REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1522/2008

In the matter between:

JIN CASINGS & TYRE SUPPLIES CC **RESPONDENT/PLAINTIFF**

and

MR E HAMBABI t/a ALPHA TYRES **APPLICANT/DEFENDANT**

Neutral citation: *Jin Casings & Tyre Supplies CC v Hambabi* (I 1522/2008) [2013] NAHCMD 215 (25 July 2013)

Coram: PARKER AJ

Heard: **4 March 2013; 6 – 8 March 2013; 11 March 2013; 16 April 2013; 3 July 2013**

Delivered: **25 July 2013**

Flynote: Practice – Applications and motions – Variation of pre-trial conference order – Order issued in terms of rule 37(13)*(a)* of the rules of court – The parties proposed pre-trial order upon which the pre-trial conference order was issued is a compromise through and through and it has the effect of *res judicata* – Moreover by signing the proposed order the legal practitioners of the parties signified their assent to the contents of it.

Flynote: Legal practitioners – Rights and duties – Authority of legal practitioner – Relationship of legal practitioner and client similar to that of principal and agent –

Admission made by counsel in a course or matter on behalf of client binding on the client.

Summary: Practice – Applications and motions – Variation of pre-trial conference order – Order issued in terms of rule 37(13)*(a)* of the rules of court – The parties proposed pre-trial order upon which the pre-trial conference order was issued constitutes a compromise through and through and has the effect of *res judicata* and is binding on the parties – By signing the proposed order the legal practitioners signified their assent to the contents thereof upon the principle of *caveat subscriptor* – The qualification to the rule, being where the signatory had been misled either as to the nature of the document or as to its contents, not applicable in this proceeding – The proposed order is therefore binding on the parties on the basis that their legal practitioners in signing the proposed order acted within their ostensible authority.

Summary: Legal practitioner – Authority of legal practitioner – Authority of the legal practitioner includes not only the power expressly conferred on him or her but also such powers as are necessarily incidental or ancillary to the performance of his or her mandate – In instant case court finding that the settling of the parties proposed pre-trial order and submitting same to the managing judge in compliance with the rules of court are indubitably necessarily incidental or ancillary to the performance of the mandate of the legal practitioners – Accordingly, the court concluded that admissions made by the defendant's counsel in the proposed pre-trial order in which the plaintiff has acted on the faith of it to the plaintiff's prejudice cannot be withdrawn – Consequently, the court dismissed the application to vary the order.

ORDER

(a) The interlocutory application to vary the pre-trial conference order is dismissed with costs, which include costs of one instructing counsel and one instructed counsel.

(b) Following immediately upon delivery of this judgment a status hearing is to be held to determine the further conduct of the matter.

JUDGMENT

PARKER AJ:

[1] This is about an interlocutory application brought by the applicant (the defendant in the action proceeding). The relief sought is primarily the 'variation of the pre-trial conference order' that the court issued in terms of rule 37(13)*(a)* of the rules of court on 2 October 2012. The respondent (the plaintiff in the action proceeding) has moved to reject the application. I shall refer to the parties as the plaintiff and defendant in the rest of this judgment.

[2] Mr Denk represents the defendant, and Ms Schneider the plaintiff. Both counsel did file heads of argument; and I am grateful for their industry. I have consulted the cases referred to me by counsel, and I have paid particular attention to those that, in my opinion, are of real assistance on the points under consideration.

[3] In the plaintiff's answering affidavit, the plaintiff raises a point *in limine* and it concerns – according to the plaintiff – the defendant's non-compliance with para 26(1) of the practice directions which is peremptory; and it provides:

'26. (1) Except where the Rules of Court otherwise provide, there shall be not less than five days between the date of service, or delivery of notice, of an interlocutory application and the date of set down.'

[4] What is the defendant's reply to the plaintiff's averment? It is only this:

'At the time when the application was to be made I was in Angola I was only able to depose to the affidavit on 11 April 2013.'

And with this nude, intrepid reason, the defendant prays 'the Honourable Court's indulgence for condonation for not bringing the application for variation of the Court Order of 2 October 2012 no less than five (5) days before the date the matter is set down'.

