



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: I 341/2008

ADVOCATE FREDERICK ALLAN LANGE N.O.

(in his capacity as the appointed curator *ad litem* for

DIRK JACOBUS LOUBSER

APPLICANT/PLAINTIFF

and

DE BEERS MARINE NAMIBIA (PTY) LTD

RESPONDENT/DEFENDANT

Neutral citation: *Loubser v De Beers Marine Namibia (Pty) Ltd* (I 341/2008)
[2013] NAHCMD 155 (14 April 2014)

Coram: GEIER J

Heard: 11 April 2014

Delivered: 14 April 2014

Released: 12 May 2014

Flynote: Practice - *Pauper* suits - Litigant seeking to continue action *in forma pauperis* – applicant not qualifying and not having applied for leave to sue *in forma*

pauperis in terms of Rule 41 of the Rules of Court – the Court – through its case management order - however affording the applicant the opportunity to formalize the right to continue to prosecute the action he had instituted in 2008 – the question thus arose whether the non-utilisation of the applicant - of the mechanisms created by Rule 41 of this Court's Rules - could be condoned? - in this regard not only the court's powers of condonation, as afforded by Rule 27 (3) came into play, but also the court's discretion, whether or not this would be a suitable case to exercise the court's inherent jurisdiction in order to grant the applicant the relief sought?

Court - Jurisdiction - Inherent jurisdiction - will only be exercised – sparingly - in specific cases and where requirements of justice demand such deviation – In present instance court prepared to condone the applicant's non-compliance with Rule 41 and to exercise its inherent jurisdiction – as this deemed to be in the interests of justice - court emphasising however that it did not exercise these powers as a matter of course, but, because it was persuaded, that the applicant had advanced sufficiently strong grounds for the court to do so, and because the court was satisfied that justice in this instance could not properly be done unless the court would grant the applicant leave to continue to prosecute this action *in forma pauperis*. Application accordingly granted.

Summary: The facts and circumstances of the matter appear from the judgment.

ORDER

1. The applicant's non-compliance with Rule 41 of the Rules of Court is hereby condoned.
2. The applicant is granted leave to continue to prosecute this action in *forma pauperis*.
3. Adv. J J Botha SC and Adv. L Viljoen, Mr A Naudé of Dr Weder, Kauta & Hoveka Inc. and Mr Schalk Maartens of De Vries Shields Chiat Inc. (DSC) are

hereby authorised to continue to act on behalf of the applicant *in forma pauperis*, subject to the provision of Rule 41 of the Rules of the High Court.

4. The parties' legal practitioners are directed to approach the managing judge in chambers on or before the close of business of 16 April 2014, for the allocation of a suitable trial date.
5. The costs of the application for leave to continue to prosecute this action in *forma pauperis* are to be costs in the cause and will be subject to the provisions of Rule 41(7) of the Rules of the High Court.

JUDGMENT

GEIER J:

[1] Pursuant to this court's order of 18 October 2013, the applicant was granted an opportunity to formalise the right to continue to prosecute this action, instituted in 2008, on an *in forma pauperis* basis, when the applicant was directed to:

'bring an application in terms of Rule 41 of the Rules High Court or to launch an application, direct, to this Court, for leave to sue *in forma pauperis*, on or before 29 November 2013'.

[2] The parameters against which the resultant interlocutory application, (for leave to continue the currently pending action, *in forma pauperis*), so brought, now falls to be determined has been conveniently set out in the heads of argument, filed on behalf of the applicant, by applicant's counsel. I will thus incorporate them into this judgment *mutatis mutandis*:

'Introduction

1. For the sake of convenience, the parties are referred to as in the main action.

2. Plaintiff is the curator ad litem appointed for Dirk Jacobus Loubser ("Loubser"), to assist him in pursuing his claim for damages against Defendant.
3. This is an application for leave to continue this action *in forma pauperis*. Rule 41 does not provide that a litigant who becomes poor during the progress of proceedings may apply for leave to continue as a *pauper*. The rule merely refers to the institution of proceedings. However, it is settled law that the failure of the rule to deal in terms with this contingency does not preclude an application in terms of the rule at any stage in any proceedings [*Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa* (5th ed.) at 1580]. In *Lax v Parity Insurance Co Ltd (in liquidation)* 1966 (3) SA 396 (E) it has been held that the Court still has the power to grant leave to continue proceedings *in forma pauperis*, either by implication from the rule or by reason of the Court's inherent jurisdiction. It is therefore submitted that this Court has the power to allow Plaintiff to continue *in forma pauperis* this action that has already been instituted.

