



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

CASE NO: HC-MD-CIV-CON-2016/03020

In the matter between:

BANK WINDHOEK LIMITED

PLAINTIFF

and

BENLIN INVESTMENT CC

DEFENDANT

Neutral citation: *Bank Windhoek Limited v Benlin Investment CC* (HC-MD-CIV-CON-2016/03020) [2017] NAHCMD 78 (15 March 2017)

CORAM: MASUKU J

Heard: 7 March 2017

Delivered: 14 March 2017

FLYNOTE: RULES OF PRACTICE – Rule 32 (9) & (10) – what compliance thereof entails – Consequences for non – compliance on application for summary judgment – Rule 54 – Application for condonation – interlocutory application – compliance with rule 32(9) (10).

SUMMARY: The plaintiff moved an application for summary judgment against the defendant in which it sued the latter for an amount of N\$ 401 788.81. Before the above cited application was moved, the plaintiff wrote a letter to the defendant, in terms of which it requested the latter to provide with suggestions on how the defendant intended to resolve the matter between the parties amicably. It was the plaintiff's argument that this was in line with rule 32(9) (10) and therefore its application for summary judgment against the defendant was ripe.

The defendant on the other hand contended that the said letter did not comply with rule 32(9) & (10). It was further the latter's contention that the plaintiff's application for condonation which was brought as a result of the late filing of its summary judgment application was equally an interlocutory application and also needed to comply with rule 32(9) & (10).

Held – that the provisions of rule 32(9) & (10) were peremptory and non- compliance with same is fatal.

Held further – that writing a mere letter to the other party requesting the latter to say how they intend to resolve the matter amicably was paying lip service to the requirements of rule 32 (9) & (10) and such a behavior on the part of legal practitioners was not only at odds with the overriding objectives of judicial case management but was also prejudicial to the clients.

Held further that - the writing of letters provides a very easy way of being shallow in consideration of issues, dismissive in approach and polarized in engagement. Legal

practitioners are not at liberty to pick and choose which rules to comply with and which ones to ignore.

Held further that - the letter to the Registrar in terms of Rule 32 (10) did not fully address the steps taken except to merely attach letters. In addition the court found that the plaintiff's application for condonation for the late filing of the summary judgment did not comply with the above stated rules and the plaintiff's latter application was therefore improper before court.

The plaintiff's application for summary judgment was on this basis struck from the roll with costs.

ORDER

1. The application for the summary judgment is struck from the roll for failure to comply with the provisions of Rule 32 (9) and (10).
2. The plaintiff is ordered to pay the costs of the application.

JUDGMENT

MASUKU J.;

Introduction

[1] Falling sharply into focus and microscopic examination is the proper and full compliance with the provisions of rule 32 (9) and (10) of this court's rules. What is the import of these subrules? What do they seek to achieve? What does full compliance with the said subrules entail?

Background

[2] The questions posed above and up for determination in this judgment arise in the following circumstances: The plaintiff, a financial institution, according to the particulars of claim, loaned and advanced monies to the defendant, amounting to N\$401 788.81. It alleges that the defendant did not keep its part of the bargain by effecting repayments as agreed. The plaintiff, accordingly sued out a summons from the office of the Registrar of this court, seeking payment of the said amount, together with interest and costs.

[3] The defendants, as they were entitled to at law, opted to defend the matter, a step that persuaded the plaintiff, to eventually apply for summary judgment. Before that step could be reached though, the court issued a case planning order on 25 November 2016, in terms of which the parties were ordered to comply with the provisions of rule 32 (9) and (10) by 29 November 2016. In the event the matter was not resolved amicably, the court further ordered, the plaintiff was to apply for summary judgment by 30 November 2016 and the defendants were granted leave to file their opposing affidavits on or before 18 January 2017. The matter was then postponed to chambers on 8 February 2017 for a status hearing.