[5] Where there has been a non-compliance with a practice direction, a formal application to condone the failure should be filed timeously. (See *Johnston v Indigo Sky Gems (Pty) Ltd* 1997 NR 239.) In this regard, it should be remembered that the so-called condonation that the defendant prays for in its replying affidavit is an indulgence and for that reason the litigant should show good cause in order to persuade the court to grant the indulgence. That in seeking condonation the defendant is seeking an indulgence of the court is appreciated by the defendant who is represented by instructing counsel and instructed counsel; but what the defendant does not see is that to succeed in persuading the court to grant the indulgence, the defendant must establish good cause. I say so for the simple reason that the defendant has not brought a formal application – none at all – for condonation of its non-compliance with the practice direction where in a supporting affidavit it would have, as is expected of it, given an acceptable, adequate and reasonable explanation for the non-compliance in order to satisfy the court to grant the indulgence.

[6] I accept Ms Schneider's submission that on this ground alone the application falls to be dismissed. Nevertheless, I think, for good reason, I should proceed to deal with the merits of the case. It is this. Since the introduction of the system of judicial case management (JCM) in the rules of court the court has been hard at work with the view to developing Namibia's jurisprudence on JCM. Besides, it will be more useful to consider the remainder of the points *in limine* not at the threshold of the proceeding on account of the fact that, to some extent, the points about whether the defendant has brought the application under rule 44(1) of the rules of court or the common law and about the inordinate delay in bringing the application have relevance on the merits, too. For all these reasons, I think it would conduce to the development of Namibia's jurisprudence on JCM – as I say – to deal with those preliminary points as such, that is, together with the merits.

[7] The one pertinent question that immediately arises is this: When did Mr Denk, the instructed counsel, realize that what was contained in the parties joint pre-trial order was not in accordance with the defendant's instructions? In this regard, one should not lose sight of the fact that as instructed counsel Mr Denk did not take instructions directly from the defendant as he practises without a fidelity fund certificate in terms of the Legal Practitioners Act 15 of 1995. It can, therefore, be safely said that the defendant gave instructions to Mr Denk's instructing counsel, Mr Philander, who has filed a confirmatory affidavit to the founding affidavit. I shall return to the confirmatory affidavit in due course.

[8] It is reasonable, therefore, to say that what Mr Denk now tells the court at this late hour in the proceedings might have been in the brief which Mr Denk qua instructed counsel received from his instructing counsel. I say 'late hour' on account of the following significant factors: Counsel tells the court about the 'instructions' (a) after the plaintiff has closed its case, (b) after the defendant's examination-in-chief evidence has been adduced and (c) when what was ongoing was the adducing of the defendant's cross-examination-evidence. In this regard, the relevant facts and circumstances at play in this proceeding are these. The present case was subjected to JCM processes in terms of rule 37 of the rules of court. The parties joint case management report indicates that a case management meeting was convened by the parties on 26 March 2012. At a status hearing held on 6 July 2012 the managing judge made the following order:

> '1. The legal representatives must not later than 6 September 2012 submit the parties' joint proposed pre-trial order, and attend a pre-trial conference in open court at 09h00 on 20 September 2012.
>
> 2. Set down trial date: 1 – 5 October 2012 at 10h00.'

[9] The question that arises *a priori* is this: Did Mr Denk the instructed counsel do that which is expected of any careful instructed counsel, namely, to read his brief studiously? If he did, when did Mr Denk gain knowledge that, according to him, what is contained in para 2(a) and (c) of the parties joint proposed pre-trial order upon

which the court issued the pre-trial conference order does not truly reflect that which the parties agreed and settled in the parties joint proposed pre-trial order? Mr Denk does not tell the court. This leads me to the next level of the enquiry.

[10] A pre-trial conference was held on 2 October 2012 to consider the parties joint proposed pre-trial order, and the judge issued a pre-trial conference order thereafter. It is significant to note that Mr Philander (the defendant's instructing counsel) who has deposed to a confirmatory affidavit to the defendant's founding affidavit, as aforesaid, appeared as counsel for the defendant. Thus, pursuant to rule 37(12) of the rules of court, the parties filed with the managing judge the aforementioned parties *joint* proposed pre-trial order (Italicized for obvious emphasis). The order was *jointly* submitted to the managing judge within the meaning of rule 37(12)*(a)* of the rules of court. And rule 37(12)*(b)* provides:

'The plaintiff or applicant must initiate communication with the defendant or respondent, as the case may be, and must prepare the initial draft of the order referred to in paragraph (a) of rule 37(12).'

