REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1408/2010
I 1539/2010

In the matter between:

PAUL FARMER	**FIRST PLAINTIFF**
MAGRIETA SUSANNA FARMER	**SECOND PLAINTIFF**

and

WERNER GUNA KRIESSBACH	**FIRST DEFENDANT**
TANIA NATASHA KRIESSBACH	**SECOND DEFENDANT**
WERTAN FARMING	**THIRD DEFENDANT**

Neutral citation: *Farmer v Kriessbach* (I 1408/2010 – I 1539/2010) [2013] NAHCMD 128 (16 May 2013)

Coram: PARKER AJ
Heard: **28 March 2013**
Delivered: **16 May 2013**

Flynote: Compromise – *Transactio* – Nature and legal effect of – *In casu* the compromise embodied in the 21 September 2012 order extinguishes and supersedes the subsequent order of 25 February 2013 – Accordingly, the court must give effect to the 21 September 2012 order.

Summary: Compromise – *Transactio* – By agreement between the parties the court made an order on 21 September 2012 – Upon counsel for the plaintiff failing to

draw the court's attention to that order the court made a subsequent order on 25 February 2013 – The court held that the 21 September 2012 order made on the basis of a compromise extinguishes *ipso jure* and supersedes the 25 February 2013 order – The holding is justified on the basis that the court has a duty to ensure the implementation of the 21 September 2012 order – Accordingly the court decided to give effect to the 21 September 2012 order.

ORDER

The plaintiffs' claims, pleas and counterclaim in the consolidated case are struck with costs, including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] To say that this consolidated case has had a chequered history would be an understatement. The case has bumped its way slowly to the present proceeding. Through its unsettled route the case has seen counsel (for the plaintiffs) withdraw as counsel of record and re-enter as counsel of record and finally withdraw. Then Mr Oosthuizen SC withdrew as counsel for the defendants at one point, but he graciously appeared as amicus curiae on 25 February 2013 in order to explain to the court certain relevant aspects of the bumpy history of the case for which the court is grateful.

[2] In my opinion, therefore, Mr Oosthuizen did not take part in the submissions placed before the court that led to the making of the 25 February 2013 order which Ms Petherbridge is so much enamoured with. During the 25 February 2013 proceedings while the plaintiffs were represented by counsel the defendants were self-represented litigants.

[3] I have sketched briefly the unsettled history of this consolidated case to make a point. Ms Petherbridge bore a clear duty to bring to the attention of the court the order that, by agreement between the parties, the court made on 21 September 2012. If the attention of the court had been drawn by Ms Petherbridge to the 21 September 2012 order, a material matter, the court would most certainly not have made the 25 February 2013 order. In this regard, I stated in *Disciplinary Committee for Legal Practitioners v Murorua* 2012 NR 481 at 493F that –

'… in England a solicitor who failed to inform the court of all material matters within his knowledge and about which the court should have been informed, is guilty of professional misconduct; so, too, is a solicitor who failed to implement an undertaking given to another solicitor and a solicitor who gave false information to another solicitor, guilty of professional misconduct. (Halsbury's *Laws of England* 4 ed paras 299, 304) I do not see any good reason why such acts of misconduct should not, in terms of Part IV of the LPA (the Legal Practitioners Act), be judged to be unprofessional conduct in Namibia (with its unified legal profession), considering the interpretation and application of s 31, read with s 32(1)*(b)*, of the LPA which I discussed previously. Furthermore, it is my view that the conduct of a legal practitioner that is found to be unprofessional may also be dishonourable or unworthy conduct.'

[4] It is therefore, with respect, cynical for Ms Petherbridge to submit with great verve and persistence that the instant proceeding should only concern itself with the 25 February 2013 order. I cannot accept that. The 21 September 2012 order was made upon an agreement between the parties; that is a compromise (a *transactio*), and the compromise is embodied in the 21 September 2012 order. And whether extra-judicial or embodied in an order of court, a compromise has the effect of *res judicata* (*Metals Australia v Amakutuwa* 2011 (1) NR 262 (SC) at 268G-H).

