REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Baobab Capital (Pty) Ltd//Shaziza Auto One (Pty) Ltd	**Case No:** HC-MD-CIV-ACT-OTH-2019/05214
	Division of Court: High Court
Heard before: Honourable Mr Justice Ndauendapo	**Delivered on:** **26 October 2020**
Neutral citation: *Baobab Capital (Pty) Ltd v Shaziza Auto One (Pty) Ltd* (HC-MD-CIV-ACT-OTH-2019/05214) [2020] NAHCMD 487 (26 October 2020)	
The order: 1 The application is struck from the roll for non-compliance with Rules 32(9) and 32(10). 2 Costs of one instructing and one instructed counsel are awarded to the first respondent, costs shall not exceed N$ 20 000. 3 The case is postponed to 29/10/2020 at 14:15 for Case Management Conference hearing (Reason: Parties to file case management conference report).	
Reasons for order: <u>Background facts</u> [1] The applicant launched an application for leave to consolidate the matter under case number 2019/05214 and the matter under case number 2019/02613. The application was opposed by the first respondent only.	

[2] On 6 April 2020 the applicant addressed a letter to the first respondent's legal practitioner stating that:

'Attention: Mr. Naude

Dear Sir,

RE: BAOBAB CAPITAL (PTY) LTD VS SHAZIZA AUTO ONE (PTY) LTD AND ANOTHER

We refer to the above matter and address this correspondence to you in terms of Rule 32 (9) & (10).

We intend to file an application for consolidation so as to apply to consolidate case number HC-MD-CIV-ACT-OTH-2019/05214 with case number HC-MD-CIV-ACT-CON-2019/02613 on the following grounds:

1. Both matters concern the same cause of action in that it involves the same loan and as a result;
2. The evidence in both matters will by-and-large overlap and therefore the witness statements and discovery affidavits in both matters will essentially be similar if not the same.

It will therefore be prudent and convenient (and ultimately save time and money) for the court to hear the two matters together.

In light of the above, please advise whether you will oppose our application for consolidation of the two matters.'

[3] The legal practitioner for the first respondent did not respond to the said letter. On 11 May 2020, a further email was sent to the legal practitioner of the first respondent stating:

'May I please request a reply to our letter of 6 August, which is again attached hereto for your convenience.'

[4] Again, the first respondent legal practitioner did not respond. The applicant then proceeded to file the report in terms of Rule 32 (10) setting out the steps it took to try and

resolve the matter amicably.

[5] It also filed the application for consolidation simultaneously. The first respondent opposed the application and also filed an answering affidavit. When the matter came before me, I requested the parties to address me on whether there was full compliance with Rules 32 (9).and 10.

[6] Mr. Jones for the applicant, argued that the applicant before launching the application took the following steps in compliance with rules 32(9) and 10:

6.1 On 6 April 2020 a letter was sent by the applicant's attorney to the respondent's attorney as contemplated in rule 32(9). No response was forthcoming;

6.2 On 11 May 2020 a follow up correspondence was sent to the respondent's attorney. This massive expressly references the letter of 6 April 2020. No response was forthcoming.

[7] In the letter of 6 April 2020, the applicant's attorney dealt with the issue of consolidation and sets out why consolidation will be prudent and convenient and would ultimately save time and money. There was no response or engagement by the respondent's attorney.

[8] Counsel for applicant argued further that the first respondent admitted that there was no cooperation forthcoming from the first respondent.

[9] Therefore, counsel argued, it is untenable, in the face of the respondent admitting that its attorneys have not engaged or co-operated with the applicant's attorneys (despite their two letters in terms of rule 32(9)) to contend that the application now stands to be struck for lack of compliance with rule 32(9) or (10).

[10] To do so, is to do so with dirty hands.

[11] In the premise, counsel argued that it is hardly tenable for the respondent to seek the striking of this application for lack of compliance with rule 32(9) and (10).

