



REPUBLIC OF NAMIBIA

CASE NO. I 1775/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

BURTON BAIN BRUCE DE WAAL

APPLICANT/DEFENDANT

and

LUCIA DE WAAL
(Born BEUKES)

RESPONDENT/PLAINTIFF

CORAM: DAMASEB, JP

Heard: **11th October 2011**

Delivered: **12th April 2012**

JUDGMENT

DAMASEB, JP: [1] This is an application seeking the rescission of an order adverse to the applicant (defendant in the main divorce action), dismissing his defence and counter claim to the plaintiff's¹ particulars of claim².

¹Respondent in the present rescission application.

²The sanction was imposed in terms of Rule 37(16); Vide Judgment delivered on 28 July 2011.

The applicant's legal practitioner of record had failed or neglected to participate in the generation of a case management report in preparation for the initial case management conference (ICMC), as required by the new case management rules³.

[2] Leading up to the dismissal aforesaid, the respondent had demonstrated the efforts made by her legal practitioner of record, Mr Kwala, to convene a parties' conference in order to generate a joint case management report but was frustrated by the applicant's legal practitioner of record in that endeavor. Although it is now claimed on behalf of the applicant that the court's notice for the ICM was never received, there is no explanation why the entreaties⁴ by the plaintiff's legal practitioner of record for the holding of the parties' conference were not heeded either.

[3] In the founding affidavit deposed to by Mr Haifidi⁵ it is stated that Mr Kwala's letters requesting the holding of the parties' conference were (just like the court's notice for the ICMC) not received by the firm Shikongo Law

³Rule 37(4).

⁴In letters sent by way of fax and supported by fax transmission sheets, dated 6th and 8th July 2011.

⁵Paragraph 18 of Founding Affidavit in the rescission application.

Chambers. That allegation is met in answer by Mr Kwala as follows⁶:

"Due to the fact that the correspondences dated 6th and 18th July 2011 respectively were sent to them via fax, requesting their availability for the case management report conference, of which such attempts were futile. (sic) I attach hereto copies of the respective letters attached hereto with fax confirmation sheets, which transmission shows receipt thereof by the applicant/ defendant's legal representative and it reflects their correct fax number..."

[4] There is conspicuous silence on the part of Mr Haifidi in respect of the latter allegation by Mr Kwala; from which it becomes apparent that there is no good cause shown by Mr Haifidi why there was no reaction to the invitation to participate in the generation of a joint report which is only applicable once a notice for the ICMC has been sent out⁷. Receipt of such request for a parties' conference must have alerted Shikongo Law Chambers that a notice for an ICMC had been sent out. That should have led them to make enquiries; but they did not. It is therefore more probable than not that the defendant's legal practitioners of record were remiss in complying with the court order. No factual basis has been established by Mr Haifidi for the inference

⁶Paragraph 12.3 of the Answering Affidavit in the rescission application.

⁷Rule 37(3).

he seeks to be drawn that there was no willful default in not co-operating with the Plaintiff's legal practitioner in generating a joint case management report.

[5] The rescission application falls to be dismissed on that ground alone, with costs. But there is a more fundamental problem with the application as I will now proceed to demonstrate.

[6] The rescission application was brought in the name of the applicant while the supporting affidavit is deposed to by a legal practitioner (Mr Haifidi) of the firm Shikongo Law Chambers, the defendant's legal practitioners of record. It purports to be in terms of Rule 44(1)(a) on the basis that the adverse order was given in error by the Court lacking the knowledge that the applicant was not in willful default of the case management order.

[7] The respondent has opposed the rescission application and *in limine* states that the legal practitioner is not authorized to bring the rescission application. The issue arises because Mr Haifidi rather curiously chose not to depose the client personally to the affidavit in support of the rescission application, or at the very least to confirm

on oath that he was authorized to bring the rescission application. That application was brought in the name of the applicant while the supporting affidavit is deposed to by Mr Haifidi.

[8] Mr Haifidi retorts in reply that the respondent's affidavit was filed outside the 14-day period within which it had to be filed and that since no condonation was sought therefor, such affidavit is incompetent and that the matter must proceed unopposed. I will accept, without deciding, that this point is properly taken. Fact is, though, that the respondent had filed a notice to oppose the matter and the objection to *locus* is in the nature of a point of law which the respondent was entitled to take even without filing an answering affidavit. Accordingly, I will entertain the point *in limine*.

[9] In argument Mr Haifidi submitted on behalf of the applicant that the allegation that he is duly authorized to depose to the founding affidavit is sufficient authority for him to have brought the application and that, in any event, the power of attorney executed in favour of the firm Shikongo Law Chambers by the defendant is, together with

such allegation in the founding affidavit, sufficient basis for the bringing of the rescission application.

[10] It is common cause that the defendant had not deposed to any confirmatory affidavit and Mr Haifidi avers only that he is authorized to depose to the affidavit but nowhere avers that he is authorized to bring the application. It is trite that it is not the deposing of the affidavit, but the institution of the legal proceedings, that must be authorized. A legal practitioner is an agent of a client and as agent cannot institute legal proceedings on behalf of the agent without authorization.⁸ There being no allegation that the legal practitioner (Mr Haifidi) is authorized to bring the application, the point *in limine* is on the face of it a good one; unless I am satisfied that the power of attorney relied upon is sufficient authority for the bringing of the rescission application.

[11] I will quote the power of attorney verbatim:

'SPECIAL POWER OF ATTORNEY

I, the undersigned

⁸Compare, *Konga Clearing Agencies CC v Minister of Finance* 2011 (2) NR 616; *Vaatz v Registrar of Deeds: In re Grootfontein Municipality: In re Nöckel's Estate* 1993 NR 170 (HC).