Defendant's attitude

4. Before endeavouring to deal with the merits thereof, it is necessary at this stage to refer to Defendant's attitude regarding this application, and the proceedings in general. It is submitted that Defendant's conduct and attitude should be regarded as a relevant consideration in the exercise of this Court's discretion whether or not to grant the leave sought.
5. It is respectfully submitted that it is not Plaintiff that is responsible for the mounting up of costs in this matter. The history of Defendant's opposition (respectfully submitted to be unreasonable) to every application so far, is indicative of an attitude that Defendant is not set about the restriction of costs in real earnest.
6. Defendant is entitled to consent to an order that Plaintiff proceed *in forma pauperis*. This is trite and requires no citation of authority.
7. On the first trial day, 14 October 2013, both parties were ready to continue. Plaintiff intended to call only one witness in the person of Mr Alan Millar. Despite all the costs

incurred at that stage, Defendant then decided to take issue with Plaintiff's junior and senior counsels' right of appearance on an *in forma pauperis* basis. When asked by this Court whether it was Defendant's purpose to have Plaintiff's legal representation eliminated, Defendant's counsel conceded or indicated that it was Defendant's sole purpose to ensure that Plaintiff's legal representation was legalised, and not to have Plaintiff's legal representation eliminated ("the concession") [see paras 42 and 43 of this Court's judgment delivered on 18 October 2013, and released on 11 February 2014]. Immediately before the concession was made, it was common cause that there is no legal principle that prevents costs from being awarded to Defendant in the event of Plaintiff (as *pauper*) being unsuccessful. It is therefore submitted that Defendant could have consented to *pauper* assistance, at least since that stage, if the concession was seriously intended. When requested to formally consent to *pauper* assistance on 18 March 2014, Defendant again formally refused its consent. This refusal is not reconcilable with the concession, as Defendant is clearly aware of the reality that Plaintiff would be unable to continue with these proceedings if *pauper* assistance is not granted.

The merits

8. Rule 41 provides that an application to institute proceedings *in forma pauperis*, should be made to the Registrar of the Court having jurisdiction. However, there is authority for the proposition that the Court has inherent power to allow any proceedings to be brought before it *in forma pauperis* [see: *Mapalala v Guter* 1958 (3) SA 679 (SR) at 680D; and *Herbstein & Van Winsen* (*supra*) at 1580].
9. A person who wishes to institute or continue proceedings, but who lacks the requisite financial means, is entitled to avail him-/herself of the provisions of Rule 41 relating to *in forma pauperis* proceedings. The rule provides for the following requirements:
 - 9.1 An affidavit setting forth fully his/her financial position and stating that, excepting household goods, wearing apparel and tools of trade, he/she is not

possessed of property to the amount of R1000 and will not be able within a reasonable time to provide such sum from his/her earnings.

9.2 A statement signed by counsel that the person concerned is unable to pay fees and that counsel is acting for the said person gratuitously.

9.3 A certificate of *probabilis causa* by the said counsel.

10. The question of *probabilis causa* is no bar, because Plaintiff, in his capacity as curator ad litem and a male advocate of the High Court of South Africa, practising at the Cape Bar, has stated that he is able to certify *probabilis causa*. This requirement has clearly been fulfilled. Both Plaintiff (in his said capacity) and his legal team stated that they are satisfied that Loubser is unable to pay fees, and that they are willing to act on his behalf gratuitously [see the supporting affidavit of the curator ad litem, paras 3 – 6].

11. The test for *probabilis causa* is only a probability of success [see *Jaspersen v Jaspersen* 1934 (2) PH B28 (SWA), a decision of the High Court of the then South West Africa].

12. It therefore remains for this Court to decide whether Plaintiff should be given leave to continue *in forma pauperis*. Plaintiff has to satisfy this Court that the indulgence ought to be afforded.

Loubser's lack of financial means

13. Loubser's financial means are set out in the accompanying affidavit of Estelle Smit ("Estelle"). The content of her affidavit is not disputed, and can be summarized as follows:

13.1 She is a 60 year old female who lives with Loubser (not married to him) in a house at Langebaan in the Western Cape, of which they are the co-owners. The house is valued at approximately R1,530,000. As a consequence of Loubser's brain injury, he is in need of constant caring, and Estelle fulfilled

this role of his carer since the incident. Estelle's elderly mother lives with them in the Langebaan house, which is their only abode.

- 13.2 Estelle has no intention of consenting to the selling of the house, even if such refusal could jeopardise their relationship and Loubser losing his only carer.
- 13.3 Estelle is not employed and haven't been working for many years. Her only income is derived from rent in the sum of R6400 from her house in Durbanville, which is her only asset. After provision for monthly water charges and levies, her net income amounts to approximately R6000 per month.
- 13.4 Since his ill-health retirement in 2007, Loubser received lump sum payments and a monthly pension of R2890 from the De Beers Pension Fund.
- 13.5 Loubser's monthly obligations amount to the total sum of R3252, excluding food, clothing, medical needs not covered by the medical aid, and other ongoing monthly needs. His monthly pension is not nearly enough to cover his monthly obligations and needs, and the funds which were paid as lump sums were used to supplement his monthly shortfalls. The remaining balance of approximately R36,000, will be used to supplement their monthly needs until its complete extermination. It is anticipated that, by the time of the hearing of this application, these funds will be completely depleted [see paras 11 and 14].
- 13.6 Estelle and Loubser owns a 2003 Volkswagen Polo which has an odometer reading of approximately 200,000 km. The car is in a bad state and was paid for by Estelle, although it is registered in Loubser's name.
- 13.7 They also possess some household furniture and goods, and certain personal belongings like clothing and a few tools, and safe for the Volkswagen Polo and the Langebaan house, Loubser has no other assets, and his sole monthly income is the pension that he receives from Defendant's pension fund.
- 13.8 According to Estelle, Loubser is in no financial position to sustain the continuation of the proceedings against Defendant, and he is totally

