

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**RULING**

Case No.: HC-MD-CIV-ACT-CON-2020/02288

In the matter between:

**HELIOS ORYX LIMITED**

**PLAINTIFF**

And

**ELISENHEIM PROPERTY DEVELOPMENT COMPANY (PTY) LTD      DEFENDANT**

**Neutral citation:** *Helios Oryx Limited vs Elisenheim Property Development Company (Pty) Ltd* (HC-MD-CIV-ACT-CON-2020/02288) [2022] NAHCMD 26 (3 February 2023)

**Coram:** PRINSLOO J

**Heard:** 18 January 2023

**Delivered:** 3 February 2023

**Flynote:** Civil Procedure – Interlocutory – Application to strike-out – Separation application – Whether this court should order that the proceedings be confined to the hearing of the special plea separately from the merits of the matter or not –

Condonation granted – The newspaper articles are held to be hearsay and therefore inadmissible – The application for separation is dismissed.

**Summary:** The defendant applied for condonation in terms of rule 55 of the Rules of Court, seeking an order to condone its failure to file its expert witness statements in terms of the court order dated 3 August 2022. The application for condonation was not opposed by the plaintiff and was accordingly granted.

*Application to strike-out:* On 4 November 2022, the defendant commenced with an application in terms of rule 63(6) of the Rules of court for an order that a special plea be adjudicated separately from the plaintiff's claim.

*Held that:* I find that the averment regarding the woes of TGH is irrelevant but not prejudicial to the defendant. The newspaper articles are held to be hearsay and therefore inadmissible.

*Separation application:* The question before court for determination is therefore whether this court should under the circumstances of this matter, order that the proceedings be confined to the hearing of the special plea separately from the merits of the matter or not.

The defendant maintains that granting the separation application will assist in having the plaintiff's claim disposed of in a cost and time-efficient manner. The defendant argues that as the pleadings stand, the plaintiff will have to approach the court again if it is successful in its claim to obtain an order to declare the property that forms the subject of the mortgage bond executable. To do this, the plaintiff requires consent from Bank Windhoek, which was previously refused.

The plaintiff opposed the application for separation of the special plea from the merits of the matter and submitted that the special plea has no merit as the plaintiff is entitled to pursue its claim solely on the guarantee. Any allegations concerning the mortgage bond

would be a plus petitio or demanding by the plaintiff in his pleading of more than he proves either in amount or as to time or condition of performance.

*Held that* the court is of the view that the issues between the parties are interlinked to a degree that it is not advisable to grant the separation application. The application for separation is therefore dismissed.

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### ORDER

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- 1) The defendant's application for condonation for the non-compliance with the court order 3 August 2022 is condoned. No order as to costs.
- 2) The defendant is directed to file its expert witness summary and statement on or before 24 February 2023.
- 3) The strike-out application is dismissed. No order as to costs.
- 4) The separation application is dismissed with costs. Such cost includes the costs of one instructing and two instructed counsel. The costs are not limited in terms of rule 32(11) of the Rules of Court.

Further conduct of the matter:

- 5) The matter is postponed to 23 March 2023 at 15h00 for pre-trial conference.
- 6) The parties are directed to file a joint proposed pre-trial order on or before 20 March 2023.

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### RULING

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PRINSLOO J:

Introduction

[1] This matter has an extensive history of litigation, and sadly, despite many months of judicial case management, this matter has yet to reach the point of a pre-trial conference. The reason is that the parties have been entangled in interlocutories, and the current proceedings are no different.

[2] The applicant in the current proceedings is the defendant, Elisenheim Property Development Company (Pty) Ltd. The respondent is Helios Oryx Limited, the plaintiff in the main action. I intend to refer to the parties as they are in the main action to ensure everything is clear.

### Background

[3] The application before me is three-fold, and I intend to discuss the applications in the following sequence, i.e;

- a) A condonation application;
- b) A strike-out application;
- c) An application for separation.

### Condonation application

[4] The defendant applied for condonation in terms of rule 55 of the Rules of Court, seeking an order to condone its failure to file its expert witness statements in terms of the court order dated 3 August 2022. The application for condonation was not opposed by the plaintiff and was granted during the hearing of this matter.

