



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3838/2011

In the matter between:

1.1.1.1.

LOIDE EUFEMIA NUJOMA

1.1.1.2.

(born NGAIKUKWETE)

PLAINTIFF

and

JAPENI GOTTLIEB NUJOMA

DEFENDANT

Neutral citation: *Nujoma v Nujoma* (I 3838/2011) [2013] NAHCMD 88 (5 April 2013)

Coram: Schimming Chase, AJ

Heard: 13 March 2013

Delivered: 13 March 2013

Reasons delivered on 5 April 2013

Flynote: Return date of a rule *nisi* in divorce proceedings (RCR) – Defendant wishing to show cause why the rule should not be confirmed and why a final divorce order should not be granted in respect of ancillary issues relating to the estate of the parties – Court initially granting defendant opportunity to file papers – Defendant instead requesting further particulars to the particulars of

claim.

Duties of officer of court – To not mislead a court on effect of any incorrectly worded court order after undertaking made to another judge that answering papers would be filed.

Summary: On the return date of a rule *nisi* in divorce proceedings, the defendant who wanted to deal with certain ancillary issues before the order was made final was given leave to do so. The legal practitioner representing the defendant undertook to file papers within one week. The divorce order indicated that leave to defend was granted. The defendant's legal practitioner then filed a request for further particulars. When the matter came before motion court again before another judge the defendant's legal practitioner represented to the presiding judge that *ex facie* the order, the defendant had been given leave to defend the action. This was done in full knowledge of the undertaking made to the judge who dealt with the matter earlier that answering papers would be filed in one week. At the later hearing the legal practitioner conceded that he was aware that it was a return date of a rule *nisi* and that the legal principles required that answering papers should be filed. This was found to be a breach of the duties of an officer of the court. The court granted a final divorce order encompassing the division of the parties' estate on the terms set out in the restitution order. Costs were awarded on an attorney and own client scale and the rule *nisi* reinstated and confirmed. The principles in Gariseb v Bayerl 2003 NR 118 confirmed as regards reinstatement of rule *nisi*.

ORDER

Having heard Ms Nambinga, counsel for the plaintiff and having heard Mr Mbaeva, counsel for the defendant and having read the papers filed of record and the arguments made by counsel on behalf of the parties it is ordered that:

(b)

1. The rule *nisi* issued on 13 August 2012 is hereby reinstated.

2. The bonds of marriage subsisting between the plaintiff and the defendant are hereby dissolved.
3. Custody and control of the minor child is awarded to the plaintiff subject to the defendant's rights of reasonable access.
4. The defendant shall pay maintenance in respect of the minor child in the amount of N\$500.00 per month, such maintenance to be payable until such time as the minor child becomes self-sufficient.
5. The benefits of the marriage in community of property are hereby divided and without derogating therefrom, due regard being had to the various movable properties of the parties, it is specifically ordered that the plaintiff shall make payment to the defendant in the amount of N\$134,918.58 within a period of six months from the granting of this order of divorce, and that ownership in respect of Erf 2975 Stephenson Street, No 26, Windhoek North, Windhoek become vested in the plaintiff.
6. The defendant is ordered to pay the plaintiff's wasted costs on an attorney and own client scale including the costs occasioned by the plaintiff on the dates of 19 November 2012 and 13 March 2013.

REASONS

SCHIMMING-CHASE, AJ

(c) On 13 March 2013 I made the order set out above granting the plaintiff a final order of divorce inclusive of ancillary issues. I indicated that reasons will be provided for the above order and the reasons are set out below.

(d) This is a return date of a rule *nisi* in terms of which Mr Justice Smuts on 13 August 2012 granted judgment for the plaintiff for an order for restitution of

conjugal rights and ordered the defendant to return or to receive the plaintiff on or before 24 September 2012, failing which to show cause if any to the court on 22 October 2012 at 10h00 why:

- “1. The bonds of marriage subsisting between the plaintiff and the defendant should not be dissolved;
2. The custody and control of the minor child is awarded to the plaintiff subject to the defendant’s rights of reasonable access;
3. The maintenance for and in respect of the children (*sic*) in the amount of N\$500.00 per month, per child (*sic*) payable until such time as the said children (*sic*) becomes self-sufficient;
4. Division of the benefits of the marriage in community of property and without derogating therefrom, due regard being had to the various movable properties of the parties, that it specifically be ordered that:
 - 4.1 plaintiff make a payment to the defendant in the amount of N\$134,918.58 within a period of six (6) months from the granting of the order of divorce, and that ownership in respect of Erf 2975, Stephenson Street, No 26, Windhoek North, Windhoek become vested in the plaintiff.”

