REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3794/2008

In the matter between:

WELLCO TRUCK AND TRAILER REPAIRS CC **APPLICANT/PLAINTIFF**

and

WW CONSTRUCTION CC **RESPONDENT/DEFENDANT**

Neutral citation: *Wellco Truck and Trailer Repairs CC v WW Construction CC* (I 3794/2008) [2013] NAHCMD 8 (17 January 2013)

Coram: PARKER AJ

Heard: **4 December 2012**

Delivered: **17 January 2013**

Flynote: Judicial case management – Case management order putting defendant on notice that sanction under rule 37(16) of the rules of court would be invoked if defendant failed to comply with order – In subsequent proceeding court invoking rule 37(16) in virtue of defendant's failure to comply with order to provide fuller and better trial particulars that is sufficient in terms of 21(4), read with 21(6), of the rules of court.

Flynote: Practice – Costs – Unjust and unreasonable to mulct a particular party with costs where blameable conduct of both parties caused undue delay in the expeditious disposal of the case.

Summary: Practice – Judicial case management – Order granted to compel defendant to provide fuller and better trial particulars – Court finding that trial particulars delivered by defendant not sufficient within the meaning of rule 21(6) of the rules of court – Court finding further that defendant has not complied with the order – Court holding that in instant case rule 21(4) and (6) should be read intertextually with rule 37(16) and applied together – When the two sets of rules are so read and applied together it merges that defendants non-compliance with the order amounts to the order being contumaciously set at naught and it also prejudices plaintiff in preparing for trial – Consequently, granting of relief to strike defendant's plea and defence and dismiss defendant's counterclaim is justified and reasonable.

Summary: Practice – Costs – Court finding that blameable conduct of plaintiff and defendant contributed to undue delay in the expeditious disposal of the case – Where both parties are blameable for the delay it is fair and just that no party is mulcted in costs.

ORDER

(a) The defendant's condonation application is dismissed and the defendant's answering affidavit is struck; and there is no order as to costs.

(b) The defendant's plea and defence to the plaintiff's claim is struck, and there is no order as to costs.

(c) The defendant's counterclaim against the plaintiff is dismissed, and there is no order as to costs.

JUDGMENT

PARKER AJ:

[1] This is literally an old case: the cause of action arose as long ago as 2007–2008. The long history of the case is dotted with protracted series of process and other documents, starting with summons (5 December 2008); and in the course of events this is followed by notice of bar by the plaintiff (9 June 2009). Then come the defendant's plea and counterclaim (19 June 2009), plaintiff's plea to defendant's counterclaim (4 September 2009). Nothing proactive happens in progression towards finalization of the case for an inordinate period of more than two years until the plaintiff files a notice of amendment of the plaintiff's plea to the defendant's counterclaim (28 November 2011), followed by plaintiff's plea (as amended) to the defendant's counterclaim (13 December 2011).

[2] Thereafter and suddenly, the plaintiff springs into action with its discovery notices in terms of rule 35 (12 January 2012). What follows thereafter is the plaintiff's notice in terms of rule 36(9)(a) and (b) (30 April 2012), the plaintiff's notice of withdrawal as attorneys of record and a notice of appointment as attorneys of record (5 June 2012). Here, too, nothing substantial and proactive happened for close to two months.

[3] The procedures that followed are in terms of the new rules of court which introduced judicial case management (JCM) (GN No. 57 of 2011, 27 April 2011). The first process under the JCM is a notice in terms of rule 37(1)(b) (26 June 2012). The notice is followed by the filing of the parties' joint case management report (23 July 2012). This is followed by the plaintiff's request for trial particulars (24 August 2012), letter (dated 4 September 2012) under the hand of Y Campbell (of the plaintiff's legal representatives) in which the defendant's legal representatives are put on notice that the defendant's 'failure to discover timeously in terms of the parties' joint case management report prejudices our client in its preparation for trial' and a consequent application to compel defendant to discover in terms of rule 35 of the rules, an application to compel the defendant to comply with the plaintiff's request for trial particulars (12 September 2012) and the issuance by the court of the order dated 20 September 2012, granting of the application brought in terms of rule 35 and rule

21(4) (read with rule 21(6)) of the rules of court, the defendant's reply to the plaintiff's request for trial particulars (2 October 2012), consequent application by the plaintiff to compel the defendant to provide fuller and better trial particulars as requested by the plaintiff in respect of the enumerated paragraphs in the plaintiff's request and the granting of an order by the court (8 November 2012).