[11] It follows that, *pace* Mr Philander; it is not offensive of the rules that the plaintiff's legal practitioners prepared the initial draft of the parties joint proposed pre-trial order and thereafter the plaintiff's legal practitioners and the defendant's legal practitioners signed the proposed order, signifying their assent to the contents of the proposed order. The following rudimentary principle of law applied by the court in the recent case of *Standard Bank Namibia Limited v Alex Mabuku Kamwi* (I 2149/2008 [2013] NAHCMD 63 (7 March 2013) (Unreported) is apropos. There, it was stated:

'[20] It is a general principle of our law that a person who signs a contractual document thereby signifies his assent to the contents of the document and if the contents subsequently turn out not to be to his or her liking, as is in the present case, he or she has no one to blame but himself. (R H Christie, *The Law of Contract in South Africa*, 5th ed (2006): pp 174 – 175). This is the *caveat subscriptor* rule which Ms Williams reminded the court about. And the true basis of the principle is the doctrine of quasi mutual assent; the question is simply whether the other party (in this case the plaintiff) is reasonably entitled to assume that the signatory (in this case the defendant), by signing the document, was

signifying his intention to be bound by it (see Christie, *The Law of Contract in South Africa*, ibid., p. 175). The only qualification to the rule is where the signatory had been misled either as to the nature of the document or as to its contents. (Christie *The Law of Contract in South Africa*, ibid., p 179)'

[12] I find that on the facts, it is as clear as day that the qualification of the principle does not apply in the instant case. For this reason, the full force of the *caveat subscriptor* rule must apply in this proceeding, and so I apply it. It follows that in my judgment the defendant is bound by the pre-trial conference order; and if the order is not to the defendant's liking the defendant has no one to blame but itself. This conclusion disposes also of Mr Philander's uncalled for vituperations levelled against a colleague without a wraith of justification. With the greatest deference to Mr Philander, I find Mr Philander's conduct to be unprofessional, and so I do not give any respectable look at those vituperative statements in his affidavit. Indeed, I cannot see how they advance the case of his client: they are plainly vexatious, and the only reasonable and fair thing to do is to struck them. I accept Ms Schneider's submission thereanent.

[13] The pre-trial conference order binds the parties on another ground. The order is a compromise through and through. (See *Farmer v Kriessbach* I 1408/2010 – I 1539/2010 [2013] NAHCMD 128 (16 May 2013) (Unreported).) There, relying on the authorities I had this to say at paras 4-5 about the legal effect of a compromise in respect of an earlier order that the court had made in the case:

'[4] It is therefore, with respect, cynical for (counsel) 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, (counsel'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 (counsel) 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).)'

[14] And what is more; it should be remembered that in all this the parties were represented by legal practitioners. I make this significant observation for a purpose. It is to signalize the point that the parties came to the judicial arena with equal arms. It is not the case where one party may be heard to say that as a lay litigant representing himself or herself he was done in by the other party's legal representatives.

[15] From the aforegoing, the conclusion is inescapable that the defendant has failed to establish that there is a mistake common to both parties in the order. By a parity of reasoning, I respectfully reject Mr Denk's submission that 'it cannot be said that the lawyers of the parties were ad idem as to the contents of the order'. By their signatures they signified their assent to the contents of the order, as I have found in paras 10, 11 and 12. But that is not the end of the matter. I now proceed to deal with the defendant's contention, which is taken in refrain by Mr Denk in his submission, that what is contained in the paragraphs sought to be varied did not reflect the instructions of the defendant to its legal practitioners.

[16] It was held by Lord Denning MR in *H Clark (Doncaster) Ltd v Wilkinson* I [1965] ALL ER 934 (Court of Appeal) at 936E that -

'An admission made by counsel in the course of proceedings can be withdrawn, unless the circumstances are such as to give rise to an estoppel. If the other party has acted to his prejudice on the faith of it, it may not be withdrawn ….'

