

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3785/2012

In the matter between:

JORGE MANUEL BATISTA NEVES**1ST PLAINTIFF****MARIA ALZIRA ALVES BATISTA NEVES****2ND PLAINTIFF**

and

RAINER ARANGIES**1ST DEFENDANT****THE COUNCIL FOR THE MUNICIPALITY OF TSUMEB****2ND DEFENDANT**

Neutral citation: *Neves v Arangies* (I 3785/2012) [2013] NAHCMD 135 (20 May 2013)

Coram: MILLER AJ**Heard:** 17 May 2013**Delivered:** 20 May 2013

ORDER

The application is dismissed. The applicants must respond to the respondents request for further particulars within 15 court days from the date of this order. The applicants are ordered jointly and severally to pay the respondents costs which will include the costs of one instructing and one instructed counsel.

JUDGMENT

MILLER AJ :

[1] This is an application brought in terms of Rule 30 of the Rules of this Court.

[2] The matter arose in the following way:

The applicants as plaintiffs issued summons against the respondent as the first defendant and the Council for the Municipality of Tsumeb as the second defendant on 30 November 2012. They seek the following relief:

'A. AD BOTH THE PRINCIPAL AND ALTERNATIVE CLAIMS

1.

1.1. An order declaring the plaintiffs have acquired a servitude of right of way of at least 4 metres wide along the route as indicated on annexures "A" and "B" annexed hereto over first defendant's property situated at Erf 646 (formerly open space) (a portion of Erf 56 open space), Susan Nghidinwa Street, Tsumeb, Republic of Namibia in terms of section 6 of Act 68 of 1969.

1.2. An order declaring that plaintiffs have acquired a servitude of right of way of 5 square metres immediately adjacent to the connecting boundaries of the erven of the plaintiffs and the defendants over the second defendant's property situated at Erf 56 (open space), Tsumeb, Republic of Namibia as indicated on annexure "B".

1.3. An order that defendants take the necessary steps to register the rights of way over the routs indicated in paragraph 11 above, or over such route as the Honourable Court may determine, over their properties mentioned above.

1.4. Should defendants fail to take the necessary steps pursuant to paragraph 1.3 above within one month of this order, the sheriff is authorized to perform all the necessary acts on defendants' behalf to effect registration of the rights of way as aforesaid.

1.5. An order that plaintiffs pay all the costs incurred (as tendered) in respect of the surveying and registration of the servitudes mentioned in paragraphs 1.1 and 1.2 above.

B. AD ONLY THE ALTERNATIVE CLAIM

2. Ordering the plaintiffs to pay the defendants as follows:

2.1. N\$25, 920-00 (twenty five thousand five hundred and twenty Namibian dollars) to first defendant;

2.2. N\$2 250-00 (two thousand two hundred and fifty thousand Namibian dollars) to second defendant.

C. IN ANY EVENT

3. Costs of suit (against second defendant only in the event of it opposing the relief sought against it).

4. Further and/or alternative relief.'

[3] The respondent as well as the second defendant filed notices of their intention to defend the matter. In the case of the respondent that notice was filed on 11 January 2013. Therefore and on 22 February 2013 the respondent filed a Request for Further Particulars to the applicants particulars of claim.

[4] It is not in dispute before that the request was filed outside the time period provided for in the Rules and is in that sense irregular. This prompted the applicants to file their application in terms of Rule 30 on 5 March 2013 in which they seek the following relief:

'1. That first defendant's "FIRST DEFENDANT'S REQUEST FOR FURTHER PARTICULARS TO PLAINTIFFS' PARTICULARS OF CLAIM" served on plaintiffs constitutes an irregular and/or improper and/or impermissible step as envisaged by the provisions of Rule 30, read further with the provisions of Rule 21 of the Rules of the above Honourable Court.

2. That first defendant's "FIRST DEFENDANT'S REQUEST FOR FURTHER PARTICULARS TO PLAINTIFFS' PARTICULARS OF CLAIM" be struck and set aside.
3. That first defendant be ordered to pay the costs of this application, including the costs of one instructing and two instructed counsel.
4. Further or alternative relief.'

