

**REPUBLIC OF NAMIBIA**



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

**RULING**

Case no: HC-MD-CIV-ACT-CON- 2018/01275

In the matter between:

**FIRST NATIONAL BANK OF NAMIBIA LIMITED**

**PLAINTIFF**

and

**LEAP AGRIBUSINESS (PTY) LTD 2012/0977**

**1<sup>st</sup> DEFENDANT**

**MANNA BLESSING JONAH MATSWETU**

**2<sup>nd</sup> DEFENDANT**

**ALLY SHANINGWA INEDHIMWA ANGULA**

**3<sup>rd</sup> DEFENDANT**

**Neutral citation:** *First National Bank of Namibia Ltd v Leap Agribusiness Ltd 2012/0977* (HC-MD-CIV-ACT-CON-2018/01275) [2018] NAHCMD 370 (15 November 2018)

**Coram:** USIKU, J

**Heard on:** 15 November 2018

**Delivered:** 15 November 2018

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## ORDER

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1. The Plaintiff's application for summary judgment is struck from the roll on account of non-compliance by the Plaintiff with the provisions of Rule 32(9);
  2. The Plaintiff is ordered to pay the costs of the Defendant occasioned by the application;
  3. The case is postponed to 05 December 2018 at 15:15 for Case Planning Conference;
  4. The parties are directed to file a joint case plan on or before 29 November 2018.
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## REASONS: PRACTICE DIRECTIONS 61 (9)

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USIKU J:

### Introduction

[1] This is an opposed summary judgment application in which the Plaintiff prays for an order against the Defendants for payment in the amount of N\$ 506 775.77, interest thereon and costs.

[2] The Defendants have raised a point in limine, to the effect that the Plaintiff has not complied with the provisions of Rule 32(9) and (10) prior to launching the summary judgment application. The Defendants further argue, among other things, that the letter the Plaintiff claims to have addressed to Defendants' legal practitioners never reached the Defendants' legal practitioners.

[3] The Plaintiff contends that it had addressed a letter dated 3 May 2018 to the Defendant's legal practitioners, via fax and via e-mail and that it is insufficient for the deponent to simply say her legal practitioners 'did not have sight of the letter'. The Plaintiff therefore contends that it had complied with the provisions of Rule 32(9) and (10).

[4] It is common cause that the Plaintiff did address a letter to the Defendants' legal practitioners, dated the 3 May 2018 in the following terms:

'FIRST NATIONAL BANK// LEAP AGRIBUSINESS (PTY) LTD 2012/0977 & SURETIES:  
MANNA BLESSING JONAH MATSWETU & ALLY SHANINGWA INEDHIMWA ANGULA CAE  
NO: HC-MD-CIV-ACT-CON-2018/01275

Your appearance to defend the above case refers.

This case will shortly be referred to a case planning conference. It is our client's view that your client's appearance to defend is merely an attempt to delay this matter and it is our client's intention to apply for summary judgment.

In light of the aforesaid and in terms of Rule 32(9) of the High Court rules we propose, as an amicable resolution, your clients' accept their indebtedness to our client and provide our client with a settlement proposal regarding the repayment of its claim, alternatively state their defence. We look forward to hearing from you urgently.

Yours faithfully

Fisher,Quarmby&Pfeifer

Signature

Per: GS McCulloch'

[5] In a report purportedly filed in terms of Rule 32(10) the Plaintiff reported, in part, as follows:

1. In terms of rule 32(9), the Plaintiff sought an amicable resolution to avoid the need to launch an application for summary judgment. Relevant correspondence was addressed to the Defendants' attorney as per annexure "A" attached. The Defendant failed to respond.
2. The parties have thus failed to resolve their dispute.
3. The case planning order dated 27 June 2018 requires the filing of a Rule 32(10) report before 16 July 2018.

Dated at Windhoek this 29<sup>th</sup> day of June 2018

(signature)

FISHER, QUARMBY & PFEIFER

Legal practitioner for APPLICANT/PLAINTIFF'

Whether the Plaintiff complied with the provisions of Rule 32(9) and (10)

[6] The issue for determination now is whether the Plaintiff had complied with the provisions of Rule 32(9) and (10) prior to its launching of the summary judgment application. The argument as to whether compliance should occur prior to the case plan order or not, is not an issue, in my opinion, as long as there was compliance with the provisions of Rule 32(9) and (10).

[7] Dealing with a similar issue, Masuku J, had the following remarks to say, in the matter of *Bank Windhoek Limited v Berlin Investment CC* HC-MD-CIV-CON-2016/03020 [2017] NAHCMD 78 (15 March 2017), at paras [14]-[17]:

[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 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

defense 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 proves 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.

by agreement between the parties in dispute.' (Emphasis added)

[8] I am of the opinion that the principles and views expressed by the learned judge in the foregoing paragraph apply with equal force to the present case.

[9] Rule 32(9) requires of a party wishing to bring any interlocutory proceeding, that such party must, before launching it, seek an amicable resolution thereof with the other party, and only after the parties have failed to resolve their dispute, may such proceeding be delivered for adjudication by the court.

[10] Among the things which the parties have to engage each other on, before an interlocutory proceedings is launched, in order to seek an amicable resolution, include:

- (a) the merits of the application/proceeding;
- (b) whether or not the opposite party would oppose the application;
- (c) the evidence and legal principles that either party relies upon;
- (d) settlement proposals;
- (e) proposed time-lines within which the party wishing to initiate the interlocutory proceeding would apply for direction in respect of the matter etc.<sup>1</sup>

[11] The Plaintiff is then required in terms Rule 32(10) to file a report, before instituting the proceeding, setting out the details of the steps taken to have the matter resolved amicably. In such a report the Plaintiff would indicate, among other things, whether or not the parties have been able to resolve their differences on the merits of the application or whether they were able to resolve their differences and that the Defendant would not oppose the application.<sup>2</sup>

[12] In the event of a defendant who rebuffs the overtures for the search for amicable solution, the details of such rebuffing are then to be set out in the Rule 32(10) report.

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<sup>1</sup> See *Standard Bank of Namibia Limited v Nekwaya* HC-MD-CIV-ACT-CON-2017/01164 [2017] NAHCMD 365 (01 November 2017), paras [24] to [25].

<sup>2</sup> *Ibid.*

[13] Having considered the pleadings and documents filed of record and oral argument by the parties, I come to the conclusion that there was no real attempt to comply with rule 32(9) in this matter. Writing a single letter without any attempt to make any follow-up to the Defendant, whether the Defendant received it or not, does not in my opinion amount to a genuine desire to seek an amicable resolution contemplated under Rule 32(9). As such, the Plaintiff cannot properly file details of steps taken, (which steps did not exist) to have the matter resolved amicably, in circumstances where there was no genuine search for the amicable resolution.

[14] For the foregoing reason, I am of the view that the application for summary judgment is improperly before court and stands to be struck from the roll with costs, for non-compliance with Rule 32(9) and (10).

[15] In the result, I made the following order:

1. The Plaintiff's application for summary judgment is struck from the roll on account of non-compliance by the Plaintiff with the provisions of Rule 32(9);
2. The Plaintiff is ordered to pay the costs of the Defendant occasioned by the application;
3. The case is postponed to 05 December 2018 at 15:15 for Case Planning Conference;
4. The parties are directed to file a joint case plan on or before 29 November 2018.

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B Usiku  
Judge

## APPEARANCES:

PLAINTIFF

Y Campbell  
instructed by Fisher, Quarmby & Pfeifer,  
Windhoek

DEFENDANT

PS Elago  
of Tjombe-Elago Inc., Windhoek