

REPUBLIC OF NAMIBIA



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

Case No: HC-MD-CIV-ACT-CON-2017/02010

In the matter between:

DEVELOPMENT BANK OF NAMIBIA LTD

PLAINTIFF

And

CREATIVE KITCHENS CC

1ST DEFENDANT

EMMANUEL BRAND

2ND DEFENDANT

MARIA ISABEL BRAND

3RD DEFENDANT

TWENTY JOHN LUDWIG STREET INVESTMENTS CC

4TH DEFENDANT

WRAP IT DOORS CC

5TH DEFENDANT

Neutral Citation: *Development Bank of Namibia Ltd v Creative Kitchens CC* (HD-MD-CIV-ACT-CON-2017/02010) [2017] NAHCMD 325 (15 November 2017)

CORAM: **PRINSLOO J**

Heard: 06 September 2017

Delivered: 25 October 2017

Reasons Delivered: 15 November 2017

Flynote: Civil Practice – Summary Judgment – Procedure – Compliance with Rule 32 (9) and (10) before launching application for summary judgment – Considerations to be made on whether Rule 32 (9) and (10) is applicable – Questions on the nature of Summary Judgments and Interlocutory orders considered – Role of Rule 32 (9) and (10) amicably discussed

Summary: This matter was allocated to a managing judge in which after a case planning conference was held and a joint case plan was filed in terms of rule 23(3) by the parties in terms of which the plaintiff indicated that it will move for summary judgment in this matter.

The matter became defended and in the fourth defendant's heads or argument, the point was raised that the plaintiff failed to comply with the procedure set out in Rule 32 (9) and (10) before launching the application for summary judgment. In countering this point, the plaintiff submitted that, among others, summary judgment applications are regulated by rules 23 and 60 and as per the agreed case planning conference, the need for compliance with rule 32(9) and (10) was removed.

Held – It is clear is that once an application is interlocutory in nature, the provisions of the subrules are peremptory and must be complied with.

Held – Rule 32(9) and (10) is neither a substitute for rule 23 and rule 60 (or *visa versa*) nor are these rules mutually exclusive or contradictory to each other.

Further held – Each of these rules has a specific place in the judicial case management process while keeping in mind the overriding objective of these rules of court. Rule 23 and rule 60 provide *inter alia* the further conduct of the matter once the parties have complied with rule 32(9) and (10).

ORDER

In respect of the Fourth Defendant:

1. The application for summary judgment in respect of the 4th defendant is struck from the roll.
2. Plaintiff is ordered to pay the cost of the application in respect of the 4th defendant, which cost will include the cost of one instructing and one instructed counsel.
3. The case is postponed to 16 November 2017 at 15:00 for status hearing.

In respect of the First, Second, Third and Fifth Defendants:

Summary judgment is granted against the First, Second, Third and Fifth Defendants jointly and severally, the one paying the other to be absolved for:

1. Payment of the amount of N\$ 11 099 002.63;
2. Interest thereon at the prime rate currently 11.75% plus 2% finance charges per annum (13.75%) from 01 May 2017 to date of final payment;
3. Cost on a scale between attorney and own client.

RULING

PRINSLOO J:

[1] This matter came before me for an application for summary judgment. Action was instituted against the defendants on 14 June 2017 for repayment of the amount of

N\$ 11 099 002.63, jointly and severally, with interest of 13.75% per annum from 01 May 2017 to date of final payment.

[2] After due service of the summons on all the parties all defendants entered a notice of intention to defend the action.

[3] The matter was allocated to a managing judge where after a case planning conference was held between the parties and a joint case plan was filed in terms of rule 23(3) on behalf of all the parties in terms of which the plaintiff indicated that it will move for summary judgment in this matter.

[4] A case plan was issued in terms of rule 23(4)¹ on 27 July 2017 setting the procedural steps and due dates thereof for the parties.

[5] This application for summary was opposed by the fourth defendant only.

[6] In the heads of argument on behalf of the fourth defendant, a point *in limine* was raised that Plaintiff did not comply with the provisions of rule 32 (9) and (10) and therefore this application should be struck off the roll.

[7] Counsel for the defendant argued the relevance and the applicability of rule 32(9) and (10) extensively with reference to the current proceedings. Counsel argued that the law is settled in this regard, that if rule 32 is not complied with the application for summary judgment must be struck unless the court chooses to exercise its discretion in condoning the non-compliance with the rule. However, in order for the court to exercise this discretion the plaintiff must show that there are grounds for such condonation. In this regard I was referred to the matters of *Mukata v Appolus*² and *CV v JV*.³

¹ (4) If a party intends to exercise any of the procedural remedies contemplated in paragraphs (a), (b) and (c), the parties must submit to the managing judge a case plan dealing solely with the manner they propose such matter or matters to be adjudicated, after which the managing judge must give directions and proceed in terms of subrule (5).

² 2015 (3) NR 695 (HC).

³ 2016 (1) NR 214 (HC) at 216 J-217C par 10-11.

[8] Counsel for the plaintiff advance a number of arguments in opposition to cases that the court was referred to and I will briefly summarize said arguments:

8.1 That the judgment in *Mukata v Appolus* should not be followed as it is not settled in law. In turn the court was referred to *First National Bank of Namibia Limited v Louw*⁴ where the court expressed doubt in *obiter* whether summary judgment is interlocutory in nature and effect and whether the court is precluded from dealing with summary judgment without reference to rule 32, especially in view of rule 60 (4).⁵

8.2 That rule 32(9) and (10) deals with interlocutory matters and where summary judgment is final in nature it is no longer interlocutory and therefore rule 32(9) and (10) should not apply.