[5] The applicable legal principles which guide me in matters of this kind appear from the judgment in ***Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd*** 2012 (2) NR 703 and I refer to the following passage:

'This debate is apparently still raging on in South Africa, but was addressed in Namibia by Silungwe AJ in ***China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC 2007 (2) NR 675 (HC)***. The facts are these. The plaintiff served summons on the wrong party, but nevertheless, and with the knowledge of the wrong citation, obtained default judgment. Silungwe AJ made a number of pertinent observations regarding the application in terms of rule 30. These were:

- (i) When an irregular step has been taken, it cannot simply be ignored, but application should be made to set the proceedings aside.
- (ii) The court has a discretion to refuse to set the proceeding aside even if an irregularity is established.
- (iii) The general rule is that in a proper case, the court is entitled to overlook any irregularity which does not occasion any substantial prejudice. This approach was subsequently confirmed by this court.
- (iv) Prejudice is prerequisite for success in an application in terms of rule 30.
- (v) Where an irregular step or proceedings causes no prejudice, the best thing to do would be to ignore it, because a rule 30 application will in any event be dismissed.
- (vi) In a proper case, the court may condone an irregularity or allow the party in default an opportunity to cure the defect, as long as such condonation does not unfairly prejudice the party which applied for the irregular step to be set aside. Although the court may make use of its inherent jurisdiction to condone such non-compliance where justice so demands, the exercise of such jurisdiction remains subject to the requirement, and safeguard, that good cause be shown.'

[6] The focal point in the Heads of Argument filed by Mr. Wylie who appeared for the applicants and Mr. Barnard who appeared for the respondents and in their respective submissions during the course of the hearing was the aspect of substantial prejudice. The applicants accepted, rightly so, that in order for them to succeed they had to establish that they were substantially prejudiced by the fact that the request was filed some 15 court days late.

[7] In his Heads of Argument Mr. Wylie submitted that substantial prejudice was suffered by the applicants because the matter was delayed by the late filing. He stated his argument in the following way:

'19. It is humbly submitted that this irregularity does substantially prejudice applicants/plaintiffs in that they are not tasked to deal with a request for further particulars that has been filed far out of time. Furthermore, respondent/first defendant is delaying and abusing the judicial process by extending the time period within which he is allowed to file his plea.

20. Justice delayed, is justice denied – and a delaying and denial of justice is definitely substantially prejudicial to applicants/plaintiffs.'

[8] Mere delay in itself does not always amount to substantial prejudice to either of the parties. What needs to be shown is in what manner the delay causes substantial prejudice. Nothing of that sort was placed before me.

[9] During the course of the hearing Mr. Wylie added a second string to his bow. If I understood him correctly, the argument is that the applicants are prejudiced because there is uncertainty as to the status of the pleadings which makes it difficult to determine the way forward. That simply cannot be so.

[10] The options open to the applicants were twofold. If they are not substantially prejudiced, the irregularity of the step taken should be ignored and the request for further particulars should be responded to. The second option is to bring an application in terms of Rule 30. That course comes with the concomitant duty and risk perhaps that substantial prejudice will have to be established.

[11] On neither basis can there be any prejudice.

[12] At best the option exercised may prove to be the wrong option, but that is an entirely difficult matter.

[13] In my view the applicants cannot be said to have suffered any prejudice, let alone substantial prejudice.

[14] In the result I make the following orders:

- 1) The application is dismissed.
- 2) The applicants must respond to the respondents request for further particulars within 15 court days from the date of this order.
- 3) The applicants are ordered jointly and severally to pay the respondents costs which will include the costs of one instructing and one instructed counsel.

P J MILLER
Judge

APPEARANCES

PLAINTIFFS:

T WYLIE

Instructed by Neves Legal Practitioners

DEFENDANTS:

T BARNARD

Instructed by Mueller Legal Practitioners