

“ANNEXURE 11”

Practice Direction 61

**IN THE HIGH COURT OF NAMIBIA**

<b>Case Title:</b> <i>Pretoria Clothing &amp; Caps (Pty) Ltd v Roland Donavan Jacobs t/a Streethouse Clothing Namibia</i>	<b>Case No.:</b> HC-MD-CIV-ACT-CON-2019/02468
	<b>Division of Court:</b> High Court (Main Division)
<b>Heard/tried before:</b> Honourable Mr Justice B Usiku J	<b>Date of hearing:</b> 30 June 2020
	<b>Delivered on:</b> 30 June 2020
	<b>Reasons released on:</b> 03 July 2020
<b>Neutral citation:</b> <i>Pretoria Clothing &amp; Caps (Pty) Ltd v Roland Donovan Jacobs t/a Streethouse Clothing Namibia</i> (HC-MD-CIV-ACT- CON- 2019/02468 [2020] NAHCMD 265 (30 June 2020))	
<b>The Order:</b> Having heard <b>Advocate Nekwaya</b> , on behalf of the Plaintiff and <b>Mr Naude</b> , on behalf of the Defendant and having read documents filed of record:  <b>IT IS ORDERED THAT:</b>  1. The defendant’s application for security for costs is struck from the roll for non- compliance with the provisions of rule 32(9) and (10).	

2. The defendant is ordered to pay the plaintiff's costs occasioned by plaintiff's opposition to the application for security for costs. Such costs include costs of one instructing and one instructed legal practitioner.
3. The defendant's third and fifth grounds of exception are dismissed. The defendant is ordered to pay the plaintiff's costs occasioned by plaintiff's opposition to the third and fifth grounds of exception. Such costs include costs of one instructing and one instructed legal practitioner.
4. The plaintiff is ordered to pay the defendant's costs in respect of the first, second and fourth grounds of exception. Such costs include costs of one instructing and one instructed legal practitioner.
5. The plaintiff is ordered to pay defendant's costs, occasioned by the defendant's opposition to the application for summary judgment. Such costs include costs of one instructing and one instructed legal practitioner.
6. The plaintiff is granted leave to amend its particulars of claim, if so advised, within 15 days from 3 July 2020.
7. The matter is postponed to 19 August 2020 at 15:15 for Case Planning Conference.
8. The parties must file a joint case plan on or before 12 August 2020.

**Reasons: Practice Direction 61(9)**

Introduction

- [1] The matter presently before court for adjudication concerns:
- (a) an application by the defendant for security for costs;

- (b) an exception raised by the defendant to the plaintiff's particulars of claim, and,
- (c) an application by the plaintiff for summary judgment.

[2] The application for security for costs is launched on the ground that the plaintiff is a peregrinus of this court and has no attachable immovable property in Namibia. The application is opposed by the plaintiff.

[3] The exception is delivered on the ground that the particulars of claim disclose no cause of action, alternatively are vague and embarrassing and lack averments which are necessary to sustain a cause of action, and alternatively, excipiable. In that regard, the defendant has raised five (5) grounds of exception to the particulars of claims.

[4] In regard to the application for summary judgment, the plaintiff alleges that the defendant has no *bona fide* defence to the action and has delivered a notice of intention to defend solely for the purposes of delaying the action. The defendant opposes the application for summary judgment.

[5] On the day of the hearing of the abovementioned applications, at the onset of oral argument, the plaintiff's legal practitioner, among other things, indicated that due to certain considerations:

- (a) the plaintiff withdraws its application for summary judgment and tender the defendant's wasted costs, and that,

- (b) the plaintiff no longer persists in its opposition to the first, second and fourth grounds of exception and that the dispute between the parties, insofar as the exception is concerned, is in respect with the third and fifth grounds of exception.

[6] In view of the foregoing submissions, the issues presently before court and which the parties argued are the third and the fifth grounds of the defendant's exception and the defendant's application for security for costs. I shall first deal with the application for security

for costs. Later I would deal with the third and fifth grounds of the defendant's exception.