[4] I have taken some time to set out *in extenso* the series of process and the 4 September 2012 letter (by the plaintiff's legal representatives) for good reason that will become apparent in due course.

[5] As long a period as four years or thereabouts, no proactively significant progress was made towards the completion of this case. It is precisely to cure such unacceptable mischieve that is wont to delay the expeditious and fair disposal of cases that the rules of court were amended on 27 April 2011 (as aforesaid) with the object of pursuing judicial case management of cases. In order to underline the seriousness of the court to ensure that the course of litigation is no longer driven by litigants and legal practitioners, who may not be minded to see to the prompt and fair disposal of cases, but by managing judges that the sanction under rule 37(16) of the rules is provided. (See *De Waal v De Waal* 2011 (2) NR 645.)

[6] The other reason is to show that it is the conduct of the plaintiff and the conduct of the defendant that have contributed to the stalling of the disposal of the case.

[7] Doubtless, the following conduct attributable to the plaintiff has contributed in no small measure to the delay in disposing of the case; indeed, the stalling of the case. There is the withdrawal and replacement of the plaintiff's legal representatives which resulted in no action being taken for some time by the plaintiff towards the completion of the case. For instance, it took the plaintiff two years or so to file notice of amendment of the plaintiff's plea to the defendant's counterclaim. Additionally, owing to the plaintiff's inaction, nothing significant and substantial happened for about two months in April–June 2012 to bring about progress in the completion of the

case. I shall take this finding into account when determining the question of costs in due course.

[8] Of course, the latterly stalling of the case which is germane to the present proceeding should be put at the door of the defendant. The defendant has displayed an unacceptable knack for not complying with relevant rules of court and has always waited to be dragged to court on notice of motion to be forced to act, thus delaying the expeditious disposal of the matter. And on the last occasion when so dragged to court, the defendant disobeyed the order of the court made on 8 November 2012, as more fully dealt with in the succeeding paragraphs.

[9] In the course of events, the plaintiff brought an application to compel in terms of subrule (4), read with subrule (6), of rule 21 of the rules of court. The plaintiff prayed the court to compel the defendant to provide 'fuller and better trial particulars' in respect of certain paragraphs mentioned in the notice of motion. The court made an order on 8 November 2012 ('the 8 November 2012 order'), having been satisfied that a case had been made out for the grant of the relief sought by the plaintiff. The relevant part of the 8 November 2012 order reads:

'1. The Defendant must comply with plaintiff's request for trial particulars in terms of the provisions of Rule 21(4), read with Rule 21(6) of the rules, and to provide fuller and better trial particulars as requested by Plaintiff and more specifically to provide full and proper answers that were refused by Defendant in the following paragraphs of its reply to Plaintiff's request for further particulars: paragraphs 3.2, 7.3, 8.6, 10.1, 10.3, 11.2, 11.4, 12.3, 14.4, 13.2, 15.2, 16.2 and 17.

2. The Defendant must comply with the order set out in paragraph 1 on or before 20 November 2012, and failing compliance therewith:

(a) the plaintiff is authorized to apply on the same papers, suitably amplified, for an order striking out the defendant's defence to the action as well as his counterclaim with costs;

(b) the plaintiff may apply for an order that the defendant pays the costs of the application.'

[10] The present application is in pursuance of paras 2(a) and (b) of the 8 November 2012 order. In the notice of motion the plaintiff prays for the following relief (apart from any 'further and /or alternative relief as the court may deem meet):

'1. That the defenant's plea and defence to the plaintiff's claim be struck with costs, including costs of one instructing counsel and one instructed counsel;

2. That the defendant's counterclaim against the plaintiff be dismissed with costs, including costs of one instructing counsel and one instructed counsel; and

3. Costs of this application, including cost of one instructing and one instructed counsel.'

[11] What stand out as crucial and relevant in the instant proceeding are these: Rule 21(4) and (6) of the rules should be read intertextually with rule 37(16) of the rules. In this regard, I should underline the point that in the 8 November 2012 order the defendant was put on notice that if the defendant failed to comply with para 1 of the order, the court would consider invoking rule 37(16) of the rules. And additionally, one should not lose sight of the fact that rule 21(6) does not only speak of trial particulars that are requested being delivered 'timeously' but also that trial particulars must be delivered 'sufficiently'; that is, the particulars delivered upon request must be sufficient for the purpose for which they are requested, which is strictly to enable the requesting party to 'prepare for trial'. The purpose is (a) to prevent surprise, (b) that the parties should be told with greater precision what the other party is going to prove in order to enable his opponent to prepare his case to combat counter allegations and (c) having regard to the aforegoing nevertheless not to tie the other party down and limit his case unfairly at the trial'. (H J Erasmus et al, *Superior Court Practice* (2000) p B1-138, and the cases there cited)