### Strike-out application

[5] On 4 November 2022, the defendant commenced with an application in terms of rule 63(6) of the Rules of Court for an order that a special plea be adjudicated separately from the merits of the matter.

[6] A comprehensive opposing affidavit was filed by the plaintiff in opposition to the defendant's application wherein it detailed its grounds for opposition to the relief sought by the defendant

[7] In the answering affidavit of Mr Bossau, the plaintiff's legal practitioner of record, the following was stated:

'41.3.4 It might also be that the defendant is liquidated by a third party, then there would not necessarily be any further approach to court at all. The recent woes of TGH and its subsidiaries have been well documented. Attached hereto marked as "HD2" are recent newspaper articles detailing this.'

[8] Mr Bossau attached to his answering affidavit several newspaper articles, consisting of 36 pages, dealing with the dispute between the Bank of Namibia (BON) and Trustco Bank of Namibia (TBN).

[9] The defendant, in its replying affidavit deposed to by Mr Floors Abrahams, takes issue with the averments made by Mr Bossau in para 41.3.4 of his answering affidavit and the articles annexed to it. The defendant believes that the information contained in para 41.3.4 are secondary facts that do not concern the defendant as the information contained in the newspaper articles is based upon the litigation between BON and TBN. The defendant contends that the contents of the newspaper articles are vexatious and irrelevant hearsay at best, and carry no evidential weight.

[10] The defendant further submits that the reference to possible liquidation of the defendant is nothing but unmeritorious speculation on the part of the plaintiff.

[11] As a result of the averments mentioned above and the filing of the newspaper articles, the defendant applied for the striking out of para 41.3.4 and the annexures to it.

[12] It was argued on behalf of the defendant that:

- a) the averments do not contribute to the factors that the court must consider in deciding the application for separation and are thus irrelevant;
- b) the averments were designed to side-track the court from the main considerations it need to consider;
- c) the inclusion of defamatory and vexatious allegations in the answering affidavit is unreasonable.

[13] In response to the defendant's complaint, the plaintiff's counsel submits that the plaintiff adduced evidence revealing the serious financial and legal woes facing Trustco Holding Group (THG) and its subsidiaries, of which the defendant is one. Counsel contends that the newspaper articles were neither speculatively nor vexatiously raised as the information stems from seven different newspaper articles, which reported on (in summary):

- a) BON having sought to liquidate TBN on account of flaws in its risk management;
- b) That TBN has become commercially insolvent;
- c) That THG had to apply to the High Court, South Africa, to interdict the JSE from suspending its listing, and
- d) The losses suffered by THG since 2018.

[14] Counsel further points out that para 41.3.4 must be considered within the context that the statement was made. More specifically, in response to the defendant's allegation that the effect of the plaintiff's amended particulars of claim is that it will be required to approach the court once more to seek an order to declare the property that forms the subject matter of the mortgage bond to be declared specifically executable, giving rise to the undue protraction of the proceedings.

[15] Counsel submits that insofar as para 41.3.4 goes, the plaintiff merely pointed out that an approach to court may not be necessary if the defendant was liquidated by a third party.

[16] Counsel pointed out that the defendant was afforded the opportunity to address these allegations but failed to address the newspaper articles head-on to illustrate that the reports were baseless, vexatious or scandalous and further failed to dispute that any of the alleged litigation was ongoing.

### Relevant legal principles

[17] Rule 70(4), reads as follows:

'(4) The court may, on application made to it, order to be struck out from an affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs on the scale as between legal practitioner and client, but the court may not grant the application unless it is satisfied that the applicant will be prejudiced in his or her case if it is not granted.'

[18] If one reads the rule carefully, it is clear that the three grounds on which an application to strike out can be made are where an averment is: i) scandalous, (ii) vexations, or (iii) irrelevant. However, the rule imposes a further requirement, namely, that the court may not grant the relief sought unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if not granted.

[19] *Vaatz v Law Society of Namibia*<sup>1</sup> is the leading case in Namibia on the interpretation and application of rule 70(4). Damaseb DCJ summarised the principles set out in the *Vaatz* matter as follows<sup>2</sup>:

'Scandalous matter is allegations which may or may not be relevant, but are so worded as to be abusive or defamatory.

- Vexatious matter is allegations which may or may not be relevant, but are so worded as to convey an intention to harass or annoy.

