

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING IN TERMS OF PRACTICE DIRECTION 61

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| Case Title: Hendrik Christian t/a Hope Financial Services and Namibia Financial Institutions Supervisory Authority Frans Jansen Van Rensburg | Plaintiff 1 st Defendant 2 nd Defendant | Case No: I 2232/2007 | Division of Court: Main Division | Heard on: 15 March 2024 |
| Heard before: Honourable Mr Justice Usiku | | Delivered on: 2 May 2024 | | |

Neutral citation: *Christian v Namibia Financial Institutions Supervisory Authority* (I 2232/2007) [2024] NAHCMD 205 (2 May 2024)

Order:

1. The plaintiff's recusal application filed on 23 October 2023, is dismissed.
2. The plaintiff is ordered to pay the costs of the first defendant occasioned by the recusal application. Such costs include costs of one instructing and one instructed counsel.
3. The plaintiff's rescission application filed on 8 May 2023, is dismissed.
4. The plaintiff is ordered to pay the costs of the first defendant occasioned by the rescission application. Such costs include costs of one instructing and one instructed counsel.
5. The plaintiff is hereby ordered to furnish security for costs to the first defendant.
6. The nature, form, manner and amount of the security to be furnished, shall be determined by the Registrar.
7. The parties shall, within 14 days of the date of this order, approach the office of the

Registrar to request a meeting where the assessment of such security shall be made.

8. The first defendant is hereby granted leave to approach this court on the same papers, in the event that the plaintiff fails to furnish the security in terms of this order.
9. The plaintiff is ordered to pay the costs of the first defendant occasioned by the application for security for costs. Such costs include costs of one instructing and one instructed counsel.
10. The matter is postponed to 19 June 2024 at 15h15 for a status hearing.
11. The parties shall file a joint status report on or before 12 June 2024.

Reasons for order:

USIKU J:

Introduction

[1] For the sake of convenience, the parties herein are referred to as in the main action. The second defendant was not served with the combined summons and he is no part of the present proceedings. I shall therefore refer to the first defendant as 'the defendant'.

[2] Presently, before court for determination, are four interlocutory applications namely:

- (a) plaintiff's rescission application, filed on 8 May 2023;
- (b) defendant's notices in terms of rule 61 (irregular proceedings) filed on 4 July 2023 and 11 August 2023, respectively;
- (c) defendant's application for security for costs, filed on 16 June 2023; and;
- (d) plaintiff's recusal application, filed on 23 October 2023.

[3] During oral argument, the defendant abandoned the notices in terms of rule 61, and I shall therefore, not deal with those notices herein.

Background

[4] This case has a long history. On 8 August 2007, the plaintiff, a lay litigant, instituted action against the first and second defendants, claiming payment in the amount of N\$2 911 402.15 together with interest and costs of suit. The defendants are being sued jointly and severally. The

plaintiff's claim is based on an alleged financial loss suffered by him as a result of an alleged interference by the second defendant with the plaintiff's business.

[5] A series of applications and court orders were made in the matter. During 2019, the plaintiff appealed to the Supreme Court. On 7 October 2019, the Supreme Court upheld the appeal, set aside various court orders made by the High Court and remitted the matter to the High Court to be placed under judicial case management for the determination of the further conduct of the case.

[6] The matter was then docket allocated to me. On 16 October 2019, I directed the parties to attend a case planning conference to be held on 4 December 2019. On that day, 4 December 2019, this court made an order directing the parties to attend to various issues, including service of the combined summons upon the second defendant by a deputy sheriff, (the plaintiff has not complied with this direction, to date); delivery of a rule compliant notice of intention to defend, if any, by the first defendant, and postponed the matter to a future date for the purposes of making such orders as are appropriate for the just and speedy disposal of the case.

[7] On 6 December 2019, the plaintiff requested to be furnished reasons for the order directing the defendant to file a notice of intention to defend. The court released its reasons for the order on 9 December 2019.

[8] On 24 January 2020, the plaintiff filed an application in terms of rule 61 (irregular proceedings). After the parties exchanged the necessary papers, this court heard the application and dismissed it on 2 June 2020.

[9] On 18 June 2020, the plaintiff filed an application for leave to appeal against the court order dated 2 June 2020. The matter was postponed to 25 September 2020 for hearing. On 25 September 2020, before the hearing started, the plaintiff indicated that he was not proceeding with the application for leave to appeal but would instead apply for my recusal from hearing the matter altogether.

