

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case No: HC-MD-CIV-ACT-OTH-2021/03315

In the matter between:

SWANU OF NAMIBIA

PLAINTIFF

and

CHARLES KATJIVIRUE

1ST DEFENDANT

ALPHA KANGUEEHI

2ND DEFENDANT

KAIRANDERUA KATJARI

3RD DEFENDANT

KATUU TJINGAETE

4TH DEFENDANT

SAM TJIKUZU

5TH DEFENDANT

PATRICIA TJARONDA

6TH DEFENDANT

DR RIHUPISA KANDANDO

7TH DEFENDANT

APOLONIA KANGUEEHI

8TH DEFENDANT

UVATERA KAHORERE

9TH DEFENDANT

SHAKES KENANDJO SIRIRIKA

10TH DEFENDANT

Neutral Citation: *Swanu of Namibia v Katjivirue* (HC-MD-CIV-ACT-OTH-2021/03315) [2022] NAHCMD 98 (09 March 2022).

CORAM: MASUKU J

Heard: 16 February 2021

Delivered: 09 March 2022

Flynote: Civil Practice – Special Pleas of *locus standi*, lack of jurisdiction and non-exhaustion of domestic remedies raised by the defendants – Facts raised in special pleas of *locus standi* and lack of jurisdiction as common cause whereas they are not – Rule 63 – Parties may make a written statements of agreed facts and issues for determination are placed in the form of a special plea for adjudication, alternatively the facts must be placed before the court through adducing oral evidence – No facts placed before court by the defendants on which the special pleas can be properly adjudicated on – Defendants need not adduce evidence to substantiate a special plea of failure to exhaust domestic remedies provided in the plaintiff's constitution – The gist of the special plea for failure to exhaust domestic remedies depends on whether the submission to the jurisdiction of the court is mandatory or not in terms of the relevant provisions providing internal remedies.

Summary: The plaintiff is a political party and the defendants are members of the plaintiff who allegedly convened a national congress and elected themselves as leaders of plaintiff, abused plaintiff's letterhead, emblem, colours, and contravened plaintiff's constitution and further threatened to take over plaintiff's office and leadership. The plaintiff seeks an order stopping the defendants' unlawful conduct and restraining them from forcibly removing the plaintiff from its offices. The defendants raised special pleas that the plaintiff lacks locus standi and authority to lodge the current proceedings and in addition to that plaintiff did not exhaust local remedies provided in its constitution. In their special pleas, the defendants rely on facts which are allegedly common cause but did not invoke rule 63, neither did they adduce evidence to establish the facts relied upon.

Held: Where the issue of lack of authority to institute proceedings is raised, admissible evidence must be properly placed before court to enable it to determine whether or not the proceedings were properly authorised.

Held: The facts raised by the defendants in their special pleas were not placed before court in the conventional manner and thus they are not facts for the purpose of determining a special pleas upon which the court is entitled to rely on.

Held that: The plea of jurisdiction must be raised by way of exception and not as a special plea.

Held further that: Where a special plea of local internal remedies provided in the constitution not being exhausted is raised, it is not necessary for the defendants to adduce evidence before court to determine the legal issue raised. The court would consider whether the wording used in the provisions makes it mandatory to exhaust the domestic remedies before approaching the court. In this case the provision is not mandatory.

Held: Parties, especially defendants, should, in line with the overriding objectives of judicial case management avoid piecemeal litigation by only raising special pleas and avoiding pleading over on the merits at the same time. Pleading over redeems the use of the court's resources and time and is less costly to the litigants.

The special pleas were dismissed with costs.

ORDER

1. The defendants' special pleas are dismissed.
 2. The defendants are ordered to pay the costs of the application, consequent upon the employment of instructing and one instructed legal practitioner.
 3. The matter is postponed to 24 March 2022, at 08:30 for further directions.
 4. The parties are ordered to file a revised joint case plan and draft case planning order on or before 19 March 2022.
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RULING

MASUKU, J:

Introduction

[1] The issue for determination in this ruling is the sustainability of a special plea raised by the defendants to the plaintiff's particulars of claim.

The parties and representatives

[2] The plaintiff is Swanu of Namibia, which is a political party duly registered as such in terms of the Article 17 of the Constitution and other applicable laws of this Republic. Its place of business is situate at Erf 1079, Rama Street in Windhoek.

[3] The first to tenth defendants are natural persons who are members of the plaintiff. They are alleged not to be in good standing. Their addresses are unknown to the plaintiff.

[4] The plaintiff is represented by Mr. Diedericks in this matter, whereas the defendants are represented by Ms. Nyashanu.

Background

[5] Briefly stated, the facts presently known as gleaned from the particulars of claim and which give rise to the proceedings are the following: the defendants, who as stated above, are members of the plaintiff, but whose standing is doubtful and for reasons not stated, convened a national congress in Windhoek on 21 August 2021.

[6] It is alleged that in doing so, the defendants abused the plaintiff's letterhead, emblems and colours and further contravened the plaintiff's constitution. Their actions are alleged to have had divisive effects and caused disharmony within the ranks of the plaintiff's members. Pursuant to that alleged congress, the defendants now hold themselves out as the elected leadership of the plaintiff.

[7] The plaintiff thus seeks an order stopping the defendant's unlawful conduct, including their verbal threat made on 23 August 2021, to forcibly take over the plaintiff's offices. In this connection, it seeks an order restraining and interdicting the defendant's aforesaid unlawful conduct, namely, holding themselves out as the leadership of the plaintiff and using the emblems, letterheads and colours of the plaintiff.

[8] The plaintiff further seeks an order restraining the defendants from forcibly removing the plaintiff from its offices in Katutura. Last, but by no means least, the plaintiff seeks an order for costs against any defendant electing to defend the matter on the scale between attorney and client.

[9] As they are entitled to, in terms of the law, the defendants filed a notice to defend, which was followed by a special plea. In their special plea, the defendants raise the issue that the plaintiff lacks the *locus standi* and authority to lodge the current proceedings. In this connection, the defendants proceeded, in their special plea, to state facts that they allege found their special plea of lack of *locus standi* and jurisdiction. They did not end there. They proceeded to make certain submissions in their special plea.

[10] In the event the court did not uphold the special plea of *locus standi* and lack of authority, the defendants, in the alternative, pleaded that the plaintiff failed to exhaust local remedies provided in its constitution. In this connection, the defendants averred certain facts and made certain submissions.

[11] The matter was thereafter placed before me for the determination of the special pleas raised by the defendants. The parties appeared to take the view that

the matter should be dealt with as a special plea with both parties filing heads of argument thereon. That is accordingly the course that the matter assumed, hence the court is now called upon to deal with the special plea.

The parties' arguments

[12] The plaintiff submitted that the special pleas are foredoomed to fail for the reason that there is no evidence that has been adduced by the defendants, to substantiate their special pleas. It was in this connection, argued that the onus to allege and prove material facts underlying the special plea, lies with the defendants. In this case, the plaintiff submitted, the defendants dismally failed to do so.

[13] Regarding the argument relating to the exhaustion of domestic remedies, the plaintiff again asserts that the special plea should fail. Relying on *Namibia Competition Commission and Another v Wal-Mart Stores Incorporated*¹ and *National Union of Namibian Workers v Naholo*² the plaintiff argues that there is no provision in the plaintiff's constitution which serves to suggest that access to the court is deferred until the provisions of article 5 of the constitution have been complied with.

[14] The defendants' argument, as expected, is a horse of a totally different colour. The defendants allege in their heads of argument that there are certain facts, which are common cause between the parties. They proceed with those alleged common cause facts, to argue that the plaintiff and/or those who represent it in the proceedings, are not properly before court.

[15] On the *locus standi* issue, the defendants argue that the proceedings can be properly instituted if there is permission granted by the Central Committee of the plaintiff to a named representative, to lodge those proceedings. They argue

¹ *Namibia Competition Commission and Another v Wal-Mart Stores Incorporated* A41/2011) NASC (11 November 2011) para 45.

² *National Union of Namibian Workers v Naholo* 2006 (2) NR 659 (HC).

that their case is unarguably good and that the special pleas they raised should be sustained.

Determination

[16] It is perhaps important to go back to the basics and in this connection, to review the law relating to special pleas. According to the learned authors *Herbstein & Van Winsen*³ a special plea is plea that does not raise a defence on the merits of the case. It, however, serves to set up some special defence whose object is to either delay the proceedings or to quash them altogether. The former is referred to as dilatory plea, while the latter, is referred to as a declinatory plea.

[17] In drawing a line between exceptions and special pleas, the learned authors state that an exception is confined to the four corners of the pleadings. In this connection, the defence raised must appear *ex facie* the pleadings. Furthermore, the excipient must accept that the factual allegations contained in the pleading concerned, are correct and may not introduce any fresh matter.⁴

[18] Dealing with special pleas, the learned authors state the following:

“Special pleas on the other hand, do not appear *ex facie* the pleading. If they did, then the exception would procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the pleading, and these facts have to be established in the usual way.’

[19] The question to ask, in view of the above quotation, is – what is the usual way of establishing facts? It would appear to me that there are a few options open by which facts can be established. Because we are dealing with a trial in this matter, I do not consider it necessary to mention affidavits as a means of establishing facts, which it undoubtedly is.

³ Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, Juta & Co, Vol 1, 6th ed, p 598.

⁴ *Ibid* at p 600.

[20] In trial proceedings, the most usual way to elicit or establish facts is by adducing oral evidence. This is where witnesses are called and they state on oath or affirmation the facts that are relevant to the issues arising for determination. Another manner for establishing facts, which is, however, very convenient, is where the facts giving rise to the *lis*, are largely common cause. In that event, the parties invoke the provisions of rule 63 in which case the parties make a written statement of agreed facts. The issues for determination are placed in the form of a special case for adjudication by the managing judge.

[21] What have the defendants done in this case? A reading of the special plea makes it plain that there are certain facts that the defendants seek to rely on as forming the bases of the special pleas. What is however odd or odious, is that these facts are not common cause as alleged by the defendants. If they were, then the provisions of rule 63 mentioned above, would have been invoked. The fact that the defendants consider the facts common cause does not render them common cause without following the procedure stated above.

[22] It is, having mentioned the application of rule 63, that the other alternative open to the defendants, is for them to place the facts before court through adducing evidence. This route, the defendants have also not followed. The stark reality facing the court is that there are not facts placed before court on which the special pleas can be properly determined.

[23] My reading of the special pleas raised, suggests that there are facts placed before court on the basis of which the determination can be made. These facts have been incorporated in the special plea. A special plea was not designed to be the bearer of facts. Its purpose is to convey the nature and ambit of the special plea and no more.

[24] It accordingly stands to reason that these facts alleged by the defendants have not, however, been placed before court in the conventional manner. They are accordingly not facts for the purpose of determining a special plea and upon which the court is entitled to rely. To this extent, it seems to me that the defendants'

special pleas, in the absence of facts, properly placed before court, cannot be sustained.

[25] It would appear to me that special pleas can be divided into two categories. There are those that are capable of being decided on the pleadings as they stand, without a need to adduce evidence in support. On the other hand, there are those that require the adduction of evidence. In this regard, a defendant must carefully consider the special pleas intended to be raised and make an election as to whether evidence is necessary or not. Where evidence is necessary but is not led, that might be the end of the road regarding that special plea. Each case must, having said this, turn on its own peculiar facts.

[26] What I intend to do at this juncture, having laid down the applicable principles, it appropriate that I now deal in turn with each of the special pleas raised by the defendants. I will commence with the one regarding *locus standi*.

Locus standi and authority

[27] Mr. Diedericks referred the court to a judgment by the Supreme Court in *Joseph v Joseph*⁵ where the court reasoned as follows about special pleas:

‘Special pleas are to be raised where, apart from the merits, there is “some special defence not apparent *ex facie* the particulars of claim. Hence, if it is apparent from the particulars of claim that the plaintiff lacks *locus standi*, this must be raised by way of an exception. The fact that there was no evidence or allegations necessary in addition to what is referred to as for the purposes of the special plea is also evident from the fact that the point was argued on the pleadings without need for any evidence. This was thus a case where the *locus* point should have been raised as an exception and not as a special plea.’

[28] It is clear, from a reading of the above case, that a special plea is one to be properly raised in cases where the defect complained of is not apparent from the

⁵ *Joseph v Joseph* SA 44/2019; SA 18/2020, para 24.

particulars of claim. In this particular case, the issue of *locus standi*, from the *Joseph* case, should have been raised by way of an exception.

[29] Even if I may be incorrect in that connection, it appears to me that where the issue is raised in connection with the lack of authority to institute proceedings, this is a matter that would require the adduction of evidence. This is so because there are no facts, properly placed before court, which can enable the court to determine the question whether the proceedings were properly authorised.

[30] As foreshadowed above, the defendants go to lengths in stating facts on which their point relating to authority is predicated. In the absence of admissible evidence, properly placed before court, it becomes clear that the court cannot properly or at all adjudicate the matter. I am of the considered view that the special plea relating to authority and *locus standi*, accordingly must fail.

Failure to exhaust internal remedies

[31] The defendants, as stated earlier, also raise the question of the plaintiff's alleged failure to exhaust local or internal remedies. In this connection, the special plea refers to the provisions of article 5(b) of the plaintiff's constitution as being the internal remedy that was available but not exercised by the plaintiff.

[32] It would appear to me that this special plea falls in a different category. It is not, in my view, necessary for the defendants to have adduced oral evidence in order to place facts before court that would conduce to a determination of the legal issue raised. It seems to me that this is an issue that can be decided by reference to the relevant provision of the plaintiff's constitution and no more.

[33] Article 5 of the plaintiff's constitution deals with disciplinary measures applicable to members of the plaintiff who are alleged to have violated the plaintiff's constitution and the National Programme for Reconstruction and Development. Art 5(a) prescribes that such members who would have violated the said documents for the 'first or second time would be warned, and helped in a comradely way.'

[34] In those instances where the transgression is serious, so the provision continues, a member may be suspended pending investigations or a hearing. Depending on the outcome, the member may be removed from office or expelled from the plaintiff if the Central Committee takes the view that the violation is extremely serious or the member has proved to be unrepentant or incorrigible.

[35] Article 5(b), which is the focal point of argument by the defendants, reads as follows:

‘The PB may appoint a Disciplinary Committee (DC). The DC task shall be to recommend appropriate disciplinary action against Party members and officials. Should SWANU Central Committee be of the opinion that the violation is of an extreme nature and/or that the member has proved to be unrepentant or incorrigible.’

[36] The exhaustion of domestic or local remedies is a principle that is well recognised in our law. The question has been settled by the Supreme Court in *Namibia Competition Commission v Wal-Mart Stores*.⁶ The Supreme Court held that in deciding whether in a particular case, it is necessary to exhaust domestic remedies, the wording of the relevant provision must be taken into account. Secondly, whether the domestic remedy would be sufficient to afford practical relief in the circumstances.

[37] In *National Union of Namibian Workers v Naholo*⁷ this court expressed itself as follows on this question:

‘I gain more assistance from the approach adopted in the matter of *Welkom Village Management Board v Leteno*, 1958(1) SA 490 (AD), where Olgivie-Thompson AJA held at 502D “Whether domestic remedies are provided by the terms of a Statute, regulation or conventional association, it is necessary to examine the relevant provisions in order to ascertain how far, if at all, the ordinary jurisdiction of the Court is thereby excluded or deferred” . . . and at 503C-D “ . . . that the mere existence of a domestic remedy did not conclude the question, since it is in each case necessary to consider all the circumstances

⁶ *Namibia Competition Commission v Wal-Mart Stores Inc.* 2012 (1) NR 69 (SC).