(e) I point out at this stage that with regard to the above restitution order, the plaintiff instituted action for divorce via combined summons on 15 November 2011. The combined summons and particulars of claim was served on the defendant personally on 28 December 2011. It is apparent *ex facie* the return of service “that the combined summons together with the particulars of claim and annexures “LEN1” up to “LEN5”, was exhibited to the defendant at the same time at which a true copy was personally handed to him with an explanation of the nature and content thereof. On or about 3 July 2012, the plaintiff filed amended particulars of claim which were also personally served on the defendant comprising annexures “LEN1” up to “LEN27” and the original was exhibited to the defendant comprising an explanation as to the nature and

content thereof on 18 July 2012.

(f) It was on this basis that the plaintiff led her evidence at second motion court resulting in the restitution order referred to above being granted. The court was *functus* when the restitution order was granted.

(g) On 1 October 2012, the plaintiff deposed to an affidavit of non-return which was delivered on the 3rd of October 2012. On the return date of the rule *nisi* on 22 October 2012, Ms Nambinga appeared on behalf of the plaintiff and Mr Mbaeva for the first time appeared on behalf of the defendant. Mr Mbaeva submitted to Mr Justice Geier the following:

“MR MBAEVA: Thank you My Lord, My Lord at this I seek instructions from my client regarding the granting of the final order. He is in agreement that a final order can be granted provided the ancillary issue stand down or stand over. There is also authority to that effect, the Vahekeni matter here would apply.

COURT: What is your client intending to do?

MR MBAEVA: My client intends to contest the ancillary issue of the (intervention).

COURT: Be a bit more specific Mr Mbaeva.

MR MBAEVA: Yes my client intends to contest the issue of the immovable property and the other immovable properties which appear in the prayers of the plaintiff My Lord.

COURT: Is that all?

MR MBAEVA: That is the main issue, we do not have a problem with custodies (*sic*) but those are the properties we do have an issue.”

(h) After Mr Justice Geier found that the defendant should be granted an opportunity to put his version before court, the following also appears from the transcript of the above proceedings:

“COURT: Why should he not be given the opportunity to put his version before the court?”

MS NAMBINGA: My Lord, if an application is brought to do so then (intervention).

COURT: Yes, obviously we will have to file some form of affidavit.

MS NAMBINGA: Yes, but my view is My Lord that this is not before this court today and so (intervention).

COURT: That is so but why should I not give that opportunity? I can put the defendant to terms.

MS NAMBINGA: My Lord there is nothing before the court, I do not know why it is that the defendant’s attorney or the defendant has not done so.

COURT: No they will have to file papers Ms Nambinga to make out a case or not.

MS NAMBINGA: My Lord respectfully my view is that it should have been done before today.

COURT: Yes but even if it comes I am not prepared to shut the doors of the court in the face of the defendant. Even if admittedly it is correct that this notice to defend is late, yes that is something that can be cured possibly by a cost order. But I will not prevent a party from possibly revisiting some of the issues which are capable of being revisited. Obviously some of the issues are final already and in that regard your client’s case has progressed surely but there are other issues in respect of which I will give them the opportunity. Whether they can make out a case is another matter and that will have to be determined after there has been a proper exchange of papers or oral evidence if needs be.”

- (i) The court went further to ask the following:

“COURT: Yes, I just want to, sorry maybe I could do it with reference to this

calendar here. Mr Mbaeva?

MR MBAEVA: Yes My Lord.

COURT: How much time do you need to file an Affidavit?

MR MBAEVA: A week My Lord.

COURT: Then I direct that you file such papers that you may wish to file on or before the close of business of 29 October?

MR MBAEVA: That is in order My Lord.

COURT: Ms Nambinga you want to write reply I suppose?

MS NAMBINGA: That is correct My Lord.

COURT: How much time do you require, also a week?

MS NAMBINGA: I think a week would be (intervention).