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<sup>1</sup> *Vaatz v Law Society of Namibia* 1990 NR 332 (HC) at 334J-335B.

<sup>2</sup> Petrus T Damaseb *Court-Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice*, 1<sup>st</sup> Ed Juta 2020 para 6-060 at 165.

- Irrelevant matters are allegations which do not apply to the matter in hand and do not contribute in any way or the other to a decision of the matter.
- The phrase 'prejudice to the applicant's case' does not mean that the innocent party's chances of success will be reduced if the court allows the offending allegations to stand. It is substantially less than that and how much less will depend on the circumstances of the case. If retaining the alleged offending matter would have the result of side-tracking the innocent party from the main issue or defame them, such matter is prejudicial to the innocent party and ergo, must be struck.'

### Application to the facts

[20] The relevant legal principles of strike-out applications are common cause between the parties.

[21] Considering the wording of para 41.3.4, it is neither scandalous nor vexatious. Therefore, the question to consider is whether it is irrelevant.

[22] The remark regarding the 'recent woes of TGH and its subsidiaries have been well documented' has no application to the matter at hand and does not contribute to the decision on the separation application one way or the other and is therefore irrelevant.

[23] What should, however, be born in mind is that even if an averment is irrelevant, the rule provides that the court may not grant the relief sought unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if not granted<sup>3</sup>. I considered the papers and the arguments advanced but fail to see where the prejudice lies. I am not satisfied that the defendant showed that it would suffer any prejudice should the averments in para 41.3.4 be left to stand.

[24] That is however not the end of the matter. There is still the issue of the newspaper articles. Newspaper articles are not generally accepted as evidence of the

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<sup>3</sup> Rule 70(4) of the Rules of Court. Also see *Stephens v De Wet* 1920 AD 279 at 282.



facts contained in them. Newspaper articles without proof of the facts through a witness is of no value. It is, at best hearsay secondary evidence, which is not proven by any material facts and is therefore inadmissible.

[25] Therefore in summary, I find that the averment regarding the woes of TGH is irrelevant but not prejudicial to the defendant. The newspaper articles are held to be hearsay and therefore inadmissible.

### Separation application

[26] The defendant brought an application in terms of rule 63(6)<sup>4</sup> on 4 November 2022, praying for the following relief:

- '1.The defendant's special plea as set out in paragraph 1 of its plea must be determined prior and separate to the hearing of the merits of the plaintiff's claim.
2. Directing that all further proceedings be stayed until such separated issues have been finally disposed.
3. That the plaintiff pays the costs of the application, including costs of one instructing and two instructed Counsel and that the limits imposed by Rule 32(11) shall not apply.
4. Further and/or alternative relief.'

[27] The background of this matter has been well documented throughout the judgments rendered by this court, but to bring the application into context, I will refer in brief terms to the history of the matter.

[28] As can be seen from the pleadings the initial claim by the plaintiff arose from a written demand guarantee (dated 29 December 2016) and a covering mortgage bond (dated 31 January 2017) as security to the plaintiff for the performance of THG.

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<sup>4</sup> '(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.'

[29] The defendant raised an exception to the plaintiff's particulars of claim on the basis that the plaintiff did not plead that Bank Windhoek consented that action may commence. The defendant contended that failure by the plaintiff to make the aforementioned averment rendered the plaintiff's particulars of claim without a cause of action, and was as a result excipiable.

[30] The plaintiff sought to amend its particulars of claim as a result of the exception raised by the defendant. The plaintiff simultaneously approached Bank Windhoek to obtain consent to act on the mortgage bond. Bank Windhoek refused to give consent.

[31] The plaintiff amended its particulars of claim by claiming monetary relief in the amount of N\$19 854 340,95 only. Accordingly, in terms of the amended particulars of claim dated 10 June 2021, the plaintiff no longer sought an order declaring the immovable property executable.

[32] The defendant withdrew its exception on 5 October 2021. On 21 October 2021, the defendant filed a special plea to the plaintiff's particulars of claim. The defendant's special plea is in summary that the plaintiff's cause of action is bad in law because the plaintiff only seeks a monetary judgment pursuant to the amendment of its particulars of claim and no longer seeks to perfect its security on the mortgage bond.

