



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3967/2009

In the matter between:

LIEUTANT-GENERAL SEBASTIAN HAITOTA NDEITUNGA

PLAINTIFF

and

PETER YA PETER KAVAONGELWA

DEFENDANT

Neutral citation: *Ndeitunga v Kavaongelwa* (I 3967/2009 [2012] NAHCMD 82
(27 November 2012))

Coram: DAMASEB, JP

Heard: 31 October 2012

Delivered: 27 November 2012

Flynote: On resumption of part-heard matter – Plaintiff’s counsel making allegation of unethical conduct against defendant’s counsel – Necessitating postponement of matter – Actions attributable to defendant – Defendant liable for costs of postponement.

ORDER

I make the following order:

The defendant must show cause, on the date to which the matter is next postponed, why the following order should not be made final:

- (a) The defendant shall pay the wasted costs occasioned by the postponement of the trial on 31 October 2012, on party and party scale, including the costs of one instructed counsel.

JUDGMENT

Damaseb, JP:

[1] On 31 October 2012, I postponed this matter to today. It was set down for continuation of trial from 31 October 2012 to 1 November 2012, but at the commencement of trial, counsel for the plaintiff, Mr Corbett, sought and obtained my leave to call the plaintiff to the stand to bring to my attention, under oath, alleged conduct by the defendant's new legal practitioner of record which Mr Corbett suggested amounted to unethical and unprofessional conduct. The plaintiff testified and was cross-examined by Mr Mbaeva who is the defendant's new legal practitioner to whom the alleged unethical and unprofessional conduct is attributed. The record of this proceeding speaks for itself and I do not propose to regurgitate the evidence adduced. In essence, what emerges from the evidence that has been led on the matter which plaintiff's counsel wished to bring to my attention is the following:

- a) Since the adjournment on 22nd February 2012, the defendant appears to have fallen on hard times financially - resulting in the withdrawal of his erstwhile instructing and instructed counsel. He then enlisted the services of Mr Mbaeva;
- b) In the period since that adjournment, the defendant became aware of some information regarding the plaintiff which he (the defendant) believes is damaging to the credibility of the plaintiff and to plaintiff's case. Whether or not

the plaintiff should be recalled to be cross-examined on that material is an issue I have yet to adjudicate;

- c) On the defendant's instructions, Mr Mbaeva initiated contact with the secretary to the cabinet, Mr Kapofi. It is a notorious fact that the secretary to the cabinet is head of the civil service and is the principal civil servant in the Office of the President of the Republic. It is undisputed that Mr Mbaeva conveyed to Mr Kapofi the information which the defendant considers damaging to the plaintiff's credibility and case, and asked Mr Kapofi to persuade the plaintiff to withdraw the defamation claim against the defendant or face public embarrassment by being confronted in court with the alleged damaging information. Mr Kapofi appears to have then conveyed the threat to the plaintiff who, without going through his legal practitioner, directly contacted Mr Mbaeva.
- d) It is common cause that the plaintiff and Mr Mbaeva discussed the exchange that took place between Mr Mbaeva and Mr Kapofi. It is admitted by Mr Mbaeva that, in fact, he had a discussion with the plaintiff on the gist of the information in defendant's possession about the plaintiff. There was some dispute about just exactly what transpired between Mr Mbaeva and the plaintiff; but I need not to resolve that dispute now.
- e) Following the discussion between Mr Mbaeva and the plaintiff, the former wrote directly to the plaintiff (and not through the plaintiff's legal practitioner of record), making a settlement proposal. There is proof of written correspondence between Mr Mbaeva and the plaintiff directly, one of which (an e-mail dated 4 July 2012) is a request by the plaintiff for Mr Mbaeva to instead communicate via plaintiff's legal practitioner of record. Even after that, a letter (dated 24 July 2012), was written directly by Mr Mbaeva to the plaintiff, seeking settlement of the matter. It states:

'We . . . wish to advise that your Legal representative has been furnished with a proposed settlement agreement which we enclose herewith for your attention. Kindly peruse same if you have not done so already and let us have your proposal therein. Our client now

instructs that he will not insist on the retraction in the newspapers and that a written retraction to us under your hand would suffice.'

- f) It is now common cause that Mr Mbaeva's approach to Mr Kapofi was on defendant's instructions. Mr Corbett had indicated that he intends to rely on that fact to have an adverse inference drawn against the defendant – considering that the gravamen of the present defamation claim is predicated on the assertion that the defendant sought improperly to beseech higher authority (including the President of the Republic) to have the plaintiff dismissed or suspended on account of the complaint the plaintiff made to the Magistrate's Commission about the defendant and which resulted in the defendant's dismissal from the magistracy. Mr Mbaeva's admissions from the bar have therefore become evidential material against the defendant. This circumstance is not insignificant and may well undermine the defendant's defence to the defamation claim given that the conduct attributed to him through Mr Mbaeva bears striking resemblance to the conduct which gave rise to the defamation claim now pending before me. The defendant has to make an election whether, in the circumstances, he desires to be represented by Mr Mbaeva in the future conduct of the case. My view is that it is undesirable for Mr Mbaeva to continue to represent the defendant for the reason that I have set out. The choice is not only of the defendant's, but of Mr Mbaeva's too. In making a decision on the matter, Mr Mbaeva must, as an officer of the court, be guided by the caution I have expressed.

[2] I had decided to postpone the matter at the last sitting for two reasons:

- (a) to afford Mr Mbaeva to carefully consider the allegations that have been made against him of unethical and unprofessional conduct – and if possible to seek independent legal advice; and
- (b) for the defendant and Mr Mbaeva to consider whether it is appropriate for Mr Mbaeva to continue to represent the defendant in view of the fact

that Mr Mbaeva's admissions may well be relied on as evidential material against the defendant.

[3] I had come to the conclusion then that it was undesirable for the trial to continue before those two matters are resolved. I am still satisfied that it was the proper course. The postponement was necessary and was directly attributable to the defendant's actions – regardless of their relevance to the ultimate issue on which I express no view one way or the other. That being the case, and prima facie, I see no basis in principle why the wasted costs occasioned by that postponement should not lie where they fall. I would accordingly order that the defendant pay plaintiff's wasted costs occasioned by the postponement of the matter on 31 October 2012. I see no reason why it should be on the scale other than 'party and party' although it must include the costs of instructed counsel.

[4] Given that I make this order without having afforded the parties the opportunity to address me thereon, I do so on a rule nisi basis and afford them the opportunity to address me on the date to which I will next postpone the matter, on any issue that may alter my provisional order.

[5] I make the following order:

The defendant must show cause, on the date to which the matter is next postponed, why the following order should not be made final:

- (a) The defendant shall pay the wasted costs occasioned by the postponement of the trial on 31 October 2012, on party and party scale, including the costs of one instructed counsel.

P T Damaseb
Judge-President

APPEARANCES

PLAINTIFF:

Mr Andrew Corbett
Instructed by Grobler & Co, Windhoek.

DEFENDANT:

Mr Mbaeva
Of Mbaeva & Associates