[10] The recusal application was heard and dismissed on 4 December 2020.

[11] On 3 February 2021, the plaintiff indicated that he has filed an appeal to the Supreme Court against the court order dated 4 December 2020.

[12] The matter was postponed on various occasions pending the outcome of the plaintiff's appeal.

[13] The appeal, together with its accompanying condonation and re-instatement applications were struck from the roll during or about July 2022.

[14] During October 2022, the plaintiff indicated that he had filed a contempt of court against me, and requested that the matter be postponed pending the outcome of the contempt of court proceedings.

[15] The contempt of court application was by this court, differently constituted, and was struck from the roll on 16 February 2023.

[16] On 19 April 2023, this court made an order in the following terms:

'Having heard Mr H Christian the plaintiff self-represented, and Mr K Haraseb and having read the documents filed of record:

IT IS RECORDED THAT:

The first defendant reports that it intends to apply for security for costs against the plaintiff. The plaintiff has filed an application for summary judgment against the first defendant.

The court directs that the first defendant's application shall be heard first, on the grounds that:

(a) it makes logical sense, in terms of sequence, that an application for security for costs be heard first, before hearing an application for summary judgment and that;

(b) the first defendant has as far back as November 2022, sought directions regarding its intended application for security for costs.

It is further directed that directions regarding the plaintiff's application for summary judgment shall be considered after the application for security for costs is disposed of. The court makes the following order:

IT IS ORDERED THAT:

1. The first defendant must comply with rule 32(9) and (10) on or before 05 May 2023.

2. If the dispute is not amicably resolved, the first defendant must deliver notice for security in terms of rule 59(1) on or before 12 May 2023, and thereafter the provisions of rule 59(2) and (3) shall apply.
3. If the plaintiff contest liability to give security; or fails or refuses to furnish security demanded within 10 days of demand; or fails or refuses to furnish security within 10 days of registrar's decision; the first defendant must deliver application for security for costs, on or before 15 June 2023.
4. The plaintiff must deliver answering papers, if any, on or before 30 June 2023.
5. The first defendant shall deliver a reply, if any, on or before 13 July 2023.
6. The matter is postponed to 26 July 2023 at 15h15 for a status hearing.
7. The parties shall file a joint status report on or before 19 July 2023.'

[17] On 8 May 2023, the plaintiff filed an application for rescission of the court order dated 19 April 2023. This application is opposed by the defendant.

[18] On 16 June 2023, the defendant filed an application for security for costs. This application is opposed by the plaintiff, however, the plaintiff did not file any answering affidavit.

[19] On 23 October 2023, the plaintiff filed an application seeking my recusal from the matter. The defendant reported that it shall not oppose the recusal application on the basis that the present recusal application is a carbon copy of the first recusal application which was heard and dismissed on 4 December 2020.

[20] The foregoing are the three applications that his court is now called upon to determine. I shall first deal with the recusal application. I shall then deal with the rescission application. Finally, I shall deal with the application for security for costs.

The recusal application

[21] In the recusal application, the plaintiff seeks an order in the following terms:

- (a) the managing judge recuses himself from hearing this application;
- (b) in the alternative, that this court grants consent for the plaintiff to institute

proceedings against the managing judge.

[22] In the founding affidavit, the plaintiff asserts that the managing judge must not sit on this recusal application. If he does, he will be sitting in his own case and that will be inconsistent with the provisions of article 12(1)(a) of the Constitution and against the doctrine that 'no one is judge in his own case'.

[23] The plaintiff further asserts that the managing judge is not impartial, independent or competent. With regard to the issue of competence, the plaintiff asserts that the managing judge has never practised as a legal practitioner and lacks experience. The plaintiff contends that, in terms of the provisions of article 12(1)(a), he is entitled to an independent, impartial and competent court.

[24] The plaintiff alleges that there exist circumstances that 'reasonably create a suspicion that he (the managing judge) is not impartial and competent' and there is 'reasonable fear that the hearing of the main application so far was not just and fair.'

[25] The plaintiff proposes that this matter be heard by a full court.

[26] In regard to the recusal application, I am of the view that, with the exception of the plaintiff's reliance on the doctrine of 'no individual should act as a judge in their own case', the present application is substantially the same as the recusal application which was determined by this court on 4 December 2020.