#### *Defendant's founding papers*

[33] In its founding papers, the defendant maintains that granting the separation application will assist in having the plaintiff's claim disposed of in a cost and time-efficient manner. The defendant argues that as the pleadings stand, the plaintiff will have to approach the court again if it is successful in its claim to obtain an order to declare the property that forms the subject of the mortgage bond executable. To do this, the plaintiff requires consent from Bank Windhoek, which was previously refused.

[34] The defendant submits that if Bank Windhoek refuses to allow the plaintiff to act against the mortgage bond it holds, it will cause the plaintiff to have a judgement to which no effect can be given.

[35] The defendant pleads that the plaintiff's amended particulars of claim do not disclose a cause of action. Therefore, if the defendant successfully argues the special plea, it will be the end of the plaintiff's claim. The defendant's counterclaim can be adjudicated without having to enter is in a long and extended trial.

[36] The defendant submits that the special plea can be conveniently decided separately as it is based upon succinctly phrased jurisprudence and that the defendant has the required prospects of success in respect of the special plea to succeed in its current application.

*The opposition to the separation application*

[37] The plaintiff opposed the application for separation of the special plea from the merits of the matter and submitted that the special plea has no merit as the plaintiff is entitled to pursue its claim solely on the Guarantee. Any allegations concerning the mortgage bond would be a plus petitio or demanding by the plaintiff in his pleading of more than he proves either in amount or as to time or condition of performance.

[38] The plaintiff submits that the defendant filed an exception to the particulars of claims and persisted with the exception months after the amendment was effected to the particulars of claim, and the relief against the mortgage bond was no longer sought. When the defendant eventually withdrew its exception, it was deemed a renouncement by it of the right to rely on the grounds contained in the exception. More specifically, in respect of the first ground of exception. The plaintiff submits that the defendant seeks to resuscitate its exception through the special plea, which is, in effect, the same as the abandoned exception.

[39] The plaintiff believes that the special plea taken by the defendant is patently bad in law. The plaintiff submits that the defendant's contention that the plaintiff must rely on the mortgage bond if it seeks a monetary claim is flawed as the defendant conflates the two processes, i.e. first obtaining the monetary judgment and secondly obtaining satisfaction of the monetary judgment.

[40] The plaintiff contends that the defendant seeks to rely on the wording of the mortgage bond that is not there. The plaintiff further argues that no authority precludes a litigant from obtaining a monetary judgment even if it does not seek an order to perfect its security and in light of the amendment to the particulars of claim it rendered the special plea moot.

[41] The plaintiff believes that the defendant is delaying the finalisation of the proceedings as the special plea was filed on 20 October 2021. Yet, the application for separation of the special plea from the merits was only filed in November 2022. According to the plaintiff, in the intervening period, the pleadings remained unchanged, and the defendant pursued an application to compel that did not affect the special plea.

[42] Therefore, the plaintiff contends that the current application attempts to protract and delay the proceedings.

### *Discussion*

[43] The respective counsel fully argued the matter and I do not intend to repeat the arguments, but will, where necessary refer to the said arguments.

[44] The question before court for determination is whether this court should under the circumstances of this matter, order that the proceedings be confined to the hearing of the special plea separately from the merits of the matter or not.

[45] In *Namibian Gymnastics v Namibia Sports Commission*<sup>5</sup> the court was referred to *Denel (Edms) v Vorster*<sup>6</sup>, on the issue of separation wherein where it was stated that:

'Rule 33(4) of the Uniform Rules – which entitles a Court to try issues separately in appropriate circumstance – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found not to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try and issue separately. But, where the trial court is satisfied that it is proper to make such an order – and, in all cases, it must be so satisfied before it does so – it is the duty of that court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion.'

[46] Sibeya J stated as follows in the *Namibia Gymnastics* matter<sup>7</sup> (and with which assessment I fully associate myself):

'[11] I hold no qualms with the said principle laid down in the interpretation of rule 33(4) of the Uniform Rules applicable to South Africa. I am further of the view that the passage quoted above finds application to rule 63(6) of the rules.