BURTON BAIN BRUCE DE WAAL

Do hereby nominate, constitute and appoint

ELIAS NDEVANJEMA SHIKONGO and/or **BOAS USIKU** and/or **JINAH MALNIE BROWN** and/or **NGUUNDJA PATIENCE KANGUEEHI-KANALELO** and/or **PETRUS SHAPUPALA TILENI ELAGO** of **SHIKONGO LAW CHAMBERS** at **NO 4 BANTING STREET, WINDHOEK WEST, WINDHOEK, REPUBLIC OF NAMIBIA**⁹

To be my/our lawful Legal Practitioners and Agents in my/our name, place and stead, to institute/defend an action in the High Court of Namibia instituted by **LUCIA DE WAAL** (Born BEUKES) against **BURTON BAIN BRUCE DE WAAL** for:

1. (a) An order for the restitution of conjugal rights, and failing compliance therewith;
(b) A final order of divorce;
2. An order in terms whereof the custody and control of all two (2) minor children to wit Nickisha Leandre De Waal (born on 24 August 2004), Nickton Noah Noelvine De Waal (born 19 February 2007) born out of the marriage between the parties, be awarded to the Plaintiff, subject to the Defendant's right to reasonable access to the said minor child;
3. An order in terms whereof the defendant be ordered to pay maintenance in respect of the minor children in the amount of N\$500.00 per month per child;
4. An order in terms whereof the Defendant be ordered to pay 50% of all pre-primary and secondary educational costs of the two minor children which costs shall include all costs relating to extra mural activities, books, stationary and tuition related costs in respect to the minor children;

⁹Mr Haifidi's name is conspicuously absent.

5. An order in terms whereof the Defendant be ordered to pay 50% of all medical, dental, pharmaceutical (on doctor's prescription), surgical, hospital, orthodontic, ophthalmological (including spectacles and/or contact lenses) expenses incurred in respect of the two minor children;
6. An order whereof Defendant forfeits his benefits in terms of the marriage in community of property in respect of the immovable property;
7. That the immovable property situated at Erf 4339, Richardine Kloppers Street, Khomasdal within the Municipality of Windhoek, bought by the Plaintiff before the marriage be awarded to Plaintiff;
8. An order whereof Defendant is ordered to sign the papers for the transfer of the immovable property when called upon by the Plaintiff's legal representative.
9. Costs of suit;
10. Further and/or alternative relief.

and generally for effecting the purposes aforesaid to do or cause to be done whatsoever shall be requisite, as fully and effectually, for all intents and purposes, as I/We might or could do if personally present and acting herein - hereby ratifying, allowing and confirming and promising and agreeing to ratify, allow and confirm all and whatsoever my/our said Legal Practitioner(s) and Agent(s) shall lawfully do, or cause to be done by virtue of these presents.

Signed at **WINDHOEK** on this **12th** day of **MARCH 2010** in the presence of the undersigned witnesses."

[12] The question that arises is if this power of attorney constitutes sufficient authority for Mr Haifidi to bring the rescission application. Powers of attorney are interpreted restrictively. As is stated by the learned authors, *Herbstein & Van Vinsen*¹⁰:

“The institution and prosecution of legal proceedings is an important step which may involve the principal in great expense, and for that reason the power is strictly construed”.

[13] One has to accept that the defendant is alive and *compos mentis* and able to give instructions and to depose to an affidavit. Why he did not remains a mystery. Even after the plaintiff raised the legal objection that Mr Haifidi was not competent or duly authorized to bring the rescission application, no confirmatory affidavit was filed by the defendant personally to confirm that he had indeed authorized the rescission application. On what basis can a Court then make an adverse costs order against the respondent if the application were to fail? That question provides the answer to the rule already referred to that civil proceedings must be brought by the party who enjoys

¹⁰The Civil Practice of the High Courts of South Africa, Vol.1 5th edn at 280

the legal right (locus) to bring it. There is no rule that prevents a legal practitioner to depose to an affidavit in support of a rescission application, as long as he is authorized to do so. In the present case, the client not only does not in the power of attorney authorize Mr Haifidi to act on his behalf; he also does not confirm that fact or the bringing of the rescission application, in the founding papers or in reply.

[14] The present power of attorney authorizes named practitioners of the firm Shikongo Law Chambers to oppose the relief sought in the combined summons. Mr Haifidi who deposes to the supporting affidavit for the relief is not named in the power of attorney. There is no explanation either by the deponent or his principal, the applicant why he is excluded. There could very well be a good reason but none has been proffered. There is therefore no factual or legal basis for Mr Haifidi's assertion that he is duly authorized to bring the application for rescission in the name of the applicant. The rescission application is therefore not competent.

[15] In view of my finding that the application was not authorized, it follows that it will be otiose to make a

costs order against the defendant. This is a case which warrants a special costs order in view of the clear absence of good cause in support of the rescission application, and the clearly defective application as regards the lack of authority to bring it.

[16] I make the following order:

1. The rescission application is dismissed.
2. Costs are awarded to the respondent (plaintiff in the main action) *de bonis propriis* against Mr Haifidi of the firm Shikongo Law Chambers, on the scale as between attorney and own client.

DAMASEB, JP

ON BEHALF OF THE APPLICANT/DEFENDANT:

Mr L Haifidi

Instructed by:

Shikongo Law Chambers

ON BEHALF OF THE RESPONDENT/PLAINTIFF:

Mr F Kwała

Of:

Kwała & Company Inc.