dependent on his present legal representatives assisting him by acting gratuitously in the continuation of the proceedings.

14. It is therefore clear that, by the time of the hearing of this application, Loubser will be in receipt of a monthly pension which falls far short of his living expenses, and he remains the co-owner of the Langebaan house and some other assets that is negligible. It is clearly impossible for him to sell the Langebaan house in order to fund the litigation as he will probably not get his co-owner's consent, and he may be in jeopardy of losing his only carer of which he is in permanent need. The only inference from the facts as deposed to by Estelle is that, if the house is sold, Loubser will lose the only roof over his head and not be able to afford to rent.
15. It is submitted that Loubser has given a full account of his financial position, with no attempt to down play his position in order to bring it strictly within the parameters of the provisions of Rule 41. At the same time it is submitted that it has to be conceded that Loubser does not strictly comply with the provisions of the rule and has to persuade this Court to come to his assistance by relaxing the provisions of the rule and to exercise its discretion in his favour.

The Court's discretion

16. Sub-rule (3) of Rule 27 reads as follows:

"The Court may, on good cause shown, condone any non-compliance with these rules."
17. This sub-rule gives the Court a wide discretion [*Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 216H – 217A]. The courts have consistently refrained from attempting to formulate an exhaustive definition of what constitutes "good cause", because to do so would hamper unnecessarily the exercise of the discretion [*Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A, *Ford v Groenewald* 1977 (4) SA 224 (T) at 225E-G]. This sub-rule empowers the Court to condone any non-compliance with the rules [*Dalhousie v Bruwer* 1970 (4) SA 566 (C) at 571E]. The use of the word "any" emphasize the absence of any restriction on the

powers of the Court to do so [*General Accident Insurance Co South Africa Ltd v Zampelli* 1988 (4) SA 407 (C) at 410B].

18. Henochsberg J remarked as follows in *Neal v Neal* 1959 (1) SA 828 (NPD) at 832F (in the context of an application for leave to sue *in forma pauperis*):

"...it is unlikely that the Judges themselves would, by the Rules that they have framed, have intended to limit their own jurisdiction or to deprive themselves of the power of relaxing the Rules where considered necessary in the interests of justice."

19. Roper J, who gave judgment of a Full Bench of three Judges in the case of *Moluele and Others v Deschatelets, NO*, 1950 (2) SA 670 (T), said the following at 675:

"The Court has not hesitated to relax the provisions of other Rules, even where peremptory in form, when necessary in the interests of justice."

20. Gardener, JP said the following in *Ncoweni v Bezuidenhout* 1927 CPD 130:

"The Rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice."

21. These authorities support the view that this Court possesses this inherent power to grant relief where insistence upon exact compliance with Rules of Court would result in substantial injustice to one of the parties.
22. It is submitted that, in all the circumstances, Loubser's financial position not having been contradicted, seems that the degree of hardship that would be caused to Plaintiff if the relief sought is refused, far outweighs any possible hardship to Defendant.
23. It has been held that an applicant need not sell the essentials of his existence in order to pay for litigation [*Joseph v Joseph* 1958 (4) SA 85 (SR) at 88F].
24. Proceedings *in forma pauperis* have in a large measure been rendered obsolete by the introduction of a State-sponsored legal-aid scheme. The amount of R1000 is clearly totally unrealistic.

25. Access to justice is a human right guaranteed by both the Constitution of Namibia and international covenants to which Namibia is a party [see: *Legal Assistance Aid Centre, "Access to Justice as Human Right", Access to Justice Series, Paper No 1, 2012*]. In this regard, it is submitted that an effective blocking of a substantial portion of the population from accessing the courts violates the human rights.
26. In this regard, the following was said by Maritz JA in the unreported judgment of *Kamwi v Duvenhage* (case no SA22/2008) in the Supreme Court of Namibia dated 13 November 2009, at 12:

"...Poverty should not be a bar to justice. It should not be allowed to deprive indigent persons with just causes or defences the opportunity to have them adjudicated. But, given the constitutional demand for equality and the right all persons have to a fair trial, the courts must seek to strike a fair balance between the measures set to accommodate poor litigants and the equally important rights of opposing parties to a just and fair adjudication of their cases..."

at para 14.