[27] In regard to the alternative relief which the plaintiff seeks in the present recusal application, the plaintiff has not set out facts on which he relies for the relief sought. The plaintiff has also not set out the nature of the proceedings that he intends to institute against the managing judge, in respect of which he seeks the consent of this court.

[28] If I understand the plaintiff's complaint correctly, insofar as he relies on the rule against 'someone becoming a judge over their own cause', the plaintiff argues that since the managing judge is the subject of the recusal application, he should not preside over the recusal application.

[29] The trite legal position is that a judicial officer whose recusal has been sought has to decide the recusal application. If a judge of first instance refuses the recusal application and the

decision is wrong, it can be corrected on appeal.¹

[30] Insofar as the plaintiff's recusal application is based on the rule against someone being a judge over their own cause, the application has no merit and stands to be dismissed. Insofar as his application is based on the remainder of the issues raised in the recusal application, those issues were already determined by this court in its judgment delivered on 4 December 2020, and the same judgment applies.

[31] It therefore, follows that the plaintiff's recusal application stands to be dismissed.

The rescission application

[32] In the rescission application, the plaintiff seeks an order rescinding the order of this court dated 19 April 2023, as more fully set out in para 16 hereof.

[33] The reason for seeking rescission is that the managing judge at the time of making the order was under a mistaken belief that the defendant was first in requesting the court's directions in respect of its intended application for security for costs, whereas the plaintiff was first in seeking directions in respect of his intended application for summary judgment.

[34] Rescission (or variation) of a court order is governed by the provisions of rule 103 or the common law.

[35] An applicant seeking to rescind an order under rule 103 or under the common law is required to show that such order was made in his or her absence. In the present matter, the order dated 19 April 2023 was made in the presence of the plaintiff. There is no ambiguity or patent error in the order and the order was not granted as a result of a mistake common to the parties. In my view, having regard to the facts and circumstances of this case, the plaintiff has no legitimate ground for rescission within the ambit of rule 103 or the common law. The application for rescission of the court order dated 19 April 2023, therefore, stands to be dismissed.

Application for security for costs

[36] The defendant seeks an order for security for costs against the plaintiff in the following

¹ *The President of the Republic of South Africa v SARFU* CCT 16/1998, 4 June 1999.

terms:

- '1. That Hendrik Christian t/a Hope Financial Service... be ordered to furnish security for the (defendant's) costs in the amount of NS450 000;
2. Such security be given in the form and manner as directed by the Registrar, within 10 (ten) days of the order, failing which the proceedings in the main action be dismissed, alternatively, stayed until the security be furnished;
3. That the (defendant) may return to court on the same papers in the event that the (plaintiff) fails to give the security in terms of the order;
4. Further and alternative relief as the Honourable Court may deem appropriate;
5. Costs hereof against the (plaintiff) capped in terms of rule 32(11).'

[37] In its founding affidavit, the defendant avers that the plaintiff has initiated numerous vexatious proceedings against it, since 2007. The defendant further avers that the plaintiff has initiated no less than 36 proceedings against it, all relating to the same cause of action.

[38] According to the defendant, the plaintiff has also brought numerous unmerited interlocutory proceedings since 2007. As a result, the main action remains delayed whilst the defendant is embroiled in pointless interlocutory proceedings initiated by the plaintiff, thereby incurring unnecessary and excessive legal costs.

[39] The defendant avers further that, since 7 October 2019, the plaintiff instituted 13 different legal processes against the defendant in this court and made four complaints to the Judicial Service Commission about the presiding officers in those matters, under various case numbers.

[40] The defendant points out that most of the proceedings brought by the plaintiff were unsuccessful and that is indicative that the proceedings were instituted without reasonable grounds.

[41] According to the defendant, the vexatious nature of the proceedings is not only demonstrated by the volume of the proceedings instituted, but also by the venomous and defamatory content of the notices, affidavits, and pleadings. These include unfounded and vexatious remarks aimed at legal practitioners representing the defendant and the judicial

officers presiding over those proceedings.

[42] The defendant relates further that, it has obtained several costs order against the plaintiff including costs on a punitive scale. The plaintiff has not been able to pay the allocator in favour of the defendant and a *nulla bona* return has been issued by the deputy sheriff. The defendant contends that the reasonable inference to be drawn from these facts is that the plaintiff is a man of straw who knows that the defendant will not to be able to enforce any of the costs order awarded against him, thereby having no deterrence in his persistence with vexatious litigation. The defendant on the other hand has incurred substantial costs in opposing the frivolous proceedings initiated by the plaintiff.

