties to file a statement of agreed facts.

[6] The parties later make good their wish and filed a statement of agreed facts dated 30 May 2022. The statement of facts contained the following as agreed facts:

'1. The parties attended mediation on 29th day of March 2022.

2. One of the contentious matters was whether or not the parties were married in or out of community of property in terms of Section 17(6) of the Native (Administration) Proclamation 15 of 1928. The following is a statement of the agreed facts between the parties:

2.1 The parties are Natives as defined by the Native (Administration) Proclamation 15 of 1928.

2.2 The parties were married to each other at Ohalushu, Ohangwena district, on the 23rd day of August 2008. The place of marriage falls within the "police zone' as set out in the Native (Administration) Proclamation Act 15 of 1928.

2.3 The parties did not within one month previous to the celebration of their marriage declare jointly before any magistrate, native commissioner, or marriage officer that it is their intention and desire that community of property and of profit and loss shall result from their marriage.'

[7] It is clause 2.3 above which the defendant intends to resile from as apparent from the notice of motion referred to above. Several accusations were made between the defendant and her erstwhile legal representative stating, inter alia, that the defendant did not provide the instructions for the agreement recorded in clause 2.3 of the agreement of facts. Ms Chinsembu filed an explanatory affidavit where she sets out the events that culminated in the statement of agreed facts being drafted and filed of record.

Rule 63 Written statement of facts

[8] Rule 63 regulates written statements of facts and it reads as follows:

'63. (1) The parties to a dispute may, after institution of proceedings, agree on a written statement of facts in the form of a special case for adjudication by the managing judge.

(2) The statement referred to in subrule (1) must set out the facts the parties agree on and the questions of law in dispute between the parties and their individual contentions and the statement must be –

(a) divided into consecutively numbered paragraphs and accompanied by copies of documents necessary to enable the managing judge to decide on the questions; and

(b) signed by each party's legal practitioner or where a party sues or defends personally by such party and the signed documents must be annexed to the statement.

(3) The managing judge must set down a special case for hearing.

(4) If a minor or a person of unsound mind is a party to the proceedings the court may, before determining the questions of law in dispute, require proof that the statements in the special case, so far as they concern the minor or person of unsound mind, are true.

(5) At the hearing of a special case the managing judge and the parties may refer to the entire contents of the documents referred to in subrule (2) and the managing judge may draw any inference of fact or of law from the facts and documents as if proved at a trial.

(6) Where it appears to the court *mero motu* or on the application of a party that there is in any pending action a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the trial of that question in such manner as it considers appropriate and may order that all further proceedings be stayed until the question has been disposed of.

(7) If a cause or matter referred to in subrule (6) involves an action for damages the court may on application of a party order that questions of liability and the amount of damages be decided separately, unless it appears to the court that the questions cannot conveniently be so decided.

(8) When considering a question in terms of this rule the court may give such decision as is appropriate and may give directions with regard to the hearing of other issues in the proceeding which may be necessary for the final disposal of the cause or matter.

(9) If the question in dispute is one of law and the parties are agreed on the facts, the facts may be admitted and recorded at the trial and the managing judge may give judgment without hearing evidence.'

[9] Rule 63 permits the legal practitioners to sign the statement of agreed facts on behalf the parties where such parties are represented. In the present matter Ms Williams and Ms Chinsembu duly signed the said statement of agreed facts on behalf of the parties.

[10] The parties are *ad idem*, correctly so in my view, that the statement of agreed facts amounts to an agreement between the parties.[1]

[11] Smuts J (as he then was) in *Scania Finance Southern Africa (Pty) Ltd v Aggressive Transport CC and Another*[2] discussed the effect of facts agreed between the parties in order limit the issues in disputes at trial and remarked that:

'[25] The Supreme Court has made it clear that where parties have elected to limit the ambit of a case by agreement, the election is usually binding and that a party cannot resile from an agreement of that nature without the acquiescence of the other party or the approval of the court on good cause shown. This was spelt out in *Stuurman v Mutual & Federal Insurance Company of Namibia Ltd*[3] in the following terms:

'[21] Parties engaged in litigation are bound by the agreements they enter into limiting or defining the scope of the issues to be decided by the tribunal before which they appear, to the extent that what they have agreed is clear or reasonably ascertainable. If any one of them want to resile from such agreement it would require the acquiescence of the other side, or the approval of the tribunal seized with the matter, on good cause shown. As was held by the Supreme Court of South Africa in *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) ([1998] 1 All SA 239) at 614B - D:

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[1] *Mbambus v Motor Vehicle Accident fund* 2015 (3) NR 605 (SC) (the dissenting judgment).
[2] *Scania Finance Southern Africa (Pty) Ltd v Aggressive Transport CC and Another* (2) (3499 of 2011) [2014] NAHCMD 19 (22 January 2014)
[3] *Stuurman v Mutual & Federal Insurance Company of Namibia Ltd* 2009 (1) NR 331 (SC).

"To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation. If a party elects to limit the ambit of his case, the election is usually binding." [Footnotes omitted.]