"...in the absence of a full disclosure of his financial position, he failed to establish any other basis upon which the Court, in the exercise of its discretion...may allow him to prosecute his appeal *in forma pauperis*..."

[Our underlining.]

27. Article 12(1)(a) of the Constitution of the Republic of Namibia provides that, "*in the determination of their civil rights and obligations...against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law*".
28. The Following remarks by Cameron AR in *Brisley v Drotskie* 2002 (4) SA 1 (HHA) at 33F-H also apply to the Consitution of the Republic of Namibia:

"All law now enforced in South Africa and applied by the courts derives its force from the Constitution. All law is therefore subject to constitutional control, and all law inconsistent with the Constitution is invalid. That includes the common law of contract, which is subject to the supreme law of the Constitution. The Bill of Rights applies to all law, and binds the Judiciary no less than the Legislature, the Executive and all organs of State. In addition, the Constitution requires the courts, when developing the common law of contract, to promote the spirit, purport and objects of the Bill of Rights."

29. In the exercise of its discretion, this Court should have regard to (*inter alia*) the following considerations:

29.1 Loubser's constitutional right of access to justice, and the effective denial of this right in the event of this application being unsuccessful;

29.2 The degree of hardship which will be caused to Loubser if the relief is refused, and any hardship or substantial injustice which may possibly be caused to Defendant, if relief is granted.

29.3 Defendant's aforesaid attitude to this litigation, and its refusal to consent to the relief sought with this application, despite the concession in open court that it is Defendant's sole purpose to ensure that the appearance of Plaintiff's legal representatives are legalised. Such consent would have the effect of immediately legalising the appearances.

29.4 The provisions of section 16(1)(a) of the Legal Aid Act, 1990, which provides that, in ascertaining the means of any person for purposes of that Act, that person's income and the value of his/her movable and immovable property, but excluding the value of (a) any dwelling house owned and occupied by him/her, shall be taken into account.

Conclusion

30. It is submitted that this Court possesses an inherent power to grant relief in this matter, especially where the insistent upon exact compliance with Rule 41 would result in substantial injustice, in that Loubser's constitutional right of access to justice will be denied.

31. This Court is requested to exercise its discretion in favour of Applicant and to allow the application.

Costs

32. Defendant gave notice of its intention to oppose this application on the basis that Plaintiff, on his own version as contained in the supporting affidavits, does not qualify to proceed on an *in forma pauperis* basis. Therefore, if successful, Plaintiff is entitled

to a costs order, alternatively, as Plaintiff is asking for a privilege, and if granted to him despite opposition, these costs could be ruled to be costs in the cause.

JJ Botha SC

Leilani Viljoen

Plaintiff's Counsel

20 March 2014'

[3] After De Beers Marine Namibia (Pty) Ltd, the defendant in the main action, and the respondent in this interlocutory application, had given notice of its intention to oppose this application, it proceeded further by giving notice that it would merely raise a point of law against the application in terms of Rule 6(5)(d)(iii) of the Rules of Court - This point was formulated as follows:

'On the applicant/plaintiff's own version as contained in the supporting affidavit to the application dated 29 November 2013, read together with the Common Law, the applicant/plaintiff does not qualify to proceed with the action under number I 341/2008 on an *in forma pauperis* basis'.

[4] In support of this point of law, respondent's counsel then filed a 'note' *in lieu* of full heads of argument, in which they raised the below mentioned issues:

'To assist the court, we make the following simple submissions:

1. The applicant did not apply or make out a case in terms of Rule 41. At best for applicant, it can be said that, by private arrangement (and outside the provisions of Rule 41) it was decided to deal with the matter on the basis that applicant's lawyers will only recover their fees if applicant is successful in his action. But such a private arrangement remains unlawful.¹ What the applicant in essence seeks is for the court to now sanction this arrangement.
2. The respondent may not agree to be part of an illegal arrangement.

¹ It is submitted that it is akin to a contingency fee arrangement, which is *contra bonos mores* and unlawful in Namibia. See: Gramwosky v Steyn 1922 SWA 48 and Law Society of SWA v Steyn 1923 SWA 46.

3. The current application appears to be in terms of the common law. The applicant contends that this Honourable Court should exercise its inherent jurisdiction to allow him to continue this action *in forma pauperis*.

4. The means test in terms of the Rules is contained in Rule 41(2)(a):

“(2) If when proceedings are instituted there be lodged with the registrar on behalf of such person -

(a) an affidavit setting forth fully his or her financial position and stating that, excepting household goods, wearing apparel and tools of trade, he or she is not possessed of property to the amount or N\$1 000 and will not be able within a reasonable time to provide such sum from his or her earnings;”

5. The means test for a common law application cannot and should not differ remarkably from the Rules. If this court sets a precedent that a person with assets worth N\$500,000.00 or N\$1,000,000.00 may be represented *in forma pauperis*, the courts will be flooded with similar applications.

6. Should the court grant the application, it should be a condition that any award made should be paid directly into the applicant's bank account and he shall make an affidavit that no deductions were made, annexing proof of payment into his bank account.

7. On the applicant's own version as contained in the supporting affidavit to the application dated 29 November 2013, read together with the common law, the applicant does not qualify to proceed with the action under case I 341/2008 on an *in forma pauperis* basis.’

[5] It will have been noted that the point relating to - what was termed by respondent's counsel as an “illegal arrangement” - was persisted with.

[6] In response to the respondent's ‘note’, counsel for the applicant also resorted to the novel procedure of ‘note- writing’ - by filing a ‘counter- note’, giving notice in the following terms:

‘Regarding Respondent's Note that Applicant's lawyers are party to an unlawful private arrangement, (paras 1 and 2 of the Note), Applicant will refer to paragraphs 45 and

46 of this Court's Judgment in the application for leave to amend, delivered on 26 September 2013'.²

[7] At the hearing of this matter - and only after Mr Botha had commenced with his argument - Mr Heathcote, rose and informed the court - and his opponents - that the respondent would now concede - and accept - that counsel for the applicant were not engaged in- and were not perpetrating an unlawful private fee arrangement and that he - (that is counsel) - and his client - were thus prepared to accept that the applicant's counsel were prepared to act gratuitously in this matter.

[8] This concession essentially cut short Mr Botha's argument who, then, confined himself to submitting further that the court, in the exercise of its inherent jurisdiction, should condone the applicant's failure to utilise Rule 41 and that the court should, on the basis of the facts before it, thus find in favour of in the applicant.

[9] Mr Heathcote, in answer, submitted that it had now become clear that the court would have to exercise its discretion in this matter on the basis of its common law inherent jurisdiction in order to decide the application.

[10] He submitted in this regard that the applicant earned more, and owned more than 80% of the Namibian population and, that the court, should take into account, that by granting the sought relief, this would mean that the greater part of those, with insufficient means, would qualify for *in forma pauperis* representation. This was in a nutshell his "floodgates argument".

² Reported on the Safflii web-site at: <http://www.safflii.org/na/cases/NAHCMD/2013/382.pdf> : where the court made the following remarks : '[44] It was pointed out on behalf of the defendant that plaintiff's legal practitioners were acting on a contingency fee basis. This was denied. [45] However and during oral argument Mr Heathcote elaborated on this point. He submitted to the court that should there be a private fee arrangement, which would amount to a contingency fee arrangement, or one that was based on the successful outcome of the plaintiff's case that this would amount to an unlawful arrangement in the Namibian jurisdiction, which unlawfulness the court should not countenance. [46] I have however on the facts before me - and also as a result of the assurances from plaintiff's counsel - no ground to assume that the plaintiff's legal practitioners are acting herein unlawfully on a contingency fee basis. I am entitled to- and will accept, for present purposes, the assurances of counsel in this regard.'

[11] He also emphasised that there was no need to allow present counsel to continue to represent the applicant as the applicant already had the benefit of a *curator ad litem*, an admitted advocate, practising with the Cape Bar. He submitted further in this regard that the purpose of the appointment of Advocate Allan Lange was to enable him to appear on behalf of his ward as the applicant was unable to do this himself. He underscored this submission with reference to the certificate of *probabilis causa* which had been issued by Advocate Lange.

[12] This factor - in addition to not passing the means test³ - posed an additional obstacle to the granting of the application.

[13] Thus, so the argument ran further, if the application would be refused, it would not mean the end at the road for the applicant as Advocate Lange could come to Namibia in order to represent the applicant in this action.

[14] It was also now - for the first time - contended that the applicant could have applied for Legal Aid - the application should thus be dismissed.

[15] Mr Heathcote then informed the court that his client would not insist on being awarded the costs of the application if it should succeed against the disabled applicant. He also reminded the court that even if the applicant was successful he could only be awarded costs once he had or being granted leave to continue *in forma pauperis*.

[16] In reply Mr Botha countered and disputed that foreign counsel would qualify to be appointed by the Namibian Directorate of Legal Aid to act in this matter. He was however, not able to deny this point categorically, as this was a new point, only raised in argument, and in respect of which no preparation and research had been conducted.

[17] In respect of the argument that Advocate Lange should litigate on behalf of his ward - also a new argument of which no notice had been given - he referred the

³ In this regard it had been submitted that the means test in the common law should not differ markedly from the means test set in the Rules.

court to *Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa* (5 ed) Vol 2, where the learned authors *Cilliers, Loots and Nel* point out at page 1522 that:

'An essential feature of the appointment of curators *ad litem* is the avoidance of a conflict of interest. Their functions are not always the same and differ according to the reasons for the appointment. ...

When a curator *ad litem* is appointed to litigate on behalf of an incapacitated person it is not the function to institute and prosecute proceedings irrespective of his or her views of the merits of the case. The curator is in a position of an ad hoc guardian of the patient and such, has a fiduciary duty.'

[18] Finally he asked the court to keep in mind that the matter was far down the line and that the applicant's current legal team were familiar with the intricacies of the applicants case, where they had consulted and conducted an inspection *in loco* and had already prepared the matter for trial, when the case had to be postponed, due to the urgent interlocutory application⁴, through which the validity of applicant's counsel's right of appearance, in terms of the Chief Justice Section 85 certificate, had been attacked. It would now simply be unjust to require Advocate Lange to take over the case at such late stage and where he would have to start all over to again prepare for trial. He thus urged the court to exercise its discretion in favour of the applicant.

THE ADMITTED FAILURE TO UTILISE RULE 41

[19] When it now comes to the determination of this dispute, it is in the first instance clear that the applicant never utilised the machinery created by Rule 41 of the Rules of Court and the reasons for this are clear. The applicant would simply not have qualified.

[20] The question thus arises in this context whether the non-compliance of the applicant - or rather the non-utilisation of the applicant - of the mechanism created by Rule 41 of this Court's Rules - can and should be condoned?

⁴ See the court's judgment of 18 October 2013 reported on the SAFLII web-site at <http://www.saflii.org/na/cases/NAHCMD/2014/40.html>

THE COURT'S INHERENT JURISDICTION

[21] In this regard not only the court's powers of condonation, afforded by Rule 27 (3) come into play, but also the court's discretion, whether or not this would be a suitable case to exercise the court's inherent jurisdiction in order to afford the applicant the relief sought.

[22] The circumstances against which the South African Courts have been prepared to exercise such jurisdiction, in the context of, for instance, considering whether or not the rules, relating to *pauper* proceedings, should also be extended to *peregrini*, were dealt with by Henochsberg J in *Neal vs Neal*⁵ where, in the course of his judgment, the learned judge also summarized the then applicable principles against which the courts have been willing to exercise this power. These he formulated as follows:

'It seems to me, however, that notwithstanding the decisions in the Cape Courts, it is unlikely that the Judges themselves would, by the Rules that they have framed, have intended to limit their own jurisdiction or to deprive themselves of the power of relaxing the Rules where considered necessary in the interests of justice. In this view I am fortified by the dicta of ROPER, J., who gave the judgment of a Full Bench of three Judges in the case of *Moluele and Others v Deschatelets*, N.O., 1950 (2) SA 670 (T). At p. 675 he said:

'The Court has not hesitated to relax the provisions of other Rules, even where peremptory in form, when necessary in the interests of justice.'

'This power to grant relief in cases of non-compliance with Rules is derived from the inherent jurisdiction of the Court and with respect I agree with the dictum of ROPER, J., that the Court possesses this inherent power to grant relief where insistence upon exact compliance with Rules of Court would result in substantial injustice to one of the parties.

Such an inherent power has also been recognised in the Cape Provincial Division, e.g., in *Basson v Bester*, 1952 (3) SA 578 (C), where the dictum of ROPER, J., was quoted with approval.

In my view moreover such inherent jurisdiction goes even further than the mere power to grant relief where insistence upon exact compliance with a Rule of Court would result in substantial injustice to one of the parties. I think such jurisdiction includes a power to grant relief where the Rules of Court make no provision therefor.'⁶

⁵ 1959 (1) SA 828 (N)

⁶ at p 832G – p 833A

[23] Mr Botha has indeed referred this court also to the *Moluele and Others v Deschatelets, N.O.*⁷ judgment and the judgment delivered in *Ncoweni v Bezuidenhout*.⁸

[24] The referred to inherent jurisdiction, also affords the court the power to allow proceedings to be brought before it *in forma pauperis* - as per *Mapalala v Guter*⁹ - and the power to grant leave to continue proceedings *in forma pauperis* - as per the Eastern Cape decisions of *Lax v Parity Ins Co Ltd (in Liq)*¹⁰ and *Commercial Union Assur Co of SA Ltd v Van Zyl*¹¹.

[25] Article 78(4) of the Namibian Constitution provides expressly that the High and Supreme Courts of Namibia shall have the inherent jurisdiction which vested in the Supreme Court of South West Africa immediately prior to the date of the independence, including the power to regulate their own proceedings...’.

[26] This power was recognised by the Namibian Supreme Court in the judgment of *Kamwi v Duvenhage* cited *supra*.

[27] A further comprehensive compendium of cases in which the courts, in this jurisdiction, have utilised their inherent jurisdiction and powers, is found in *Namibian Development Cooperation v Aussenkehr Farms (Pty) Ltd* 2010 (2) NR 703 HC, at paragraphs [17] to [29].

[28] It thus admits to no doubt that this court has the jurisdiction and powers contended for by Mr Botha - and not disputed by Mr Heathcote - and it therefore comes at no surprise that counsel where *ad idem* in this regard.