8.3 The court was invited to take the matter further and consider cases where summary judgment is final in nature to find that it is then not interlocutory in nature.

8.4 That court should give regard to the fact that rule 23 and rule 60 specifically deals with summary judgment and that rule 32(9) and (10) deals with interlocutory applications in general.

8.5 As summary judgment applications are regulated by the rule 23 and rule 60 and the agreement as per the case planning conference removes the obligation of the parties to comply with rule 32(9) and (10).

Position in law:

[9] An application for summary judgment is an interlocutory application brought during the course of action proceedings. The book *Summary Judgment- a Practical Guide*⁶ summary judgment is described as a *sui generis* interlocutory application.

[10] It is indeed so that summary judgment can be final and definitive, however that does not mean it is not interlocutory in nature.

⁴ (I 1467-2014) [2015] NAHCMD 139 (12 June 2015).

⁵ Page 2 of judgment under heading 'SUMMARY'.

⁶ SJ Van Niekerk, HF Geyer and ARG Mundell, *Summary Judgment- A Practical Guide*, Service Issue 11 April 2012 at page 1-9.

[11] *Herbstein and Van Winsen: The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa*⁷ describes interlocutory order as follows:

'An interlocutory order is an order granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties. Such an order may be either purely interlocutory or an interlocutory having a final or definitive effect. The distinction between a purely interlocutory order and an interlocutory order having a final effect is of great importance in relation to appeals.'

[12] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*⁸ the court considered the test to be applied to determine whether or not an order is interlocutory or not and summarized as follows:

'(a) In a wide and general sense the term 'interlocutory' refers to all order pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as 'simple (purely) interlocutory orders' or 'interlocutory orders proper' which do no. . . .'⁹

[13] Having regard to the authoritative works referred to, there can be no debate in this case that, summary judgment proceedings under rule 60 are interlocutory in nature. This would be the case in spite of the fact that rule 23 and rule 60 applies to summary judgment applications.

[14] In the matter of *Mukata v Appolus* , a similar argument was advanced as in the matter *in casu*, namely that rule 32(9) and (10) does not apply to summary judgment application as the launching of the summary judgment was anticipated by the case plan and that rule 32 only applies to application for directions in respect of interlocutory proceedings and not every interlocutory proceeding.

⁷ 5 ed vol 2 at 1204.

⁸ 1977 (3) SA 534(A) at 549F-550A.

⁹ Referred to in *Van Straten NO v Desert Fruit (Pty) Ltd* (A38/2014 and 91/2015) [2016] NAHCMD 349 (10 November 2016).

[15] This argument was rejected in no uncertain terms by Parker AJ.

[16] The fact that the parties filed a joint case plan in an interlocutory proceeding such as in the case of a summary judgment application, does not mean that there was an effort by the parties to amicably resolve the issues as provided for in rule 32(9).¹⁰ A case plan merely means that the parties have reached consensus on the plan for further conduct of the proceedings and such case plan is submitted by either the parties or their legal practitioners, if represented, before the case planning conference or directed by the managing judge at such conference in terms of rule 23.

[17] The purpose of rule 32(9) and (10) was clearly enunciated by Masuku J in the matter of *Bank Windhoek Limited v Benlin Investment CC*,¹¹ wherein he said as follows:

[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).’

¹⁰ Rule 32(9) reads as follows: ‘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.’

¹¹ (HC-MD-CIV-CON-2016/03020) [2017] NAHCMD 78 (15 March 2017).

[18] Since the *obiter* remarks made by Masuku AJ (as he then was) in the matter of that the *First National Bank of Namibia Limited v Louw*¹² on the issue of summary judgment application as an interlocutory application and the peremptory compliance with rule 32 has evolved since then and have crystalized in a number of judgments from this court cementing the role of rule 32(9) and (10).

[19] The judgment in the *Mukata*- matter has been confirmed over and over to be the position in our law relating compliance with rule 32 and interlocutory applications.¹³ What is therefore clear is that once an application is interlocutory in nature, the provisions of the subrules are peremptory and must be complied with.

[20] Rule 32(9) and (10) is neither a substitute for rule 23 and rule 60 (or *visa versa*) nor are these rules mutually exclusive or contradictory to each other. Each of these rules has a specific place in the judicial case management process is striving to comply with the overriding objective of these rules as set out above. Rule 23 and rule 60 provide *inter alia* the further conduct of the matter once the parties have complied with rule 32(9) and (10).

[21] There was no attempt on the part of the plaintiff to comply with the said rules.

[22] My order is therefore as follows:

In respect of the Fourth Defendant:

1. The application for summary judgment in respect of the 4th defendant is struck from the roll for non-compliance with the provisions of rule 32 (9) and (10).
2. Plaintiff is order to pay the cost of the application in respect of the 4th defendant, which cost will include the cost of one instructing and one instructed counsel.
3. The case is postponed to 16 November 2017 at 15:00 for status hearing.

In respect of the First, Second, Third and Fifth Defendants:

¹² Supra.

¹³ *Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (12 March 2015).

Summary judgment is granted against the First, Second, Third and Fifth Defendants jointly and severally, the one paying the other to be absolved for:

1. Payment of the amount of N\$ 11 099 002.63;
2. Interest thereon at the prime rate currently 11.75% plus 2% finance charges per annum (13.75%) from 01 May 2017 to date of final payment;
3. Cost on a scale between attorney and own client.

J S PRINSLOO

APPEARANCES:

PLAINTIFF:

P Muluti
Of Muluti & Partners,

Windhoek

DEFENDANTS:

Adv. J P Jones

Instructed by:

Theunissen, Louw & Partners
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