



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 626/2012

In the matter between:

1.1.1.1.

MARITZA RICKERT
PLAINTIFF

and

RICHARD VENTER

1ST DEFENDANT

PAULA VENTER

2ND DEFENDANT

Neutral Citation: *Rickert v Venter & Another (I 626/2012) [2013] NAHCMD 280*
(16 September 2013)

Coram: SMUTS, J

Heard: 16 September 2013

Delivered: 16 September 2013

ORDER

- 1) Condoning the applicant's non compliance with practice directives applicable to the filing of interlocutory applications.
- 2) Condoning the applicant's non-compliance with Rule 25 read with Rule 27 and her failure to file a plea to the first and second defendants' counter-claim within the time period provided for the rules.
- 3) Granting the applicant leave to file her plea to the first and second Respondents' counter-claim within ten days of the date of this order.
- 4) Directing that the applicant is to pay the respondents' costs of this application and those occasioned by the steps to file the notice of bar and to apply for judgment by default. These costs are to be on the scale as between legal practitioner and client and are to include the costs of one instructing and one instructed counsel.

EX TEMPORE JUDGMENT

SMUTS, J

[1] This is an application to stay the defendant's application for default judgment, pending the finalization of this application and to condone the failure to file a plea within the time required, to uplift the bar and for leave to file a plea within 10 days from an order of this Court.

[2] The applicant in the notice of motion correctly tendered costs for the application and also sought condonation for the failure to comply with practice directives for not bringing this application in accordance with the practice directives relating to interlocutory applications. In this brief ruling, I refer to the parties as in the main action.

[3] The plaintiff instituted an action against the defendant for N\$61 433-25 in January 2012. It was defended. A request for further particulars followed and it was replied to. The defendants thereafter filed a plea and a counter-claim on 10 July 2012.

[4] The plaintiff's erstwhile legal practitioners sought instructions from her as to the further conduct the matter and asked to be placed in funds to cover further steps and also what had been done before. The plaintiff says that she considered, with some justification I may add, that the costs in this matter would not warrant taking the further steps which had been explained to her. She decided not to proceed. She obviously did not realize that the counter-claim could be prosecuted by not taking further action on her part. She considered that the matter would simply go away. I do not consider that to be implausible in the circumstances of this case.

[5] Her legal practitioner subsequently in September 2012 sought instructions from her and stated that he did not receive a response. The plaintiff stated that she had not received that letter from him. After he had not received instructions, he then withdrew as legal practitioner of record on 8 October 2012.

[6] The defendants thereafter served the notice of bar on the plaintiff on 8 July 2013, some nine months later. Despite the terms of this notice, she only faxed it to her erstwhile attorney on 11 July 2013 when she took the matter up with him. He tried to revert to her but could not get through on the landline and cell phone numbers which he had for her. The plaintiff in reply states that the former was disconnected whilst the latter was lost as a consequence of her cell phone being stolen.

[7] The plaintiff however only followed up with that legal practitioner on 29 July 2013. Her explanation for the failure to do so before, despite knowing that time was of the essence, is on the weak side. A new lawyer was appointed and brought this application some days later. It was set down on the same day as the application for default judgment. It was on very short notice to the defendants. The defendants' lawyers very properly did not proceed for default

judgment, even though no interim relief was sought or moved with regard to staying that application.

[8] The defendants however in the short time available to them filed full answering papers. Mr Dicks who appears of the defendants rightly subjected the applicant's explanation to severe criticism for the two delays in question. There was firstly the delay during 2012 in not providing instructions to her attorney and secondly, and of more importance to me, is in respect of the time which had elapsed after the service of the notice of bar until this application was brought. As I have indicated the criticism of the failure to take steps more expeditiously in respect of the period from 8 July 2013 until the bringing of the application is well founded. But the underlying reason why no steps were taken previously was, as I have already indicated, to an extent plausible, given the fact that the plaintiff had formed a view that the cost of litigating would not be warranted in view of the size of the claim and the counter claim which she faced.

[9] I take into account that the defendants did not take steps for some nine months after the withdrawal of the plaintiff's legal practitioner of record. I also take into account that the notice of bar was not preceded by any form of notice to the plaintiff to file a plea, failing which that would occur. That of course is not required in the rules. It would also not necessarily be followed because of the fact that the plaintiff was no longer represented. But the point I make in this regard is that there was not a history of delays on the part of the plaintiff which frustrated the defendants in pursuing their counter-claim. I also take into account the fundamental right to a fair trial entrenched in Article 12 of a Constitution which would entitled a party to be heard on the merits of claim, even at times where they have defaulted with regard to the prescribed steps to be taken in defending or prosecuting a matter where condonation for such a failure is warranted. I wish to stress that this would not mean that there would be a license for parties to pursue claims in a slovenly manner or to unduly delay matters. On the contrary, the introduction of the rules relating to judicial case management mean that parties need to act more expeditiously in proceeding with matters than has been the case in the past.

[10] I further into account, as was correctly pointed out by Ms Bassingwaighe in argument, that a default judgment in respect of the counter-claim would not bring an end to this matter. She correctly pointed out that the plaintiff's claim would need to be referred to case management before it could come to trial. This matter would thus not come to an end if the plaintiff were not to succeed in uplifting the bar.

[11] Fundamental fairness in my view would require that seeing that the matter would need to proceed to case management that the entire matter should proceed in that way and that the defendants' prejudice should be addressed by an appropriate cost order. In this case I would consider that costs on a punitive scale would be justified, given the slovenly manner in which the plaintiff took steps after receiving the notice of bar.

[12] It would follow in my view that plaintiff should be permitted to file a plea, and that the defendants' prejudice should be remedied by an appropriate cost order. Both parties have been represented by instructed counsel.

[13] It would follow that the cost order should include those costs. In exercise of my discretion, I make the following order:

- 5) Condoning the applicant's non compliance with practice directives applicable to the filing of interlocutory applications.
- 6) Condoning the applicant's non-compliance with Rule 25 read with Rule 27 and her failure to file a plea to the first and second defendants' counter-claim within the time period provided for the rules.
- 7) Granting the applicant leave to file her plea to the first and second Respondents' counter-claim within ten days of the date of this order.
- 8) Directing that the applicant is to pay the respondents' costs of this application and those occasioned by the steps to file the notice of bar and to apply for judgment by default. These costs are to be on the scale as between legal practitioner and client and are to include the costs of one instructing and one instructed counsel.

D.F. SMUTS, J

APPEARANCES

PLAINTIFF:

DEFENDANTS: