

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, HELD AT WINDHOEK

RULING ON SPECIAL PLEA

Practice Directive 61

Case Title: Andreas Nelumbu v New Era Publication Corporation New Era Festus Nakatana Edward Mumbuu	Plaintiff First Defendant Second Defendant Third Defendant Fourth Defendant	Case No: HC-MD-CIV-ACT-DEL-2022/04549
		Division of Court: High Court (Main Division)
Heard before: Honourable Justice Sibeya		Date of hearing: 17 April 2023
		Ruling delivered on: 20 April 2023
Neutral citation: <i>Nelumbu v New Era Publication Corporation and Others</i> (HC-MD-CIV-ACT-DEL-2022/04549) [2023] NAHCMD 208 (20 April 2023)		
The order: 1. The first, second, third and fourth defendants' special plea of non-joinder is dismissed.		

2. The first, second, third and fourth defendants must, jointly and severally, the one paying the other to be absolved, pay the plaintiff's costs of opposing the special plea of non-joinder subject to rule 32(11).
3. Parties must file their discovery affidavits and exchange bundles of discovered documents on or before 5 May 2023.
4. The parties must file a joint case management conference report and a draft order on or before 8 May 2023.
5. The matter is postponed to 11 May 2023 at 08:30 for case management conference hearing.

Reasons for the order:

SIBEYA J

Introduction

[1] In the furtherance of the ancient rule of natural justice, parties with an interest to the suit must be joined to the proceedings so as to afford them an opportunity to be heard. The interest is, however, not that of any curious person but that of one who has a direct and substantial interest in the subject matter of the litigation.

[2] The plaintiff instituted action for a claim based on alleged defamatory statements published by the defendants in their print media (newspaper). The claim is defended by all defendants. In their joint plea, the defendants raised a special plea of non-joinder of the Minister of Home Affairs, Immigration, Safety and Security ("the Minister"). The special plea is opposed by the plaintiff.

The parties and their representation

[3] The plaintiff is Mr Andreas Nelumbu, a major male resident of Windhoek, employed as a Commissioner in the Namibian Police Force under the Ministry of Home Affairs, Immigration, Safety and Security ("the Ministry").

[4] The first defendant is New Era Publication Corporation, an entity established in terms of the New Era Publication Corporation Act No. 1 of 1992, with its principal place of business situated at Daniela Tjongarero Houze, corner of Dr. Kulz and Kerby Streets, in Windhoek.

[5] The second defendant is New Era, owned by the first defendant, registered as a print media (newspaper) with registration number 06/08/91 and its principal place of business as the address of the first defendant.

[6] The third defendant is Mr. Festus Nakatana, a major male employed as the Managing Editor of the first and second defendants and whose address of service is the address of the first defendant.

[7] The fourth defendant is Mr. Edward Mumbuu, a major male employed by the first and second defendants as a Reporter and/or Journalist and whose address of service is the address of the first defendant.

[8] Where reference is made to all the defendants, they shall be referred to as the defendants. Where the defendants and the plaintiff are referred to jointly, they shall be referred to as the parties.

[9] The plaintiff is represented by Mr Bangamwabo while the defendants are represented by Mr Shimakeleni.

Relief sought

[10] In the main action, the plaintiff claims against the defendants, jointly and severally, the one paying the other to be absolved:

1. Payment in the amount of N\$300 000;

2. Interest on the aforesaid amount at a rate of 20% per annum from the date of judgment to the final day of payment;

3. An order directing the Defendants to unconditionally retract the false and defamatory statements and/or words within ten (10) days of the Order of this Honourable Court;
4. An order directing the Defendants to publicly apologise to the Plaintiff within ten (10) days of the order of this Honourable Court;
5. Cost of suit;'

[11] In the special plea against the plaintiff's aforesaid claim, the defendants raised a special plea of non-joinder of the Minister. The defendants aver that the plaintiff's claim is based on allegations made in a newspaper article where he was cited in his official capacity as a Police Commissioner and Head of Logistics. The Minister is, therefore, a necessary party who should be joined to the proceedings, claims the defendants.

[12] The defendants contend that the plaintiff's failure to join the Minister should result in the dismissal of the plaintiff's claim with costs, in the alternative, the plaintiff's claim should be stayed pending the joinder of the Minister. As alluded herein above, the plaintiff opposes the special plea of non-joinder.

The law

[13] Damaseb JP in *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others*,¹ discussed the joinder of a necessary party and said the following:

'The leading case on joinder in our jurisprudence is *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). It establishes that it is necessary to join as a party to litigation any person who has a direct and substantial interest in any order which the court might make in the litigation with which it is seized. If the order which might be made would not be capable of being sustained or carried into effect without prejudicing a party, that party was a necessary party and should be joined except where it consents to its exclusion from the litigation. Clearly, the ratio in *Amalgamated Engineering Union* is that a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of

¹ *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC) at 447 para 32.

the court, has a direct and substantial interest in the matter and should be joined as a party.’

[14] Cheda J in *Maletzky v Minister of Justice and Others*,² remarked as follows at paragraph 10 regarding non-joinder of necessary parties:

‘[10] A direct and substantial interest is an interest in the right which is the subject matter of the litigation by the litigant and not merely a pecuniary interest. See *Ex parte Sudurhavid (Pty) Ltd: In re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd*. Our courts have, in the interests of justice, adopted a strict approach to the need for joinder of parties with direct and substantial interest to an extent that when that need becomes apparent, they will ensure that interested parties are afforded an opportunity to be heard. This, of course, is in line with the time-honoured and revered principle of *audi alteram partem*.’

[15] Miller AJ in *Ondonga Traditional Authority v Oukwanyama Traditional Authority*³ said the following at paragraph 13 regarding joinder of a necessary party:

‘[13] It is trite law that when a person has an interest of such a nature that he or she is likely to be prejudicially affected by a judgment given in the action, it is essential that such person be joined either as an applicant or as a respondent. The objection of non-joinder may be raised where the point is taken that a party who should be before court has not been joined or given notice of the proceedings. The test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned.’

[16] I am in agreement with the above authorities as constituting good law on joinder of a necessary party.

The defendants’ arguments

[17] The defendants state that the article that forms the subject matter was published on 27 September 2022 titled ‘Top cops plot thickens’ subsequent to an investigation conducted by the defendants, reported on alleged dealings within the Namibian Police Force and included the plaintiff. The defendants state that they published the report based on the alleged improper conduct, malpractice and misuse of official property by

² *Maletzky v Minister of Justice and Others* 2014 (4) NR (HC) 960-961.

³ *Ondonga Traditional Authority v Oukwanyama Traditional Authority* (A 44-2013) [2025] NAHCMD 170 (27 July 2015) para 13.

members of the Ministry. Before the article was published, the defendants aver that, the plaintiff was contacted to comment thereto but he declined the invite.

[18] Mr Shimakeleni argued that the Minister needs to comment and/or participate in the proceedings as the leading character in the article is the Ministry and not the plaintiff. Besides, argued Mr Shimakeleni, the plaintiff was referred to in his official capacity as a Police Commissioner, Head of Logistics. Mr Shimakeleni, in written arguments, relied on the following sentence quoted from the article in question where it is recorded that: "Refer your questions to the Inspector General Nelumbu said yesterday upon enquiry." He argued that the said passage demonstrates that even the plaintiff's position was that the Inspector-General, who represents the Ministry, should respond to the questions raised.

[19] Mr Shimakeleni argued that it will not be in the interest of justice not to join the Minister as the Minister needs to answer or comment on the allegations.

[20] Mr Shimakeleni concluded his arguments by submitting that the plaintiff confirmed that his private residence was searched on three different occasions by members of the police. On this basis, he submitted, the Minister is an interested party who must be afforded an opportunity to participate in the proceedings and shed light on the reason for the searches.

The plaintiff's arguments

[21] The plaintiff states that the Minister has no direct and substantial interest in the subject matter of the litigation required to be joined to these proceedings. It is not just an indirect or remote interest required to be established. Mr Bangamwabo responded to the defendants arguments pound for pound as it were. He argued that orders sought in the main action against the defendants do not affect or prejudice the Minister.

[22] In respect of Mr Shimakeleni's argument that it is necessary for the Minister to be joined so that the Minister, as the protagonist in the article, can comment or answer to the allegations in the said article, Mr Bangamwambo argued the contrary that this is a personal claim. Mr Bangamwambo augmented his argument that the plaintiff's claim emanates from the alleged defamatory statements published by the defendants to the

detriment of the plaintiff's dignity and good name. He called for the dismissal of the special plea of non-joinder with costs not capped by rule 32(11) of the Rules of this Court.