Defendant's application for security for costs

[7] The plaintiff raises a *point in limine*, in regard to the application for security for costs, to the effect that the defendant has not complied with the provisions of rule 32(9) and (10) before launching his application. In response to this *point in limine*, the defendant contends that it has complied with the provisions of rule 32(9) and (10) report on 13 November 2019 instead of the 8 November 2019 deadline. And the defendant seeks condonation for the one court day late filing of the rule 32(10) report.

[8] It is common cause that by court order dated 17 October 2019, the defendant was directed to comply with rule 32(9) and (10) not later than 8 November 2019.

[9] It is also not in dispute that on Thursday 07 November 2019, the defendant, purportedly in an attempt to comply with the aforesaid court order, addressed a letter to the plaintiff's attorneys, in the following terms, in part:

'Dear Sir/Madam

RE: PRETORIA CLOTHING & CAPS (PTY) LTD T/A SOVIET // R.D JACOBS T/A STREETHOUSE CLOTHING NAMIBIA – CASE NO.HC-MD-CIV-ACT-CON-2019/02468

We refer to the above matter and to the court order dated 17 October 2019 and hereby engage you again and inform you for purposes in terms of rules 32(9) and (10), that the defendant intends to bring an application for an order that such security of N\$ 150,000.00 be given on a date to be determined by the court, alternatively that the plaintiff's claim be dismissed with costs, due to the non-compliance with the defendant's notice for security in terms of rule 59(1) dated 29 August 2019.

We also refer you to and regard our engagement with yourselves in paragraph 3 of the joint status report dated 10 October 2019 as a proper and further demand by our client for your client to comply with the notice for security for costs dated 29 August 2019, and to which you did not respond nor did you furnish the requested security for costs of N\$ 150,000.00.

Should your client not undertake irrevocably to furnish the Bond of Security in the amount of N\$ 150,000.00 by tomorrow, 08 November 2019 at 16h00, we hold instructions to proceed with the aforesaid application.

Yours faithfully'

[10] The defendant responded to the above letter the following day, remonstrating that such letter does not amount to a genuine attempt to resolve the matter amicably, as contemplated under rule 32(9). In addition, the defendant denied liability to pay security for costs.

[11] It is apparent that the "search" for amicable resolution purportedly made by the defendant, before launching the application for security for costs, is through the letter which was addressed to the plaintiff's attorneys on 7 November 2019.

[12] The question now is whether the steps taken by the defendant are sufficient to satisfy the requirements of rule 32(9) in the circumstances.

[13] The mere writing of a letter as a means of seeking an amicable resolution to a dispute and as an end in itself, was deprecated in *Bank Windhoek Limited v Benlin Investment CC HC-MD-CIV-CON- 2016/03020 [2017] NAHCMD 78 (15 March 2017)*. Furthermore, in a similar matter of *ADIDAS (South Africa) (Pty) Ltd v Roland Donovan Jacobs HC-MD-CIV-ACT-CON-2019/02339 (2020) NAHCMD 81 (06 March 2020)* this court, agreeing with the sentiments expressed in the Benlin matter above, held that a letter couched in similar terms and forwarded to the plaintiff on the last day (of about a two weeks period within which the defendant was directed to comply with the provisions of rule 32(9) and (10)), did not constitute compliance with the rule 32(9).

[14] I am of the opinion that in the present case, the letter requesting the plaintiff to make an undertaking to pay security for costs "by tomorrow", is not sufficient initiative by itself, for a search of an amicable resolution of a dispute, contemplated under rule 32(9). On the basis of the facts in this matter, it is apparent that the defendant has not demonstrated serious intention to engage the plaintiff in the process of attempting to resolve the dispute amicably. I therefore find that there was no compliance with the provisions of rule 32(9) and (10) in this

matter.

[15] Insofar as the request for condonation for non-compliance with rule 32(9) is concerned, I wish to underline that the defendant was given sufficient time within which to comply with rule 32(9) and (10), namely from 17 October 2019 to 08 November 2019. The defendant opted to do nothing during the most part of that period, addressing the aforesaid letter to the plaintiff's legal practitioners only on 07 November 2019, urging them to make an undertaking "by tomorrow". There is no explanation for the defendant's conduct in that respect. Furthermore, I see no good reasons why condonation should be afforded to the defendant in such circumstances. The requested condonation is therefore rejected.

[16] For the foregoing reasons, the application for security for costs stands to be struck from the roll, with costs.