[4] In a bid to comply with the order relating to rule 32 (9), the plaintiff wrote a letter to the defendant's Legal Practitioners dated 28 October 2016. I will revert to its contents in due course. Mr. Tjombe strenuously argued that this letter does not comply with rule 32 (9) and further contended that there was, for that reason, no compliance whatsoever with the said subrule. He implored the court, in the circumstances, to strike the matter from the roll therefor.

[5] That is not all. It is common cause that the plaintiff failed to file its application for summary judgment within the period stated in the order of court. It would appear from the affidavit explaining the delay, that this was due some logistical difficulties experienced with the e-justice system at the time of uploading the said application. In order to try and cure the non-compliance, Ms. Angula, filed an application for

condonation. Mr. Tjombe, takes the point that this application is not properly before court for the reason that it is an interlocutory application and is, for that reason, subject to the mandatory provisions of rule 32 (9) and (10) as well. Because these subrules were not followed before the launching of the said application, the application for condonation is also ill-fated, he argued.

Determination

[6] It will be plain, from the foregoing that there are two issues that the court is called upon to determine in this judgment and that they both have to do with rule 32 (9) and (10). In determining the first issue, I will endeavour to examine the said provisions and what the duties of parties to interlocutory proceedings are in that regard. Secondly, I will determine whether Mr. Tjombe is correct that the plaintiff failed to comply with the said rule before launching the application for condonation. I will conclude the judgment by considering what the consequences of that non-compliance are to the application for summary judgment, if indeed Mr. Tjombe is found to have been correct in his submissions.

Compliance Rule 32 (9) and (10)

[7] The said subrules reads as follows:

'(9) In relation to any proceeding referred to in this rule, a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or other parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication.

(10) The party bringing any proceeding contemplated in this rule must, before instituting the proceeding, file with the registrar details of the steps taken to have the matter amicably resolved as contemplated in subrule (9) without disclosing privileged information.' (Emphasis added).

[8] In *Irvine Mukata v Lukas Appolos*,¹ Mr. Justice Parker held, and correctly so, in my view, that the above provisions were, on account of the language used by the rule-maker, peremptory in nature and effect. The learned Judge expressed himself thus:

'I conclude that the provisions of rule 32 (9) and (10) are peremptory, and non-compliance with them must be fatal. I, therefore, accept Mr. Jacob's submission that the summary judgment is fatally defective because the plaintiff has failed to comply with rule 32 (9) and (10). Consequently, the application is struck from the roll'.

I fully endorse the learned Judge's approach and decision in this regard. That reasoning has influenced the approach to these subrules in many judgments of this court on the subject.

Was there compliance with the subrules before the launch of the application for summary judgment?

[9] What I need to decide in relation to this case is whether the steps taken by the parties, particularly by the plaintiff, upon whom the onus to set the process in rule 32 (9) in motion, as the party seeking to bring the interlocutory application, fully complies with the imperatives of the rules in question. As intimated earlier, the plaintiff wrote a letter to the defendant's legal representatives and it was in the following terms, in part:

'RE: BANK WINDHOEK / BENLIN INVESTMENTS CC & 2 OTHERS – LETTER IN TERMS OF RULE 32 (9)

Sir,

We refer to the above matter and would be pleased if you could inform us within 7 days of the date hereof, how you intend to resolve this matter amicably. (Emphasis added).

Yours faithfully

DR WEDER, KAUTA & HOVEKA INC

That is all.

[10] It would appear that this letter elicited no response from the defendants' legal representatives, culminating in the plaintiff's Legal Practitioners writing a letter to the Registrar, purportedly in terms of rule 32 (10), reporting on the 'steps taken to attempt to resolve the matter amicably'. The said letter, dated 28 November 2016, reads as follows:

'REGISTRAR OF THE HIGH COURT
WINDHOEK

Madam,

RE: RULE 32 (10) REPORT – BANK WINDHOEK LIMITED / BENLIN INVESTMENTS CC AND
2 OTHERS – CASE NO. HC-MD-CIV-ACT-CON-2016-03020

Kindly take notice that the parties have failed to resolve the matter amicably.