[5] Accordingly, in my judgement, the 21 September 2012 order has the effect of *res judicata*. That being the case the 21 September 2012 order extinguished *in jure* and 'superseded' the 25 February 2013 order. (See *Green v Rozen* [1955] 1 WLR 741 at 746; *Metals Australia v Amakutuwa* at 269A.) Besides, Ms Petherbridge's submission that the present proceeding should only dwell on the 25 February 2013

can be rejected on a second ground. There is a valid order of the court (the 21 September 2012 order); and the court has a duty to enforce the 21 September 2012 order for the benefit of the defendants who were granted some relief. To overlook the 21 September 2012 order, as Ms Petherbridge submits, would be tantamount to the court setting at naught its own order, and that would not conduce to due administration of justice. (See *The Minister of Education and Another v The Interim Khomas Teachers Strategic Committee and All Persons Forming Part of the Collective Body of the First Respondent and Others* Case No. LC 166/2012 (judgment delivered on 5 December 2012) (Unreported).)

[6] The aforegoing reasoning and conclusions lead me to the next level of the enquiry. In the present proceeding the defendants are now represented by Mr Oosthuizen and counsel has filed what counsel characterizes as 'Synopsis as from 11 September 2012'. In this written submission counsel reviews the history of this matter since 11 September 2012 when Scholtz Law Chambers came on record as legal representatives of the plaintiff. Two key paragraphs of the submission must be highlighted for my present purposes, namely –

> '5. Paragraph 2 of the order (the 21 September 2012 order) obliged the Plaintiffs in the consolidated case to pay the agreed costs of N$70,000.00 for the postponement on or before 30 November 2012 and in the event of their default they agreed that their claims, pleas and counterclaims shall be struck. It was so ordered.
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> 17. On 7 February 2013 Plaintiff's present legal practitioners came on record and on 12 February 2013 withdrew Plaintiff's abortive Notice of Appeal against the court order of 21 September 2012.
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> 18. Despite the withdrawal of the notice of appeal no tender to comply with paragraph 2 thereof and application for condonation were forthcoming.'

[7] I accept Mr Oosthuizen's submission that the plaintiffs are in contempt of the order of the court, that is, the order of 21 September 2012. As I see it, instead of bringing a contempt of court application to enforce the order, the defendants seek rather in the present proceeding the implementation of the 21 September 2012 order,

particularly para 2 of that order as set out in para 6. I find this approach to be reasonable and efficacious. The 21 September 2012 order has its own clearly built-in consequences in the event of the relevant para 2 of that order being breached. It is this. Para 2 says that the plaintiffs (respondents then) must on or before 30 November 2012 pay the agreed costs of N$70 000,00 for the postponement; and if they defaulted on the aforesaid payment, the following consequence enures without more: 'their (the plaintiffs') claims, pleas and counterclaim in the consolidated action shall be struck'. It is an irrefragable fact that the plaintiffs have defaulted and they have known that since 30 November 2012. We are in April 2013, and, as Mr Oosthuizen submitted – as aforesaid – 'no tender to comply with para 2 of the order has been forthcoming'. Besides, there has been no application to condone their default; in which application they would have been expected to place before the court in a supporting affidavit adequate and acceptable explanation for their default. They have, without justification, squandered such opportunity to so give explanation for their default. It will therefore not serve any purpose to schedule a further case management conference, as Mr Oosthuizen proposed in the Synopsis.

[8] It follows inevitably that on the authorities referred to previously and on the facts and in the circumstances of the case the only reasonable and fair decision to take is to give effect to the 21 September 2012 order. The court has a duty to ensure that that order is implemented. Whereupon, I make the following order:

> The plaintiffs' claims, pleas and counterclaim in the consolidated case are struck with costs, including costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

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APPEARANCES

PLAINTIFFS	:	M C Petherbridge Of Petherbridge Law Chambers, Windhoek
DEFENDANTS	:	G H Oosthuizen, SC Instructed by Kirsten & Co. Inc., Windhoek