



'Not Reportable'

CASE NO.: I 362/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

**BV INVESTMENTS 264 CC
FREDRICH WILLY SCHROEDER**

**First Plaintiff
Second Plaintiff**

and

**FNB NAMIBIA HOLDINGS LTD
ALLGEMEINE ZEITUNG
ERWIN LEUSCHNER**

**First Defendant
Second Defendant
Third Defendant**

CORAM: PARKER J

Heard on: 2011 July 18

Delivered (reasons) on: 2011 July 28

JUDGMENT

PARKER J: [1] After the hearing of the application on 24 January 2011, I gave an *ex tempore* decision and made an order in the following terms:

Having heard ADV. SCHICKERLING, Counsel for the 1st Defendant, and MR. SCHROEDER, In Person, for the 1st and 2nd Plaintiffs, and having read the documents filed of record, and having taken into account that Mr Schroeder conceded that the pleadings do not raise a course of action:

IT IS ORDERED:

That the first defendant's exception is hereby upheld with costs, which costs shall include the costs occasioned by the employment of one instructing counsel and one instructed counsel.

Thereafter, on 18 July 2011, after hearing the present application, I gave another *ex tempore* decision and made an order in the following terms:

The action instituted against the first defendant under Case No. I 362/2010 is dismissed with costs, which costs shall include costs occasioned by the employment of one instructing counsel and one instructed counsel.

And the following are my reasons for so deciding and ordering on 18 July 2011.

[2] When the matter of Case No. I 471/2010 was called before Swanepoel J on 10 May 2011, the record of proceedings shows that there was an understanding between Mr Schroeder, in person, for the plaintiffs, and Mr Schickerling, counsel for the first defendant, that the said Case No. I471/2010 be set down together and heard together by me on the date of the hearing of the present matter (Case No. I 362/2010), that is, 18 July 2011. But Mr Schroeder took a great deal of time in his attempt to mislead this Court that he was not aware that Case No. I 362/2010 was set down to be heard on 18 July 2011, as aforesaid; and so he was not ready to deal with Case No. I 362/2010. But the record of proceedings of 10 May 2011 is clear: it debunks Mr Schroeder's disingenuous attempt to mislead the Court. Mr Schroeder admitted in the present proceedings that he was in court before my brother Swanepoel J on 10 May 2011. The following exchange between the Court (Swanepoel J) and Mr Schroeder

following upon the said understanding is instructive and buries Mr Schroeder's feigned unawareness that Case No. I362/2010 was to be heard on 18 July 2011:

Court: Anything you want to reply to, Mr. Schroeder?

Mr Schroeder: My Lord, it is not a problem, we can set it down'

[3] In the present proceedings, Mr. Schickerling's submission is short, crisp and straight to the point as follows. The first defendant's exception was upheld, as aforementioned, and there is no motion for leave to amend, and so the first defendant is entitled to apply to the Court to dismiss the action against the first defendant. Mr Schroeder's response is merely to say that he had not come to court to deal with Case No. I 362/2010 because there was no set down for the matter of Case No. I362/1010 to be heard on 18 July 2011. I have demonstrated previously that Mr Schroeder's contention is, with respect, palpably wrong. He was aware that the matter of Case No. I362/2010 was set down to be heard on 18 July 2011. He did not deal with the matter at hand when he was given the opportunity to do so (i.e. Case No. I362/2010) at the hearing because, as I see it, he came to court with the settled intention to tell the Court that he was not aware of the set down date, and be done with, which mendacity, I have rejected previously.

[4] I have given due consideration to Mr Schickerling's submission; and I accept it. It has been held that where an exception to a combined summons is upheld and there is no motion for leave to amend, it is proper for the court, on application for dismissal, to dismiss the action; as I do (see *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa*, 5th edn: p 646, and the cases there cited).

[5] Whereupon, the action instituted against the first defendant under Case No. I 362/2010 was dismissed with costs, *vide supra*.

PARKER J

ON BEHALF OF THE FIRST AND SECOND PLAINTIFFS:

Mr Fredrich Willy Schroeder
(in person)

COUNSEL ON BEHALF OF THE FIRST DEFENDANT:

Adv. Schickerling

Instructed by:

Van der Merwe-Greeff Inc.