[29] Once Mr Heathcote, who appeared with Mr Dicks, on behalf of the respondent, made the concession in regard to the alleged “unlawful fee arrangement”, this concession narrowed down the scope against which this application was to be decided, namely to the issue of the court’s discretion, i.e.

⁷ Op cit above

⁸ 1927 CPD 130

⁹ 1958 (3) SA 679 (SR)

¹⁰ 1966 (3) SA 396 (E)

¹¹ 1971 (1) SA 100 (E), at 102 to 103

whether the discretion in this case, which the court admittedly has, can judicially be exercised for or against the granting of this application.¹²

[30] For purposes of this exercise the following factors were put before the court and are thus considered.

THE FACTORS TAKEN INTO ACCOUNT

THE ISSUE OF LEGAL AID

[31] This aspect was belatedly raised - and counsel had not prepared on this issue nor incorporated this aspect into their heads of argument.

[32] Accordingly - and in the absence of any evidence on this aspect - it remained, for instance, unknown what the means test is that is currently being applied, by the Directorate of Legal Aid, in its consideration, of whether or not legal aid should be granted to a litigant, in civil proceedings, in terms of Section 11 of the Legal Aid Act, 29 of 1990, and what the policy of the Directorate is, in regard to the appointment of foreign counsel, in a civil matter.

[33] It also appears with reference to Section 6 of the Legal Aid Act that the Director may allocate to any practitioner any matter in respect of which legal aid has been granted. The term "practitioner" is defined in Section 1 to mean "a legal practitioner as defined in Section 1 of the Legal Practitioner's Act 1995". The Legal Practitioner's Act in turn defines a "legal practitioner" as "a person, who in terms of that Act, has been admitted and authorised to practise as a legal practitioner, who is deemed to have been so admitted".

[34] Whether the definition contained in Section 1 of the Legal Practitioner's Act includes foreign legal practitioners, who are merely authorised, in terms of a certificate to act, in relation to a specific matter, was not argued before me.

[35] Whilst it is clear that foreign counsel are usually not admitted to practise in this country, and, although it may be arguable, that, for purposes of appearing in a

¹² See *Namibia Development Cooperation v Aussenkehr Farms*, cited above at paragraph [30]

specific matter, in respect of which a Section 85(2) Certificate has been issued, that such counsel are deemed to have been so admitted, I refrain from expressing any opinion in this regard, as also this aspect was not argued before me..

[36] This factor can accordingly not carry any weight.

THE ALLEGED FAILURE TO PASS THE MEANS TEST

[37] In this regard it is of relevance that the facts admitted onto the record regarding the applicant's financial position were un-contradicted and appear in summary form in the heads of argument filed on behalf of the applicant, quoted above.

[38] It appears in essence that the applicant's only income is a pension which does not cover his financial needs. The shortfall is/was supplemented from a lump sum payment received in 2007, which funds are apparently now depleted - The applicant has no other source of income.

[39] As far as his other assets are concerned, these seem insignificant and can be ignored for present purposes.

[40] The main asset which is however of relevance is the applicant's half- share in a home, situated in Langebaan, Cape, currently valued at R1 530 000.00, which he co-owns with a certain Mrs Smit. The circumstances relating to this asset have also been explained in the cited heads of argument from which the reasons appear why applicant cannot sell his half- share in this house in order to fund this litigation.

[41] On the facts it so appears that the applicant is indeed not in a position to financially sustain the action brought against the respondent.

[42] He is thus dependent on his current legal team acting gratuitously for him, also in the continuation of these proceedings.

[43] It is of relevance in this regard that an applicant need not sell the essentials of his existence in order to pay for any litigation.

SHOULD THE CURATOR AD LITEM CONTINUE TO ACT FOR THE APPLICANT

[44] In my view Mr Heathcote's argument was effectively countered with reference to the relied upon passage from *Herbstein & Van Winsen* from which it emerges that it is not for the curator himself to act, as he has a fiduciary role to fulfil and which imposes on him the duty to avoid any conflict of interest, which can quite obviously arise in circumstances where the curator would conduct the litigation himself and where he could seek to continue to do so, with one eye on the fees that he might be able to generate through the undue protraction of such litigation, while on the other hand he would be duty-bound to protect his client interests in such litigation by terminating it sooner, through a settlement, for instance. Such a scenario would obviously not be in the best interests of his client and ward.

[45] In any event it would also be totally impractical to now remove the applicant's current legal team, who are already intimately acquainted with their client's case, which was prepared for trial - and to - at this advanced stage - replace same with someone who would have to commence all trial preparations afresh.