#### Defendant's grounds of exception

##### Third ground of exception

[17] In his third ground of exception the defendant argues that Annexure "C" which purports to be a deed of surety, is not stamped in terms of the Stamps Duties Act and therefore may not be used or tendered in evidence or made available in any court.

[18] I am of the view that the defendant's contention on this aspect has no merit. An unstamped instrument may be stamped retrospectively. At the hearing of the matter, before judgment is given, the plaintiff would have to show cause, if any, why the court should permit it to have the instrument stamped and be made available, in terms of section 12 of the Stamp Duties Act. At this stage, the instrument has not yet been placed in evidence and the admissibility thereof on the ground of it being unstamped cannot be adjudicated upon.<sup>1</sup>

[19] On the basis of the aforesaid reasons, the defendant's third ground of exception has no merit and stands to be dismissed.

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<sup>1</sup> Miller v Prosperity Africa Holdings (Pty) Ltd (I1218/2010) [2013] NAHCMD 255 (17 September 2013) para 26.

Fifth ground of exception

[20] In his fifth ground of exception, the defendant argues that the letter of demand, referred to in paragraph 12 of the particulars of claim, is not attached to the particulars of claim. The defendant therefore argues that the failure to attach the letter of demand makes the particulars of claim excipiable and/or vague and embarrassing and/or lack averments necessary to sustain a cause of action.

[21] The defendant does not state how the failure to attach the letter of demand makes the particulars of claim vague and embarrassing or lack averments necessary to sustain a cause of action. The defendant has not established that due to the failure to attach the letter of demand, the particulars of claim are rendered meaningless or capable of more than one meaning or can be read in anyone of a number of different conflicting ways. Nor has the defendant shown that, upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed due to the omission to attach the letter of demand. In any event, the defendant has not established how the failure to attach the letter of demand prejudices him. There is no merit in the defendant's fifth ground of exception and this ground of exception falls to be dismissed.

Conclusions

[22] Insofar as the plaintiff indicated that it shall no longer persists in opposing the first, second and fourth grounds of the exception and that the parties agreed that the only issues in dispute, in regard to the exception, are the third and fifth exception, I treat that as acceptance by both parties that the particulars of claim are defective in the respects pointed out by the defendant and that the plaintiff agrees to remove the cause of complaint. I would, therefore, accept, without deciding, that the defendant was justified in raising the first, second and fourth grounds of exception and that the defendant is entitled to its costs in regard to the first, second and fourth grounds of exception.

[23] In conclusion, my findings are that:

(a) the defendant's application for security for costs is dismissed on account for non-compliance with the provisions of rule 32(9) and (10); and,

(b) the third and fifth grounds of exception are dismissed on the basis that the defendant has not established that such grounds render the particulars of claim vague and embarrassing or lack necessary averments to sustain a cause of action.

[24] As regards costs, I am of the view that the general rule that costs follow the event should find application.

[25] In the result, I make the following order:

1. The defendant's application for security for costs is struck from the roll for non-compliance with the provisions of rule 32(9) and (10).
2. The defendant is ordered to pay the plaintiff's costs occasioned by plaintiff's opposition to the application for security for costs. Such costs include costs of one instructing and one instructed legal practitioner.
3. The defendant's third and fifth grounds of exception are dismissed. The defendant is ordered to pay the plaintiff's costs occasioned by plaintiff's opposition to the, third and fifth grounds of exception. Such costs include costs of one instructing and one instructed legal practitioner.
4. The plaintiff is ordered to pay the defendant's costs in respect of the first, second and fourth grounds of exception. Such costs include costs of one instructing and one instructed legal practitioner.
5. The plaintiff is ordered to pay defendant's costs, occasioned by the defendant's



opposition to the application for summary judgment. Such costs include costs of one instructing and one instructed legal practitioner.

6. The plaintiff is granted leave to amend its particulars of claim, if so advised, within 15 days from 3 July 2020.

7. The matter is postponed to 19 August 2020 at 15:15 for Case Planning Conference.

8. The parties must file a joint case plan on or before 12 August 2020.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendant</b>
Advocate E Nekwaya Instructed by ENSafrica Namibia Windhoek	A. Naude Instructed by Dr Weder, Kauta and Hoveka Inc. Windhoek