[12] Mr. Barnard for the first respondent argued that the respects in which the letter of 6 April 2020 failed to comply with the "*plethora of cases*" that laid down the requirements

that must be complied with in terms of rules 32(9) and 10 are manifold. Mr. Barnard argued that it is clear from the authorities that compliance with rule 32(9) can only take place once the interlocutory application that an applicant wishes to launch is drafted, and has been presented to the prospective respondent so that it (the respondent) can acquaint itself with the full and comprehensive nature of and basis upon which the applicant's relief will be sought. Without such knowledge a respondent can clearly not meaningfully consider an amicable solution of issues of which it is not aware of.

[13] Mr. Barnard further argued that the "notice of motion" in the consolidation application was only launched on or about 20 May 2020, long after the 6 April 2020 letter had been dispatched to the defendant's legal practitioner. At the time when the 6 April 2020 letter was dispatched to the first defendant's legal practitioner, the latter had nothing to enable him to meaningfully consider any request concerning an application that he had never seen. Secondly, the purported rule 32(9) letter of 6 April 2020 made no attempt to amicably resolve, such end-result being the imperative contemplated by rule 32(9), the unidentified disputes still to arise in the contemplated interlocutory application.

[14] Mr. Barnard submitted that whereas rule 32(9) contemplates the "amicable resolution" of a proceeding, the plaintiff's letter of 6 April 2020 did nothing to seek or promote an "amicable resolution" of anything. It simply enquired whether the first defendant intended opposing an application that it had not yet seen.

[15] Rules 32(9) and 10 are couched in the following terms:

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

(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 resolved amicably as contemplated in sub rule (9), without disclosing privileged information.'

In *Kondjeni Nkandi Architects v The Namibian Airports Company Limited* (I 3622/2014) [2018] NAHCMD 274 (31 August 2018) , Masuku J said the following:

'[14] Reverting to the matter at hand, it is clear that the letter referred to as compliance with sub rule (9) was written at demand stage i.e. even before the combined summons was

issued. Compliance with the said sub rule demands that having drafted the pleading containing the interlocutory application but 'before launching it seek an amicable resolution thereof…' In this case, it means that having drafted the exception, but before launching it, the excipient should have sought an amicable resolution of the dispute and this evidently did not happen…

In *Bank Windhoek Limited v Benlin Investment CC* (HC-MD-CIV-CON-2016/03020) [2017] NAHCMD 78 (15 March 2017) regarding the issue of exchange of letters, Masuku J, expressed himself as follows: '[12] 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 application. I am of the view that the mere writing of a letter, calling on the other party to say 'how you intend to resolve the matter amicably,' cannot, even with the widest stretch of the imagination, amount to compliance with the rules. (Emphasis added)

And further

[16] The writing of letters provided a very easy way of being shallow in consideration of issues, dismissible in approach and polarized in engagement. This becomes so even If there are matters that may be canvassed, even it 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 or approach to the live issue going forward**. The benefit must not be lost behind the veil of avoiding active engagement by the mere superficial exchange of letters.' (Emphasis and bold print supplied)

[16] In this matter the onus was on the applicant to engage the first respondent in a meaningful manner, that entailed having drafted the application and before launching it, presented to the first respondent to consider it and, if there was any opposition to the application to call a face to face meeting to consider the issues raised in the application before launching it. That was not done. Mr. Barnard correctly submitted that the first respondent could not have engaged in an amicable resolution without having seen the application and having considered the issues raised therein.

[17] Mr. Jones correctly submitted that there was an ethical duty for attorneys of the first respondent to reply to the letters of the applicant legal practitioners, and such failure left the applicant with no choice, but to launch the application. I agree that there was a duty to reply to the letter, however the applicant should have done more before launching the application. For instance by providing the draft application to the first respondent and

asking it to indicate whether there was any opposition to such an application and, if so, to agree on a date to have a face to face meeting (or via zoom) to meaningfully engage as required by rule 32(9).The applicant failed to do that.

[18] For those above reasons, the application was struck from the roll.

The first respondent asked that the costs be not capped as provided for by rule 34(11), however due to the conduct of the first respondent' legal practioner in not replying to the letters of the applicant, I ordered that the costs be capped to N$20 000.

G.N. NDAUENDAPO **JUDGE**	
Counsel for applicant: Adv. Jones Ellis Shilengudwa Inc Windhoek	Counsel for first respondent Adv. T Barnard Dr Weder, Kauta & Hoveka Inc. Windhoek