[12] I have carefully pored over the trial particulars that the plaintiff requested and the particulars that the defendant delivered in relation to the paragraphs enumerated in para 1 of the order. Having done that, I find that the plaintiff has established that the particulars are not sufficient; that is to say, the defendant has not provided 'fuller and better trial particulars' which the court ordered it to provide in terms of the 8

November 2012 order. They may be the ‘best answers’, as Mr Boesak, counsel for the defendant, described the particulars that the defendant delivered; but in my opinion they are not sufficient within the meaning of rule 21(6) of the rules.

[13] It is Mr Boesak’s further submission that the relief sought in paras 1 and 2 of the notice of motion is ‘drastic’. That may be so – on the face of it. In the instant case, one must not lose sight of the intertextuality of rule 21(4) and (6) and rule 37(16) of the rules of court. And if these two sets of rules are read intertextually and applied together the following emerges inexorably: The defendant has not only contumaciously set the 8 November 2012 order at naught; but also the defendant’s non-compliance with the 8 November 2012 order prejudices the plaintiff in preparing for trial, as Mr Obbes, counsel for the plaintiff submitted. Having taken these two negative aspects together as they should and considering the defendant’s conduct described in para 3 of this judgment, I find that the relief sought by the plaintiff in paras (1) and (2) of the notice of motion is justified and reasonable in the circumstances of the case, Mr Obbes submitted.

[14] For these reasons I hold that the plaintiff has shown that it entitled to the relief sought in paras 1 and 2 of the notice of motion. That being the case I exercise my discretion in favour of granting the relief sought in paras 1 and 2 of the notice of motion. Nevertheless, I make no order as to costs (ie para 3 of the notice of motion) in view of the conclusion I have reached in para 7 and 8 (of this judgment) to the effect that both the plaintiff and the defendant are blameable for the delay that has resulted in the case not being disposed of expeditiously. In such a case it is fair and just that no party is mulcted in costs.

[15] I have also exercised my discretion and rejected the defendant’s condonation application for the late filing of the defendants answering affidavit in disobedience of the order of the court dated 28 November 2012. I must consider it in bad light the filing of the defendant’s answering affidavit out of time without condonation having first been sought by the defendant and granted by the court. The defendant’s conduct resulted in the matter not being heard on the set down date of 4 December 2012, resulting in a postponement, and the defendant has not tendered wasted costs

for the postponement; but, more important, the facts relied on by the defendant are not sufficient to justify the grant of the relief of condonation. The defendant is, therefore, not entitled to the grant of the indulgence sought from the court to condone the late filing of the answering affidavit. It follows that the defendant's condonation application falls to be dismissed; even so, I make no order as to costs, considering the view I have taken of the plaintiff's application. The failure of the condonation application is so intertwined with the success of the plaintiff's application that it would, in my opinion, be unjust and unreasonable to order the defendant to pay costs for failing in its challenge to the plaintiff's application and at the same time also pay costs for being unsuccessful in its condonation application in the one and same proceeding when the success of the plaintiff's application and the award of costs following the event have been brought about to an appreciable extent by the failure of the condonation application. In the circumstances, in the exercise of my discretion I hold that costs should not follow the event in the dismissal of the plaintiff's application for condonation. This is a proper case where costs should not be awarded against the defendant.

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

(a) The defendant's condonation application is dismissed and the defendant's answering affidavit is struck; and there is no order as to costs.

(b) The defendant's plea and defence to the plaintiff's claim is struck, and there is no order as to costs.

(c) The defendant's counterclaim against the plaintiff is dismissed, and there is no order as to costs.

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C Parker

Acting Judge

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APPEARANCES

PLAINTIFF:	D Obbes Instructed by Du Pisani Legal Practitioners, Windhoek
DEFENDANT:	W Boesak Instructed by Krüger, Van Vuuren & Co., Windhoek