ADDITIONAL FACTORS

THE RESPONDENT'S PAST CONDUCT, *EGALITE DES ARMES* and THE INTERESTS OF JUSTICE

[46] It is here that the history of this litigation comes to the fore - This is the fourth interlocutory judgment which has to be written in this case before the trial has even got out of the starting blocks. It becomes clear from this history that *De Beers Marine Namibia (Pty) Ltd* will deploy the might of its financial power, to the full, and 'will leave no stone unturned' in order to defeat the applicant's claims. The respondent has engaged two senior advocates as well as an experienced instructing legal practitioner to fight its case. To not allow the applicant's current legal representatives to continue to act for the applicant would disturb the current balance, where, presently, and if one compares the legal teams, there exists 'an equality of arms', so to speak.

[47] It becomes clear from these factors that the insistence - in this instance - upon the exact compliance with the Rules of Court will result in substantial injustice to the applicant.

[48] On behalf of the applicant the court's attention was quite rightly drawn to the respondent's attitude regarding this application and that the respondent's past actions should constitute a relevant consideration in the exercise of the court's discretion from which attitude the impression could not be avoided, as pointed out by applicant's counsel, that the respondent's true aim for raising the issue of *pauper* representation, was not really aimed at ensuring that applicant's legal representation was legalised, but was rather aimed at achieving that the applicant would be unable to continue to litigate on level terms, in these proceedings, in the absence of effective legal representation.

[49] This point was underscored by the belated concession and the withdrawal of the point relating to the alleged unlawful fee arrangement made during oral argument only.

POVERTY SHOULD NOT BE A BAR TO JUSTICE

[50] It must further be of import that poverty should not be a bar to justice and that also the poor should have access to the courts and to have their cases heard.

FULL AND FRANK DISCLOSURE OF FINANCIAL POSITION

[51] In this instance there has been a full and frank disclosure of the applicant's financial position, and to now, at this advanced stage of the litigation, deprive the applicant of the opportunity to continue to prosecute his action effectively to its final end and determination would surely not be in the interests of justice.

[52] A fair balance between the applicant's interests, on the one hand, and those of the respondent, on the other, would also be struck by acceding to the relief sought in this application.

THE FLOODGATES ARGUMENT

[53] The 'floodgates' argument, raised on behalf of the respondent, in my view, is taken care of by the trite and tested qualifications formulated by the courts in this

regard¹³ and which Botha J, in *Moulded Components & Rotomoulding SA (Pty) Ltd v Coucourakis*¹⁴, has so aptly expressed as follows:

'I would sound a word of caution generally in regard to the exercise of the Court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The Rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced, in my view, to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that will be exercised sparingly. As has been said in the cases quoted earlier, I think that the Court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the Court will only come to the assistance of an applicant outside the provisions of the Rules when the Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant.'¹⁵

[54] I respectfully agree with these sentiments - which I will adopt and apply in this instance – and in which I am prepared to exercise my powers in favour of the applicant, who is an incapacitated and disabled person, and who quite obviously requires the assistance of a *curator ad litem* and his current legal team.

[55] I want to emphasise however that I do not exercise these powers as a matter of course, but, because I am persuaded, that the applicant has advanced sufficiently strong grounds for me to do so, and because I am satisfied that justice in this instance cannot be properly done unless I grant the applicant leave to continue to prosecute this action *in forma pauperis*.

[56] In the result I make the following further orders:

1. The applicant's non-compliance with Rule 41 of the Rules of Court is hereby condoned.

¹³ See for instance : *Veto v Ibhayi CC* 1990 (4) SA 93 (SE), *Krygkor Pensioenfonds v Smith* 1993 (3) SA 459 (A) at 469, *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) (1997 (2) SACR 540; 1997 (10) BCLR 1348; [1997] ZACC 11) at [25], *Loretz v MacKenzie* 1999 (2) SA 72 (T), *Oosthuizen v RAF* 2011 (6) SA 31 (SCA) at [19], *Shabangu v Road Accident Fund* 2013 (3) SA 245 (GNP)

¹⁴ 1979 (2) SA 457 (W)

¹⁵ at 462H to 463B

2. The applicant is granted leave to continue to prosecute this action in *forma pauperis*.
3. Adv. J J Botha SC and Adv. L Viljoen, Mr A Naudé of Dr Weder, Kauta & Hoveka Inc. and Mr Schalk Maartens of De Vries Shields Chiat Inc. (DSC) are hereby authorised to continue to act on behalf of the applicant *in forma pauperis*, subject to the provisions of Rule 41 of the Rules of the High Court.
4. The parties' legal practitioners are directed to approach the managing judge in chambers on or before the close of business of 16 April 2014, for the allocation of a suitable trial date.
5. The costs of the application for leave to continue to prosecute this action in *forma pauperis* are to be costs in the cause and will be subject to the provisions of Rule 41(7) of the Rules of the High Court.



W GEIER
Judge

APPEARANCES

APPLICANT/PLAINTIFF: J J Botha SC (with him L Viljoen)
Instructed by Dr Weder, Kauta & Hoveka Inc.,
Windhoek

RESPONDENT/DEFENDANT: R Heathcote SC (with him G Dicks)
Instructed by GF Köpplinger Legal Practitioners,
Windhoek