COURT: So that will take us to the 5th of November.

MS NAMBINGA: In order.

COURT: We can then have a reply of Mr Mbaeva, by the close and I will extend the return date to the 19th."

(j) The transcript also dealt with the order made as follows:

(k)

"ORDER: Yes very well then the Defendant having indicated his intention to defend the matter is hereby granted leave to file such papers as he may be (indistinct). On or before the close of business of 22 October 2012. The Plaintiff is entitled to file answering papers thereto on or before the close of business of 29 October 2012. The Defendant is and can reply thereto if he so chooses on or before the close of business on 5 November 2012. The rule is hereby extended to 12 November 2012 at 10:00."

(l) The order of Court made on 22 October 2012 by Mr Justice Geier reads as follows:

“Having heard Ms Nambinga counsel for the plaintiff and Mr Mbaeva for the defendant having read the documents filed of record

IT IS ORDERED:

1. That the defendant is granted leave to defend.
2. That the defendant file papers on or before 29 October 2012 and the plaintiff to file a reply on/ before 5 November 2012.
3. That the matter is postponed to 19 November 2012.
4. That the defendant pay wasted costs.”

(m) On 19 November 2012 both counsel still on record for the parties, appeared before Mr Justice Unengu Acting at second motion court. The transcript of these proceedings was also provided to the court. During these proceedings Ms Nambinga, counsel for the plaintiff, sought to bring the court into the picture as to why the matter was extended to 19 November 2012. She stated the following:

(n) “My Lord I would just like to bring the Court into the context of why this matter was postponed to or extended to today. In essence My Lord this matter was postponed for the following reasons, on the 22nd of October 2012 the parties appeared before Your Lordship’s brother Justice Geier to hear whether or not the restitution order that was granted in this matter should may (*sic*) not be made final. On that day the defendant had filed the noticed to defendant (*sic*) and power of attorney in respect of this matter and the plaintiff argued that the defendant at that interim (*sic*) could not join the flare of these proceedings by virtue of the fact that he did not file an affidavit to this court to explain why the restitution order should not be made a final order. The defendant argued that it

has an in factual (*sic*) an intention to want to join the flare in these proceedings and in essence seek the court or seek from the court that in fact it would put its reasons before this court so the court can consider the issues. Primarily the issues were relating to the (indistinct) relief in support of that of the plaintiff vis a vis the orders made in respect of the properties of the parties. The court then granted that the matter be postponed to 19 November and in the interim the parties file papers, the defendant file before 29 October and for the plaintiff to reply on or before 5th November. The court will then argue the matter or would hear arguments on this matter today.”

(o)

(p) Further Ms Nambinga submitted the following:

(q)

(r) “MS NAMBINGA: In the interim the defendant filed a request for further particulars, the plaintiff wrote letter and indicate say (*sic*) we have not seen your papers in accordance and in the spirit and purport of what the court granted on the particular day and we are now seek (*sic*) to see why it is or cause that the defendant shows why this court should not grant this order today. On this basis My Lord I submit that those papers are still not before this Court today and would seek to as far as the plaintiff is concerned to motivate for final order. Previously the parties relied on a case that is Vahekeni v Vahekeni, I submit My Lord that if the court wants to hear argument on this aspect, we are prepared to tender argument and seek for a final order of divorce.”

(s) Mr Mbaeva submitted the following to Mr Justice Unengu Acting:

“MR MBAEVA: My Lord the order of the 22nd of October 2012 paragraph 1 grants leave to the defendant to defend the matter. Now granting leave obviously means that a plea has to be filed. Now we cannot file a plea without requesting further particulars and this is what we have done. The order does not specify what sort of papers must be filed, this is one of the papers which the defendant filed. To that we have not received any reply so I request for further particulars. So on this basis alone now My Lord I do not think that the plaintiff is entitled to a final order as of today.” (emphasis supplied)

(t) Mr Mbaeva also stated the following:

“MR MBAEVA: Yes My Lord there is one issue which is very, very critical, it is the fact that the plaintiff is alleging that the parties are married in community of properties (*sic*) and they are asking further particulars on that then my take would be for this matter to be taken to case management so that we can ventilate the issue there, not in motion court.”

(u) Subsequent to the above submissions, Mr Justice Unengu Acting indicated that there was not sufficient information to enable him to make a decision and that he would wish to hear properly the ventilation of both issues in front of him as a result of which he extended and postponed the matter to a date to be arranged with the registrar.

(v) The court order dated 19 November 2012 reads as follows:

“Having heard Ms Nambinga, counsel for the plaintiff and having read the rule *nisi* issued by this Honourable Court on 13 August 2012 and other documents filed of record:

IT IS ORDERED:

1. That the said rule *nisi* is hereby extended and the matter postponed to a date to be arranged with the registrar.”

(w) The matter came before me on the interlocutory roll on 22 January 2012. At that stage the transcripts of the proceedings were not made available and it was not clear what relief was being sought and what issues were to be determined. Furthermore, no heads of argument had been filed by either side to be adjudicated on. As a result an opportunity was provided to the parties to get their papers in order and to obtain an alternative date for the hearing of this matter. In the result, the following order was made on 22 January 2013:

“Having heard Ms Nambinga, counsel for the plaintiff and Mr Kasper for the defendant and having read the documents filed of record:

IT IS ORDERED:

1. That the matter is hereby postponed to a date to be arranged with the registrar.”

(x) I also requested the parties to properly paginate the court file, to provide me with an indication of what this matter was about and what this court had to adjudicate on, and also to provide heads of argument or any further necessary documentation in order to assist the court.

(y)

(z) On 12 March 2013, the plaintiff’s legal practitioner provided an index which included the pleadings, the restitution order made by Mr Justice Smuts on 13 August 2012 as well as transcripts of the hearing before Mr Justice Geier on 22 October 2012 and before Mr Justice Unengu Acting on 19 November 2012. The plaintiff’s legal practitioner also delivered a “note” which she submitted set out what relief the plaintiff was seeking and the legal basis for the relief sought. In essence the plaintiff sought an order reinstating the rule *nisi* previously granted in court on 13 August 2012 by Mr Justice Smuts as well as an order that the aforesaid rule *nisi* be made final. The matter was argued in full before me on this date.

(aa) Ms Nambinga submitted that at the hearing of 22 October 2012 before Mr Justice Geier, the court ordered that the parties file affidavits to show cause why the ancillary relief sought in the restitution order should not be made final. Since that date, no such affidavits had been filed. Yet Mr Mbaeva sought to file a request for further particulars instead. This aspect is set out in the relevant portion of the transcript quoted above.

(bb) Mr Mbaeva appearing on behalf of the defendant made identical submissions to this court as he made to Mr Justice Unengu Acting at the hearing of 19 November 2012, namely that the court order of Mr Justice Geier indicated that the defendant had been granted leave to defend and further that it was not clear what papers were being referred to in the court order, thus he was permitted to request for further particulars.

(cc) I specifically requested Mr Mbaeva to address the court on the

representations made *ex facie* the transcript of proceedings to Mr Justice Geier on 22 October 2012, on the return date of the restitution order, to the effect that he relied on the case of Vahekeni v Vahekeni¹ for the defendant's right to address the court on ancillary issues and further that he undertook to the court that he would file the defendant's affidavit within one week.

(dd) Mr Mbaeva conceded that he had made such an undertaking to court, but submitted that the court order by Mr Justice Geier stated in paragraph 1 that the defendant had been granted leave to defend, and further that a notice of intention to defend had been filed. Accordingly he was entitled in the circumstances to file a request for further particulars. He also conceded, after an inquiry from the court whether it was competent to file a notice to defend and in particular a request for further particulars, instead of an affidavit showing cause why the ancillary relief contained in the restitution order should not be made final, that it was not competent for the request to be filed. But he persisted that the order indicated that a notice to defend could be filed. On that basis he submitted that the parties should be allowed to ventilate their issues in accordance with the procedure he had set in motion.

(ee) Before I deal with the main issues regarding why I granted a final order of divorce, I first deal with the aspects relating to the return date of the restitution order. As stated above, the restitution order was granted on 13 August 2012. Mr Justice Geier postponed the matter to 19 November 2012. Mr Justice Unengu Acting ordered that the rule *nisi* be extended and that the matter postponed to a date to be arranged with the registrar. On 22 January 2013 for the reasons set out above, I also made an order that the matter be postponed to a date to be arranged with the Registrar.

