



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3396/2014

In the matter between:

IRVINE MUKATA

PLAINTIFF

And

LUKAS APPOLUS

DEFENDANT

Neutral citation: *Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (12 March 2015)

Coram: PARKER AJ

Heard: 16 February 2015

Delivered: 12 March 2015

Flynote: Practice – Applications and motions – Interlocutory application – Court held that rule 32 contemplates two types of proceedings ie (a) applications for directions in respect of interlocutory applications and (b) interlocutory application – Court held further that since an application for summary judgment is an interlocutory proceeding an applicant is bound by rule 32(9), (10) and (11) which are peremptory – Consequently where an applicant fails to comply with rule 32(9) and (10) his or her application falls to be dismissed.

Summary: Practice – Applications and motions – Interlocutory application – Applicant launched application for summary judgment without complying with rule

32(9) and (10) of the rules – Court held that an applicant for summary judgment must comply with rule 32(9) and (10) which are peremptory – Consequently, application dismissed with costs.

ORDER

- (a) The application for summary judgment is struck from the roll.
- (b) Each party to pay his own costs.

JUDGMENT

PARKER AJ:

[1] The plaintiff instituted action in which he claims the relief set out in the particulars of claim. The defendant noted appearance to defendant; whereupon the plaintiff launched an application for summary judgment. Counsel on both sides of the suit filed their heads of argument out of the time ordered by the court. Of the view I take of the application for summary judgment and the preliminary point in opposition raised by the defendant, I shall condone the late filing of the heads of argument.

[2] It is argued by Mr Jacobs, counsel for the defendant, that the application is premature and fatally defective on the basis that the plaintiff has failed to comply with the mandatory provisions of rule 32(9) and (10) of the rules of court. That being the case, so Mr Jacobs submits, the summary judgment application should be dismissed with costs and on a scale as between legal practitioner and client as provided by rule 60(11) of the rules.

[3] Ms Shifotoka, counsel for the plaintiff, argues the other way that rule 32 does not apply to the summary judgment application that the plaintiff has launched and whose launching was anticipated by the Case Plan. For counsel, rule 32 applies to only applications for directions in respect of interlocutory proceedings and not every interlocutory proceeding; and so, counsel concludes, subrules (9), (10) and (11) do not bind the plaintiff who has launched a summary judgment application in pursuit of the Case Plan.

[4] At first brush Ms Shifotoka's interpretation of rule 32(9), (10) and (11) sounds attractive but on close scrutiny it is not correct. Indeed, to start with the title of rule 32 and the *ipssima verba* of its provisions debunk Ms Shifotoka's argument.

[5] Rule 32 contemplates two types of proceedings, namely, first, applications for directions in respect of interlocutory applications (subrules (1), (4), (5), (6), (7) and (8)); and, second, interlocutory applications (subrules (2), (3) and (11)). Subrules (9) and (10) are common to applications for directions in respect of interlocutory applications and interlocutory applications. Thus, the clause 'In relation to any proceeding referred to in this rule (ie rule 32) in subrule (9)' and the clause 'The party bringing any proceeding contemplated in this rule (ie rule 32)' in subrule (10) refer to both applications for directions in relation to interlocutory applications and interlocutory applications; and so, *pace* Ms Shifotoka, rule 32(9) and (10) apply to these two forms of proceedings. And I accept Mr Jacobs's submission that a summary judgment application is an interlocutory proceeding. See Andries Charl Cilliers, *et al*, *Herbstein and Van Winsen: The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa*, 5 ed, Vol 2, p 1204.

[6] It is undisputed that the plaintiff did not comply with rule 32(9) and (10) of the rules. Considering the use of the words 'must' in rule 32(9) and (10) and the intention of the rule maker as set out in rule 1(2) concerning the overriding objective of the rules (see *The International University of Management v Torbitt* (LC 114/2013) [2014] NALCMD 6 (20 February 2014)), I conclude that the provisions of rule 39(9) and (10) are peremptory, and non-compliance with them must be fatal. I, therefore, accept Mr

Jacob's submission that the summary judgment application is fatally defective because the plaintiff has failed to comply with rule 32(9) and (10). Consequently, the application is struck from the roll.

[7] One last word; in keeping with judicial case management process in which parties and counsel are expected to cooperate among themselves and with the court in order to attain expeditious and just disposal of cases by the court, the defendant's legal practitioner should have at an appropriate judicial case management conference requested the court not to set down the interlocutory application for hearing because 32(9) and (10) have not been complied with. Counsel should not wait until during the hearing to argue that rule 32(9) has not been complied with, particularly where such interlocutory application is contemplated in the parties' Case Plan. For this reason, even though the defendant has been successful, he should be denied his costs.

[8] I also respectfully reject Mr Jacobs's argument that invokes the effect of rule 60(11). In the present proceeding, the court has not considered the merits of the application; and so the court is not in a position to hold that the plaintiff knew or ought to have reasonably known that the defendant relies on a contention which would entitle the defendant to be granted leave to defend. For this reason, it is my view that Mr Jacobs' argument is self-serving and fallacious.

[9] In the result I make the following order:

- (a) The application for summary judgment is struck from the roll.
- (b) Each party to pay his own costs.

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C Parker
Acting Judge

APPEARANCES

PLAINTIFF : E Shifotoka
Of Conradie & Damaseb, Windhoek

DEFENDANT: S J Jacobs
Instructed by Lentin, Botma & Van den Heever, Keetmanshoop
c/o Delport-Nederlof Attorneys