[12] What is apparent from rule 63 (6) is that the court has a discretion to determine whether a question of law or fact should be decided either prior to or separate from the hearing of the merits of the matter. In the exercise of its discretion, the court must bear in mind that the underlying objective of the rule is to ensure convenient and expeditious disposal of litigation. It is not a given that in every case where questions of law or fact is raised and applied for by any of the parties to be heard prior to or separately from the merits of the matter, that separation will be granted. The question of law or fact raised should be carefully considered in order to properly

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<sup>5</sup>*Namibian Gymnastics v Namibia Sports Commission* (HC-MD-CIV-ACT-OTH-2021/02269) [2021] NAHCMD 376 (19 August 2021)

<sup>6</sup> *Denel (Edms) v Vorster* 2004 (4) SA 481 (SAC) at para [3].

<sup>7</sup> *Ibid.*

determine or not whether it will be convenient and expeditiously dispositive of the matter to separate the hearing.’

[47] Unlike special pleas of jurisdiction and locus standi, the current special plea, in my view, does not go to the root of the plaintiff’s claim in light of the amendment to the plaintiff’s particulars of claim. I agree that this application is neither the time nor the place to decide whether the special plea raised by the defendant is good or not, nor whether it should be upheld or not.

[48] However it is clear to me that the gist of the special plea appears to be an extension of the exception which was withdrawn by the defendant in 2021 already. The general principle seems to be that if an exception is withdrawn then by implication the exceptor accepted that the exception had been resolved<sup>8</sup>. There are therefore merits in the question raised by the plaintiff whether this would then not account for the defence pleaded in the special plea as well.

[49] On the one hand the defendant submits that the exception was not withdrawn due to lack of merit but because evidence need to be lead and as a result, it decided to rather file a special plea. It is not clear what evidence would be required. On the other hand, the defendant had a change of heart and it would now appear that the defendant no longer wishes to call witnesses on the issue raised in the exception (and the special plea).

[50] The main thrust of the defendant’s argument is that separation between the hearing of special plea and the merits of the matter would save cost and time as the special plea would dispose of the plaintiff’s claim.

[51] However, even if the defendant succeeds in its special plea, it would not dispose of the matter as the defendant has a counterclaim against the plaintiff, which needs to be heard and adjudicated.

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<sup>8</sup> *De Klerk v Lee* 1926 SWA 56 at 58.

[52] From my reading of the pleadings, I am of the view that the issues between the parties are interlinked to a degree that it should not be separated. I also do not agree that the special plea will dispose of the plaintiff's claim, given it's the amended particulars of claim.

[53] Further, from a convenience point of view, it would also not be advisable to separate proceedings. For the past year the parties were solely engaged in interlocutory skirmishes without getting to the heart of the dispute between the parties. This is not in line with the overriding objective of the rule to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable<sup>9</sup>.

[54] The application for separation is therefore dismissed.

#### Costs

[55] The last issue to consider is the issue of costs. It is trite that the issue of costs falls within the discretion of this court.

[56] In respect of the three applications I find as follows:

- a) In respect of the condonation application, which proceeded unopposed, no cost was sought and none is granted.
- b) In respect of the application to strike out, I make no order as to cost.
- c) In respect of the separation application, the costs will follow the result. The inordinate delay by the defendant in bringing this application and the waste of time as a result of the conduct of the defendant must be met with a court order that shows the displeasure of this court. I am therefore of the view that cost should not be limited to rule 32(11) of the Rules of Court.

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<sup>9</sup> Rule 1(3) of the Rules of the High Court.

Order

[57] Following the discussion above, my order is as follows:

- 1) The defendant's application for condonation for the non-compliance with the court order 3 August 2022 is condoned. No order as to costs.
- 2) The defendant is directed to file its expert witness summary and statement on or before 24 February 2023.
- 3) The strike-out application is dismissed. No order as to costs.
- 4) The separation application is dismissed with costs. Such cost includes the costs of one instructing and two instructed counsel. The costs are not limited in terms of rule 32(11) of the Rules of Court.

Further conduct of the matter:

- 5) The matter is postponed to 23 March 2023 at 15h00 for pre-trial conference.
- 6) The parties are directed to file a joint proposed pre-trial order on or before 20 March 2023.

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J S PRINSLOO  
Judge

**APPEARANCES**

PLAINTIFF:

J Babamia SC assisted by Y Alli



Instructed by HD Bossau & Co.,  
Windhoek.

DEFENDANT:

J P Van Den Berg SC assisted by  
D H Hinrichsen  
Instructed by PD Theron & Associates  
Windhoek