(ff) It is well established for purposes of the granting of divorces in this court that if a defendant has not defended an action for divorce when the combined summons and particulars of claim has been personally served on that defendant, that the plaintiff may lead evidence in support of the claim for a divorce and any ancillary relief. It is further trite that the court does not after

¹2008(1) NR 125 SC.

hearing the evidence grant a final order of divorce. It grants a restitution order in the form of a rule *nisi* calling upon the defendant to show cause why the order should not be made final and why the ancillary relief claimed in that order should also not be made final. The restitution order is also personally served on the defendant.

(gg) The rule *nisi* is an interim order. As such, it cannot be postponed. It can only be extended, or discharged or confirmed. It was accordingly not competent for the rule *nisi* or restitution order to be postponed. In Gariseb v Bayerl², Mr Justice Hoff made it clear that any practice of postponing rules *nisi* to dates to be arranged with the Registrar should be discouraged since it invariably bears the consequences of uncertainty and vagueness and opens itself to differing interpretations. It is clear that neither of the earlier judges hearing this matter nor I intended to postpone the rule *nisi*. Thus the rule is expressly reinstated in these proceedings.

(hh) As to whether the rule should be extended again or made final, it is clear that Mr Mbaeva undertook to file affidavits and that this was the correct procedure to follow in this matter, in order for the presiding judge to determine whether the restitution order should be made final on the ancillary issues. This is clear from the transcript of proceedings before Mr Justice Geier. Despite this undertaking, Mr Mbaeva sought to opportunistically interpret the court order of Mr Justice Geier (through unfortunately worded) as the granting of leave to defend the divorce action and misrepresented the true facts, in particular his undertaking as well as the proper procedure to follow to Mr Justice Unengu Acting on 19 November 2012.

(ii) Section 33(1)(b) of the Legal Practitioners Act³, dealing with unprofessional or dishonourable or unworthy conduct by a legal practitioner defines such conduct to *inter alia* include wilfully misleading a court or tribunal, or allowing it to be misled. The learned author CG Marnewick⁴, stated that

²2003 NR 118 (HC) at 121B-C.

³ Act 15 of 1995 (as amended).

⁴Litigation Skills for South African Lawyers, 2nd ed, LexisNexis at 272.

counsel's⁵ duty to the court requires him or her *inter alia* not to deceive the court knowingly or recklessly on the facts or the law, and not to present argument or points which are obviously specious or frivolous. "Mislead" is defined in the Concise Oxford Dictionary as "causing a person to go wrong in conduct or leading astray or in the wrong direction". This, unfortunately, is exactly what Mr Mbaeva, a senior legal practitioner, did. In fact, he went further. He breached his undertaking to Mr Justice Geier, and thus to the court, which amounts to contempt of court.

(jj) In light of this behaviour, I see no reason why the defendant should be given the opportunity to do what was undertaken some time ago on 22 October 2012. This matter dragged on unnecessarily due to the conduct of the defendant's legal practitioner, and after the defendant failed on two separate occasions to defend proceedings personally served on him and containing pleadings and annexures indicating exactly the evidence that the plaintiff would lead at the hearing, as well as the documentation she would rely on. The failure of the defendant to defend and the failure of the parties to properly comply with the court order dated 22 October 2012, coupled with Mr Mbaeva's conduct makes it clear that the parties lost their entitlement to any further chances to lead evidence on the ancillary issues. In the result the restitution order is made final as set out in the above order.

(kk) As regards the question of costs, I was initially inclined to grant a costs order *de bonis propriis*. However, based on what I set out in the above paragraph, I find that the defendant is also not innocent. The conduct of the defendant, and in particular his legal practitioner, was clearly vexatious and a special costs order is warranted, in this case on an attorney and own client scale.

(ll) A copy of this judgment shall be delivered to the Law Society of Namibia for consideration of its Ethics Committee.

⁵Counsel in the Namibian context includes any admitted legal practitioner by virtue of the provisions of the Legal Practitioners Act.

EM Schimming-Chase
Acting Judge

APPEARANCES

PLAINTIFF:

Ms Saima Nambinga
Of AngulaColeman, Windhoek

DEFENDANT:

Mr Mbaeva
Of Mbaeva & Associates, Windhoek

CC:

The Law Society of Namibia