Please find the following correspondence:

1. Letter from Plaintiff to Defendant dated 27 October 2016.
2. Email from Plaintiff to Defendant with the attachment.

Yours faithfully

DR. WEDER, KAUTA & HOVEKA INC

[11] It would appear that the email referred to is the one under cover of which the letter to the defendant's legal representatives was sent to the latter on behalf of the plaintiff. As intimated earlier, the question is whether the steps taken by the plaintiff in this matter, meet muster and in particular, whether there was compliance with what, it must be stressed, are peremptory requirements of the aforesaid subrules. Mr. Tjombe records an emphatic No! to this question. Ms. Angula argues that her office duly complied.

[12] I am of the view that the letter written by the plaintiff's legal representatives cannot pass as a genuine attempt to settle the matter amicably. As indicated earlier, the onus to move the matter for amicable resolution, lies with the party seeking to move the interlocutory application before delivery of the said application. I am of the view that the mere writing of a letter, calling upon the other party to say 'how you intend to resolve the matter amicably', cannot, even with the widest stretch of imagination, amount to compliance with the rules. (Emphasis added).

[13] It appears to me that what the plaintiff sought to do was to exclude itself from participating in the amicable resolution of the matter, throwing the ball, as it were, into the defendant's court to say, "Tell me...how you intend to resolve this matter amicably?' This process, though initiated by the party seeking to deliver the interlocutory application, is in essence one that must necessarily involve the full and undivided attention and participation of both parties to the *lis*. In the context of a summary judgment, it is not a call to the defendant to say how it wants to settle the debt, as the intimation in the letter by the plaintiff's legal practitioners seems plain.

[14] I am of the considered view that the mere writing of the letter may be the precursor to a meeting where the parties, duly instructed with issues or material for full discussion, and possibly resolution of some, if not all the issues on the table. The letter initiating the meeting cannot be an end in and of itself. It is the initial step to what should be an actual meeting where the parties will put their cards on the table, with the defendant, in this case, stating what its defence to the summary judgment, if any, is and

where the parties cannot meet each other half way, then the summary judgment application could be delivered to the court for determination.

[15] Having failed to reach common ground, it is then opportune for the plaintiff to record and inform the Registrar of the actual steps taken by the parties to attempt to resolve the matter amicably in terms of subrule (10). This should include, not just the writing of the letter by the initiator, but that the parties met at a certain place on a named date, to discuss the matter and regrettably did not manage to resolve it.

[16] The writing of letters provides a very easy way of being shallow in consideration of issues, dismissive in approach and polarized in engagement. This becomes so even if there are matters that may be canvassed, even if not eventually settled in full or at all. The face to face engagement on such issues brings such cursory and perfunctory approach to a screeching halt. After the meeting, you understand your case better as that of your opponent, which assists the resolution of or approach to the live issues going forward. This benefit must not be lost behind the veil of avoiding active engagement by the mere and superficial exchange of letters.

[17] It must be mentioned and pertinently so, that rule 32 (9) and (10) are not merely incidental rules. They actually go to the core of the edifice that should keep judicial case management standing tall and strong. The two subrules fully resonate with and give live expression to the overriding and core values of judicial case management as found in rule 1 (3) and stated in the following terms:

'The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by –

*

(b) saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter;

*

(f) considering the public interest in limiting issues in dispute and in the early settlement of disputes by agreement between the parties in dispute.' (Emphasis added).

[18] In this regard, I must, perforce, make reference to the provisions, in addition to those quoted above, to the relevant provisions of rule 19, which deal with the 'Obligation of parties and legal practitioners in relation judicial case management'. In particular, two of these subrules bear mentioning. They are subrules 19 (c) and (g), which read as follows:

'(c) to limit interlocutory proceedings to what is strictly necessary in order to achieve a fair and expeditious disposal of a cause or matter;

(d) to use reasonable endeavours to resolve a dispute by agreement between the persons in the dispute;'

[19] In this regard, I am of the view that legal practitioners should take the peremptory provisions in question seriously and make every effort, with every sinew in their bodies, to fully and deliberately engage in the process of attempting to resolve matters amicably. The impression one gets from the letter by the plaintiff's legal practitioner, is that some legal practitioners merely pay lip service to the said subrules and behave in a manner appears to have all the hallmarks a perfunctory approach to dealing with this subrule.