[43] The defendant submits that in the circumstances of this case, the amount of N\$450 000 in respect of security for costs is reasonable.

[44] In the present matter, the issue for determination is whether the defendant is entitled, in the circumstances, to be provided with security for costs. Rule 59(1) of the rules of this court deals with security for costs and provides that:

'A party entitled to demand security for costs from another must, if he or she so desires, as soon as practicable after the commencement of the proceedings, deliver a notice setting out the grounds on which the security is claimed and the amount demanded.'

[45] The onus is on the party seeking security for costs to convince the court that security should be ordered. Whether or not security for costs should be ordered depends on the facts of each case and in the discretion of the court. The court has inherent jurisdiction to order a litigant to give security for costs of the other side when it is satisfied that the litigation is vexatious.²

[46] In the present matter, the plaintiff has filed a notice to oppose but did not file any answering affidavit. At the hearing of the matter the plaintiff attended court but indicated that this court has infringed his fundamental rights guaranteed under article 12 of the Constitution and that he cannot be involved in an unfair hearing. He further indicated that the managing judge is not impartial and walked out.

[47] In the instant case, there is unchallenged evidence that the plaintiff has, over the period of

² *Fitchet v Fitchet* 1987(1) SA 450 at 454.

more than ten years, persistently instituted hopeless proceedings against the defendant. The record shows that since this matter was remitted to this court from the Supreme Court, no progress has been made in advancing the case towards trial, on account of unnecessary dilatory proceedings instituted by the plaintiff and the majority of those proceedings were instituted without any reasonable cause.

[48] Having regard to the legal principles stated above, and the facts of this case, I am of the view that the defendant has discharged the onus cast upon it and has shown that it is entitled to security for costs. I shall, therefore, grant an order to that effect.

[49] As regards the issue of the nature, form and amount of security, it is trite law that such is ordinarily a matter for the decision of the Registrar.³ I shall, therefore, make an order to that effect.

[50] Insofar as the issue of costs is concerned, counsel for the defendant submitted that there are grounds in this matter for deviating from rule 32(11), with regard to the recusal application, and urged the court to grant a costs order not limited by the provisions of rule 32(11). I have considered the submissions made by counsel for the defendant. However, I am not persuaded that the present case meets the requirements as outlined in the *South African Poultry Association v The Ministry of Trade and Industry* (A 94/2014) NAHCMD 331 (7 November 2014) para 67, and I shall, therefore, not grant an order uncapped by the provisions of rule 32(11). I am nonetheless, of the view that the general rule that costs follow the result, must find application.

[51] In the result, I make the following order:

1. The plaintiff's recusal application filed on 23 October 2023, is dismissed.
2. The plaintiff is ordered to pay the costs of the first defendant occasioned by the recusal application. Such costs include costs of one instructing and one instructed counsel.
3. The plaintiff's rescission application filed on 8 May 2023, is dismissed.
4. The plaintiff is ordered to pay the costs of the first defendant occasioned by the rescission application. Such costs include costs of one instructing and one instructed counsel.
5. The plaintiff is hereby ordered to furnish security for costs to the first defendant.
6. The nature, form manner and amount of the security to be furnished, shall be

³ *Martucci v Mountain View Game Lodge (Pty) Ltd* (I 2295/2015) [2016] NAHCMD 217 22 July 2016).

determined by the Registrar.

7. The parties shall, within 14 days of the date of this order, approach the office of the Registrar to request a meeting where the assessment of such security shall be made.

8. The first defendant is hereby granted leave to approach this court on the same papers, in the event that the plaintiff fails to furnish the security in terms of this order.

9. The plaintiff is ordered to pay the costs of the first defendant occasioned by the application for security for costs. Such costs include costs of one instructing and one instructed counsel.

10. The matter is postponed to 19 June 2024 at 15h15 for a status hearing.

11. The parties shall file a joint status report on or before 12 June 2024.

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| Judge's signature | Note to the parties: |
| B Usiku Judge | Not applicable |
| Counsel: | |
| Plaintiff: | 1st Defendant: |
| H Christian (in-person) Windhoek | R Lewies (assisted by E Omoregie) Instructed by Ensafrica (incorporated as Lorenz Angula Inc.), Windhoek |