In *F & I Advisors (Edms) Bpk en 'n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA) ([1998] 4 All SA 480) at 524F - H this principle was reiterated. The judgment is in Afrikaans and the headnote to the judgment will suffice (at 519D):

". . . a party was bound by an agreement limiting issues in litigation. As was the case with any settlement, it obviated the underlying disputes, including those relating to the validity of a cause of action. Circumstances could exist where a Court would not hold a party to such an agreement, but in the instant case no reasons had been advanced why the appellants should be released from their agreement".' [4]

[12] It follows, therefore, that whether it is endorsed by the court or not, a statement of agreed facts constitutes an agreement between the parties. It is in any event an agreement to confine issues and which agreement is binding upon the parties and from which they could only resile upon good cause shown. In *casu*, the statement of agreed facts is yet to be endorsed by the court, but, nevertheless, it constitutes an agreement between the parties in respect of the facts agreed therein. The effect of such statement of agreed facts on the trial is subject to the court endorsing the said statement of agreed facts. That, however, does not militate against the fact that the statement of agreed facts is an agreement between the parties.

Competency of the relief sought

[13] The main relief sought by the defendant is an order whereby the parties are granted leave to draft a stated case that is in compliance with rule 63.

[13] The relief sought suggests that the parties (the plaintiff and the defendant) jointly seek leave to draft a stated case that is in compliance with rule 63. That is not the case on the papers before court.

[4] Supra at par [21]; see also *Bella Vista Investments v Pombili and Another* 2011 (2) NR 694 (HC) at par [41].

[14] An applicant can be granted the relief sought in the notice motion after being satisfied that a case for the said relief sought is made out in the founding papers. In the present matter the plaintiff does not seek such relief as no case is made out in the founding papers filed of record that the plaintiff seeks the said relief. To the contrary, the plaintiff opposes the relief sought by the defendant for leave to file a stated case that is in compliance with rule 63. There is further no amended notice of motion filed of record to exclude the plaintiff from the said relief sought by the defendant. On this basis alone, the defendant's application ought to be struck from the roll as a case for the relief sought was not made out in the founding papers. For what it is worth, I proceed to consider the existence of the existence of the agreement dated 30 May 2022.

The existence of the statement of agreed facts dated 30 May 2020

[15] Ms Shikale argued that all that the defendant seeks is leave to draft and file a stated case that is compliant with rule 63 and urged the court to grant such leave in the interest of justice so that real issues between the parties may be ventilated. Ms Garbers argued contrariwise and emphasised that the relief sought by the defendant is incompetent as the defendant does not seek an order to set aside the statement of agreed facts of 30 May 2022.

[16] It is settled law that an applicant must set out his or her case in the founding papers. See: *Stipp & Another v Shade Centre & Others.*[5] One peruses the notice of motion and the founding papers in vain for attempts by the defendant to seek an order to set aside the statement of agreed facts of 30 May 2022. It follows, as a matter of consequence, that the statement of agreed facts dated 30 May 2022 is live, it stands and is not subject to any attack and, therefore not open for criticism by this court. I will therefore not consider the veracity of the statement of agreed facts of 30 May 2022.

[17] The failure by the defendant to apply to court for the statement of agreed facts of 30 May 2022 to be set aside makes the relief sought in the present notice of motion for leave to file another stated case in attempt to resile from the statement of agreed facts of 30 May 2022, incompetent.

[5] *Stipp & Another v Shade Centre & Others* 2007 (2) NR 627 (SC).

Conclusion

[18] In view of the foregoing findings and conclusions reached on the basis of reasons stated hereinabove, I find that the relief sought by the defendant for an order whereby the parties are granted leave to draft a stated case that is in compliance with rule 63 when the plaintiff does not seek such relief and when the statement of agreed facts of 30 May 2022 is not sought to be set aside, is incompetent. In the premises, the defendant's application falls to be struck from the roll.

Costs

[19] It is settled law that costs follow the result. I have not been provided with reasons why I should depart from the said established principle nor could I find any on record. In the premises, the plaintiff will be awarded costs. This being an interlocutory matter in all shape and size, the costs to be awarded shall be limited in terms of rule 32 (11).

[20] In the result, I order that:

1. The defendant's application for an order to grant the parties leave to draft a stated case that is in compliance with rule 63 is struck from the roll for constituting an incompetent relief.

2. The defendant must pay the costs of the plaintiff including costs of one instructing and one instructed legal practitioner capped by rule 32(11).

3. The interlocutory application is removed from the roll and finalized.

4. The main matter is postponed to 10 November 2022 at 08:30 for a status hearing and parties must file a joint status report on or before 07 November 2022.

Judge's signature:	**Note to the parties:**
	Not applicable.

Counsel:	
Defendant/Applicant	**Plaintiff/Respondent**
L Shikale for the defendant/applicant Of Shikale & Associates	H Garbers-Kirsten for the plaintiff/respondent Instructed by Williams Legal Practitioners