[20] This, it must be made clear, will not be accepted or tolerated by the courts. Parties will not be allowed to merely go through the motions as the rule is designed to assist practitioners deal with the wheat and not concentrate on the chaff, and thus not expending time needlessly on lost or still-born causes, to the detriment of clients' interests and the administration of justice in general.

[21] I should mention that I have gained the distinct impression that some practitioners have no real regard for the subrules in question and this has manifested itself in a number of applications for summary judgment in which the 'steps' alleged to have been taken in pursuance of rule 32 (10), are the exchange of one of two letters, without the parties having meaningfully or at all engaged in the process of attempting to settle the matters amicably.

[22] Once the summary judgment has been filed and reality hits home that the defendant actually has a *bona fide* defence or has raised a triable issue in the opposing affidavit, only then is the plaintiff inveigled to agree to the defendant being granted leave to defend the action. Precious time is lost, needed is energy expended unwisely and costs become unnecessarily incurred, to the detriment of the clients, not to mention clogging the court's roll with seriously limping, if not still born interlocutory proceedings.

[23] The other issue that I should caution practitioners about, particularly regarding summary judgment is the temptation to carry out the client's instruction to pursue summary judgment at all costs, and sometimes paying little attention to the genuine issues raised by a defendant during the rule 32 processes, ultimately resulting in summary judgment being refused on those very issues. Practitioners should, as much as they carry out their clients' instructions, not lose sight of their duty to court and should ensure that matters that are pursued need to be and those that are lost causes be consigned to the correct pigeon hole. In this regard, the rule 32 process plays a central role if properly and fully utilised and I implore practitioners to do so.

[24] I therefore come to the conclusion that there was no real and genuine attempt to comply with the 32 (9) in this case, the plaintiff pushing responsibility to amicably resolve the matter to defendant, as aforesaid. Furthermore, the letter to the Registrar in terms of Rule 32 (10) does not fully address the steps taken (which I find there were none) except to merely attach letters. Writing of letters simpliciter, devoid of the demonstration of a genuine desire to seek an amicable resolution will not do and cannot amount to compliance with the subrules in question.

[25] I must not leave the defendant blameless either. Once the defendant's Legal Practitioners received the letter from the plaintiff, I am of the considered view that they had a duty to respond to it, even if they wanted to convey their view that it was not in compliance with the letter and/or spirit of the rule in question. It is always helpful both to the court and other side to respond to such correspondence so that the matter moves

forward with minimum delay. In this regard, the provisions of rule 19 (*h*) are critical as they refer to the need for legal practitioners and parties to act promptly and minimize delay.

[26] For the foregoing reasons, I am of the considered view that there was no proper or genuine compliance with rule 32 (9) and (10) before the application for summary judgment was lodged. The imperatives of the said section, viewed in the wider scheme of judicial case management, was done a shattering blow. As a result, the application for summary judgment is improperly before court and has to be struck from the roll for non-compliance as stated in the *Mukata* judgment (*supra*).

Was there compliance with the subrules before launching the application for condonation?

[27] In this regard, the question falling for determination is whether the plaintiff, who it is common cause, was unable to file its summary judgment within the time limits specified in the court order as stated above, and consequently filed an application for condonation, complied with the provisions of rule 32 (9) and (10) before doing so. If not, what are the consequences of the non-compliance with the said provisions?

[28] In this regard, Mr. Tjombe argued that the plaintiff did not comply with rule 32 (9) and (10) and that the fate pronounced above in *Mukata*, in relation to the previous question, should also apply in this matter. Ms. Angula had no answer to this argument as it is clear that the plaintiff did not, before launching the application for condonation, seek to resolve the matter amicably.