⁷ *National Union of Namibian Workers v Naholo* 2006 (2) NR 659, para 59.2.

in order to determine whether the necessary implication arises that the Court's jurisdiction is either wholly or at least deferred until the domestic remedies have been exhausted . . . ' and in my judgment, the necessary implication in question can seldom, if indeed ever, arise when the aggrieved person's very complaint is the illegality or fundamental irregularity of the decision which he seeks in the Courts.'

[38] It is clear therefore that what the court has to do in these cases, is to consider whether the wording employed in the provisions makes it mandatory to exhaust domestic remedies before approaching the court. Having regard to art 5(b), there is no indication whatsoever that the plaintiff intended that parties, including itself, should not approach without having exhausted the local remedy provided in art 5(b).

[39] I am accordingly of the considered view that the defendants' special plea in this regard should fail. Nothing in the wording of the relevant provision conveys an intention by the constitution makers, to defer the court's jurisdiction in mandatory terms.

[40] In *Sibeko & Another v Minister of Police and Others*⁸ Stegmann AJ stated the following regarding the failed special pleas:

'Accordingly, where a defendant properly delivers a special plea with no plea over, and thereby misses the opportunity offered by Rule 22 to deliver a plea on the merits, and where such a special plea is set down for hearing, and where the special plea fails to achieve its objective of eliminating the need to canvass the merits or of postponing such need pending the taking of some step which the plaintiff may have omitted, the Court will then allow the defendant a further opportunity to deliver a plea canvassing the merits and thereby proceeding to *litis contestatio*.'

[41] I am of the considered view that the approach quoted above must be taken with a pinch of salt in this jurisdiction. I say so for the reason that it is consonant with the objectives of judicial case management stated in rule 1(3), for a defendant, who wishes to deliver a special plea, to also plead over on the merits.

⁸ *Sibeko & Another v Minister of Police and Others* 1985 (1) SA 149 (WLD) at 158 E-F.

[42] In a case like the present, where the special pleas have been dismissed, the parties have to go back to the drawing board for the subsequent steps of exchanging the pleadings to continue. If, on the other hand, the defendants had pleaded over on the merits, the matter would have proceeded to the next case of case management, without incurring loss of time in that regard.

[43] Cases differ markedly in their nature and idiosyncrasies. There may well be cases where on account of their peculiar facts, it may not be prudent to plead over on the merits. In the majority of cases, however, this one included, parties should plead over on the merits even if a special plea is raised so as to fall in line with the objectives of judicial case management, which are to facilitate the resolution of cases on the real issues in dispute justly, and speedily, efficiently and cost effectively. Every decision, at every turn, must be influenced if not directed by this consideration.

Conclusion

[44] I am of the considered view, having considered the argument and the conclusions thereon, that the special pleas cannot, for the reasons advanced above, be sustained. They are bound to fail.

Costs

[45] The law relating to costs is trite. Costs ordinarily follow the event. There is no basis, in the premises why that beaten track should not be followed in this matter. There is no argument advanced by the defendants nor are there any facts that call for a departure from that course.

[46] I should mention, however, that a special plea is not interlocutory in nature. Accordingly, the provisions of rule 32(11), do not apply in this matter.⁹

Order

⁹ *Uvanga v Steenkamp* (I 1968/2014) [2016] NAHCMD 378 (2 December 2016).

[47] Having regard to the discussion and conclusions above, the following order commends itself as being appropriate in this matter:

1. The defendants' special pleas are dismissed.
2. The defendants are ordered to pay the costs of the application, consequent upon the employment of instructing and one instructed legal practitioner.
3. The matter is postponed to 24 March 2022, at 08:30 for further directions.
4. The parties are ordered to file a revised joint case plan and draft case planning order on or before 19 March 2022.

T.S. Masuku
Judge

APPEARANCES:

PLAINTIFF: J. Diedericks
Instructed by: Tjitemisa & Associates

DEFENDANTS: S. Nyashanu
Of Koep & Partners