[17] In the instant case, as Ms Schneider submitted, the plaintiff has acted to its prejudice on the faith of the order issued by the court. The plaintiff has closed its case on the faith that it did not need to adduce evidence to prove that which the defendant has assented to and so not in dispute. It follows that the defendant cannot withdraw the contents of para 2 of the pre-trial conference order.

[18] Furthermore, the learned Master of Rolls continued at 936F-G:

'We are referred to cases where a compromise or settlement has been made by counsel acting within his ostensible authority. That of course is binding, as in the case of *Strauss v Francis*; … and they rest on the simple principle that a principal is bound by a contract made by his agent within his ostensible authority.'

[19] Agreeing with Lord Denning Salmon LJ stated the law even more succinctly thus at 937E:

'No doubt a statement made by counsel, just like a statement made by the other side to their prejudice, cannot be withdrawn. This is because an estoppel would then arise. Further, counsel is the ostensible agent of his client to make an agreement during the course of a trial settling the case. If he does so, his client is bound by the agreement, just as anyone is bound by an agreement made on his behalf by another who is ostensibly his agent to make the agreement.'

[20] Furthermore, it has also been stated (see *Halbury's Laws of England* (3 ed) Vol. 3 at para 118I) that -

'At the trial of an action, counsel's authority extends, when it is not expressly limited, to the action and all matters incidental to it and to the conduct of the trial such as … a compromise …'

[21] The essence of these English authorities on the relationship between counsel and his or her client in proceedings is in sync with the principles enunciated by the

Supreme Court in *Worku v Equity Aviation* 2010 (2) NR 621. There, at 630E-F Chomba AJA, who wrote the unanimous judgment of the court, stated the law thus:

'[27] The lawyer and client relationship is no more than that of principal and agent. As such it is trite that when an agent acts within his apparent or ostensible authority, the principal is bound thereby even if he or she has given private or secret instructions to the agent limiting the authority. It is equally trite that the authority of the agent is generally construed in such a way as to include not only the powers expressly conferred upon him or her, but also such powers as are necessarily incidental or ancillary to the performance of his mandate. In order to escape liability it would be necessary for the principal to give notice to those who are likely to interact with the agent, qua agent, of the limitations imposed by him or her upon the agent's apparent authority.'

[22] Having carefully considered the facts and circumstances of the instant case, as I have found them to exist, against the backdrop of the authorities, I come to the following inevitable conclusions: The parties joint proposed pre-trial order is a compromise through and through. In settling the proposed pre-trial order, ie the compromise, the legal practitioners acted within their apparent or ostensible authority. The authority of the legal practitioners extends – and it has not been expressly limited – to all matters incidental to the action and the conduct of the trial, including the settling of the parties joint proposed pre-trial order (ie the compromise). The settling of the proposed order and submitting same to the managing judge in compliance with rule 37(12) are indubitably necessarily incidental or ancillary to the performance of the mandate of the legal practitioners of the defendant. The defendant did not give notice to the plaintiff of any limitations imposed by the defendant upon the apparent authority of the defendant's legal practitioners to assent to the contents of the parties joint proposed pre-trial order. The defendant is, accordingly, firmly bound by the pre-trial order that the court issued. The defendant cannot now attempt to square it up with the plaintiff and escape the consequences of the order just because it has subsequently turned out not to be to its liking.

[23] For these reasons, I refuse to grant the application to vary the pre-trial conference order issued on 2 October 2012. Rule 37(13) is not available to the defendant. If I varied the order that would fly in the teeth of the well-founded

principles discussed previously; and, a fortiori, it would, on the facts and in the circumstances of the case, visit manifest injustice on the plaintiff as I have indicated previously. Accordingly, in my judgment the interlocutory application must fail; and it fails.

[24] In the result, I make the following order:

(a) The interlocutory application to vary the pre-trial conference order is dismissed with costs, which include costs of one instructing counsel and one instructed counsel.

(b) Following immediately upon delivery of this judgment a status hearing is to be held to determine the further conduct of the matter.

C Parker

Acting Judge

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APPEARANCES

RESPONDENT/PLAINTIFF: H Schneider
Instructed by Du Pisani Legal Practitioners, Windhoek

APPLICANT/DEFENDANT: A H G Denk
Instructed by LorentzAngula Inc., Windhoek