[29] It may well have been that had that opportunity been taken advantage of, an agreement may have been reached because it would in any event be clear that the delay in compliance with the court order was not inordinate. This may well have resulted in the parties saving time and costs, obviating the need to file the interlocutory application for condonation. There is no question and there was no argument by Ms.

Angula, that an application for condonation is not interlocutory and therefor is not amenable to the provisions of rule 32 (9) and (10).

[30] In this regard, the plaintiff's fate is sealed by the analysis and determination I have already made in answering the first question above. In *Visagie v Visagie*² this court expressed itself as follows regarding the need and importance of complying with the above subrules:

[11] It is plain, in my view, that failure to comply with either or both requirements in rule 32 (9) and (10), is fatal. The court cannot proceed to hear and determine the interlocutory application. The entry into the portals of the court to argue an interlocutory application must go via the route of rule 32 (9) and (10) and any party who attempts to access the court without having gone through the route of the said subrules can be regarded as improperly before court and the court may not entertain that proceeding. In colloquial terms, that party may be said to have "gatecrashed" his or her way into court. Gatecrashers are certainly unwelcome if regard is had to the provisions of the said subrules.

[12] A proper reading of the above rule suggests unequivocally that once an application is interlocutory in nature, then the provisions of the subrule are peremptory and a party cannot wiggle its way out of compliance therewith. Rule 61, as mentioned above, pronounces itself as interlocutory and this admits of no doubt or debate. For that reason, I am of the considered view that a party may not circumvent compliance with the said subrules, whatever the circumstance and the one at hand, namely, that the case involves minors, is not, in my view one that brooks an exception. In point of fact, I would incline to the view that matters involving minors should be on top of the list of matters that are subject to amicable resolution first.'

[31] It is accordingly clear that the plaintiff, as stated earlier, did not take any steps to submit the application for condonation of the late filing of the application for summary judgment to the strictures of rule 32 (9) and (10). No reason for this is hazarded. Even if a reason had been provided, I am of the considered view that such a reason would not pass muster. I say this in view of the paragraph that follows below.

² (I 1956/2014) [2015] NAHCMD 117 (26 May 2015) at p. 6 para [11] and [12].

[32] I close this enquiry by making reference to the judgment of this court in *Kondjeni Nkandi Architects v Namibia Airports Company*³ where the court expressed itself on the subrules in question as follows:

'I understood Mr. Totemeyer to suggest in the alternative that as the parties representing the litigants, they took the position that there was, on account of the disputed nature of the issues, no prospect of settling the matter amicably and hence no need to comply with the said provisions. My reading of the subrule does not leave it to the parties to agree or disagree to comply with what are clearly mandatory provisions. Parties cannot be allowed to opt out and to choose which rules to comply with and which ones not to comply with. Such an election would be perilous and result in anarchy and a complete breakdown in the orderly conduct of litigation.'

[33] In conclusion, I am of the view that the above subrules are part and parcel of the attempts to settle matters or issues at an early stage and to ensure that minimum time, money and effort is spent on interlocutory proceedings. It is necessary and desirable for all counsel and officers of this court to move in tow with the letter and spirit of the rules in this regard. Those who disengage from the tow will be met with unfavourable orders as to costs or have their matters struck from the roll, a needless but heavy price to pay, seen in the context of the benefit otherwise derived from following what is an uncomplicated rule.

Order

[34] In the result, and for the foregoing reasons, I am of the view that the following order is condign:

1. The application for summary judgment is struck from the roll for non-compliance with the provisions of rule 32 (9) and (10).
2. The plaintiff is ordered to pay the costs of this application.

³ (I 3622/2014) [2015] NAHCMD 223 (11 September 2015) at p8 para [18].

T.S. Masuku
Judge

APPEARANCES:

PLAINTIFF: M Angula

Instructed by: Dr Weder, Kauta & Hoveka Inc.

DEFENDANT: N Tjombe

Instructed by: Tjombe-Elago Law Firm