Analysis

[23] At the outset it should be made clear that the plaintiff's damages claim arose from the allegations forming part of the newspaper article titled 'Top cops plot thickets' where it was alleged that:

'One of the police's alleged enfants terribles is head of logistics Andreas Nelumbu, who allegedly stole a power generator and has been using a police vehicle on his private farm in northern Namibia, charges which were allegedly swept under the rug under Ndeitunga's stewardship... (the plaintiff) is accused of contravening the State Finance Act, Police Act and Treasury Instructions ... it is under his watch that 90 firearms and ammunitions from the police depot in Windhoek vanished into thin air, without a trace.'

[24] The plaintiff claims that the above statements damaged his reputation, good name and dignity, as a result of which he instituted a personal claim. The question that begs an answer is whether or not the Minister has a direct and substantial interest in the plaintiff's claim being the subject matter of the litigation. The question may further be whether or not the Minister will be affected or prejudiced by any order that the court may deliver in the main action in view of the relief sought by the plaintiff as quoted above.

[25] The relief sought are personal to the plaintiff in their nature, form and purpose. Even if the defendants attempt to paint the plaintiff's claim as official, the delictual claim remains personal for alleged damages to good name, character and dignity. The fact that the plaintiff is a Commissioner in the Namibian Police Force and that he identifies himself as such adds or subtracts no value to the fact that his claim is personal in nature.

[26] In my considered view, no order by the court on the relief sought by the plaintiff can affect or prejudice the Minister. This finding is at the backdrop of the fact that the claim amount is against the defendants for what they are alleged to have done which allegedly injured the plaintiff's good name and dignity. The retraction of the statements in the article and the apology sought by the plaintiff by equal measure have nothing to do with the Minister.

[27] In any event, despite the defendants claiming that the Minister has a direct and

substantial interest in the matter, the defendants failed to explain the nature of such interest. All that the defendants brought to the fore is a label that the Minister has an interest in the matter without substantiating it. It follows, therefore, that the defendants failed to establish that the Minister has a direct and substantial interest in the matter.

[28] At best, it appears from the defendants' papers that it is their wish to have the Minister joined to the proceedings so that the Minister can comment on the aforesaid newspaper article which forms the subject matter of the litigation. Requiring the Minister to comment is not a test to determine whether or not such Minister has a direct and substantial interest in the matter, quite far from it. If the defendants are serious with requiring the Minister to comment on the article, they can call or subpoena the Minister as their witness to testify at the trial.

[29] Mr Shimakeleni further argued that the police conducted three searches at the plaintiff's premises, which searches are admitted by the plaintiff, and this means there is merit to the allegations published by the defendants and therefore raises the direct interest of the Minister in the matter. The court is privy to the basis on which the police officers searched the premises of the plaintiff, or if it was on the authority of a search warrant, what the information was on which search warrant was issued. The court is, therefore, unable to make a determination in a vacuum. It follows this argument lacks merit.

Conclusion

[30] In view of the above findings and conclusions, the court is of the view that the defendants failed establish that the Minister has a direct and substantial interest in the subject matter of this litigation. The defendants further failed to establish that the relief sought by the plaintiff in the main action is capable of prejudicing or affecting the Minister, for the Minister to be joined to the proceedings.

[31] For the reasons set out above, the special plea raised by the defendants ought to be dismissed for being unmeritorious.

Costs

[32] It is a well-beaten principle of our law that costs follow the result. The plaintiff succeeded to repel the special plea of non-joinder and is, therefore, entitled to an award of costs. This, being an interlocutory application means that the costs to be awarded should be capped in accordance with rule 32(11) unless ordered otherwise. In *casu*, I find no justification to depart from rule 32(11), thus the costs will be capped accordingly.

Order

[33] In the result, I deem the following order to meet the justice of this matter:

1. The first, second, third and fourth defendants' special plea of non-joinder is dismissed.
2. The first, second, third and fourth defendants must, jointly and severally, the one paying the other to be absolved, pay the plaintiff's costs of opposing the special plea of non-joinder subject to rule 32(11).
3. Parties must file their discovery affidavits and exchange bundles of discovered documents on or before 5 May 2023.
4. The parties must file a joint case management conference report and a draft order on or before 8 May 2023.
5. The matter is postponed to 11 May 2023 at 08:30 for case management conference hearing.

Judge's signature:	Note to the parties:
Sibeya J	Not applicable.
Counsel:	
Plaintiff	Defendants
F Bangamwabo of FB Law Chambers, Windhoek	A Shimakeleni Of Appolus Shimakeleni Lawyers, Windhoek

