REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

***EX TEMPORE* JUDGMENT**

In the matter between: Case no: I 341/2008

DE BEERS MARINE NAMIBIA (PTY) LTD **APPLICANT/DEFENDANT**

and

ADVOCATE FREDERICK LANGE N.O.

(in his capacity as the appointed curator *ad litem* for

DIRK JACOBUS LOUBSER **1ST RESPONDENT/PLAINTIFF**

THE HONOURABLE CHIEF JUSTICE OF NAMIBIA **2ND RESPONDENT**

JOHANNES JACOBUS BOTHA SC **3RD RESPONDENT**

LEILANI VILJOEN **4TH RESPONDENT**

Neutral citation: *Loubser v De Beers Marine Namibia (Pty) Ltd* (I 341/2008) [2014] NAHCMD 40 (18 October 2013)

Coram: GEIER J

Heard: **18 October 2013**

Delivered: **18 October 2013**

Released: **11 February 2014**

Flynote: Practice — Judicial case management — urgent interlocutory application brought to review and set aside a certificate issued in terms of Section 85(2) of the Legal Practitioners Act 1995 by the Chief Justice to plaintiff's counsel authorizing

them to act and appear on behalf of plaintiff on an *in forma pauperis* basis – such issue not identified as an issue requiring determination at the trial in the court's pre-trial order issued on the basis of the parties' pre-trial proposal – applicant failing to apply for the variation or re-consideration of the pre-trial order -

Practice — Judicial case management - Rule 37(14) of the Rules of High Court expressly providing that *'issues, evidence and objections not set out in the managing Judge's pre-trial order are not available to the parties at the trial or hearing'*.

Held – that this provision takes into account the binding nature of pre-trial orders – which are interlocutory in nature - and the underlying legal principles that the courts will not readily or lightly vary their own simple interlocutory orders - as the applicant had failed to address this point at all and had also failed to take into account that pre-trial orders stand unless reconsidered, varied or rescinded on *good cause* shown – the application could not be granted in the absence of any application for the reconsideration, variation or rescission of the pre-trial order made on 19 March 2013 - which pre-trial order thus continued to stand and which order did not- and still does not permit the defendant to raise this *in limine* interlocutory issue.

Court accordingly holding that the absence of any application for the variation, or rescission, or even an application for its reconsideration constituted a material, if not absolute barrier, to the defendant's urgent interlocutory application - at least until such time - that that obstacle, on *good cause* shown, had been removed.

The urgent interlocutory application was accordingly dismissed with costs.

Summary: The facts appear from the judgment.

ORDER

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1. The urgent interlocutory application brought by defendant on 15 October 2013 is hereby dismissed with costs. Such costs are to include the cost of two instructed- and one instructing counsel.

2. The plaintiff is directed to bring an application in terms of Rule 41 of the Rules of High Court or to launch an application direct to this Court for leave to sue *in forma pauperis*, on or before 29 November 2013.

3. In so far as it is necessary the pre-trial order of 19 March 2013 is hereby varied to allow for the interlocutory hearing of any such application.

4. The matter is postponed for a status hearing to 4 February 2014 at 15h30 to determine the further conduct of these proceedings.

JUDGMENT

GEIER J:

[1] The Legal Practitioners Act 1995[1] affords litigants the opportunity to be represented by foreign counsel of their choice.

[2] Section 85(2) of that Act regulates this facet of the right to legal representation as follows:

'(2) Where the Chief Justice or, in his or her absence, the Judge-President is satisfied that, having regard to the complexity or special circumstances of a matter, it is fair and reasonable for a person to obtain the services of a lawyer who has special expertise relating to the matter and that the lawyer is not resident in Namibia or a reciprocating country, he or she may, upon application made to him or her in that behalf, grant to such lawyer a certificate authorising him or her to act in Namibia in relation to that matter.'

[1] Act 15 of 1995, as amended

[3] The plaintiff in this instance, now resident in Langebaan, South Africa, has obtained the services of both senior and junior counsel practising at the Cape Bar. He has also secured the services of an attorney practising in Cape Town and those of a local correspondent legal practitioner.

[4] The plaintiff has also instituted an action for damages against the defendant arising out of an incident as a result of which he suffered brain damage, so much so, that a curator *ad litem* was appointed to assist the plaintiff in pursuing his claim for damages.

[5] The action was opposed and was resuscitated through a successful rescission application which had been launched on behalf of the plaintiff against the dismissal of his action at a case management hearing.

[6] Subsequent to the rescission having been granted the matter once again proceeded to case management and a case management hearing was set for 27 November 2012.

[7] The parties duly filed a case management report on 21 November 2012.

[8] It is interesting to note that this joint report describes counsel for the plaintiff as ‘Advocate Botha SC (RSA), Advocate Viljoen Junior (RSA), Mr D Maartens (RSA) and Mr Naude. Counsel for the defendant, on the other hand, were reflected simply as Advocate Heathcote SC, Advocate Dicks (Junior) and Ms Mignon Klein, with no suffix.

[9] Why the qualification/categorization into ‘Namibian counsel’ and ‘South African counsel’ was made did not emerge from the content of the case management report, nor was this strange phenomenon explained, and, I must simply add, that this is not the customary thing to do.

[10] Be that as it may, what was however stated expressly in the report, under the heading was:

'Need for interlocutory motions and dates of such motions to be heard - None foreseen at this stage'.

[11] I pause to mention that the defendant, by then, had already raised an *in limine* issue, relating to Mr Maartens' authority - that is the plaintiff's Cape Town attorney - to launch the rescission application on behalf of the plaintiff in response to which plaintiff's counsel, to their heads of argument, filed in support of the rescission application, annexed the certificate which had in the interim been issued to them by the Chief Justice in terms of Section 85(2) and in terms of which both senior- and junior counsel, as well as the South African instructing attorney, were authorized to act in Namibia, in this matter, on an *in forma pauperis* basis.

[12] These heads of argument, together with the said Section 85(2) certificate, where already delivered to the defendant's legal practitioners as far back as 9 October 2012.

[13] In any event and pursuant to the case management order issued by the court on 27 November 2012 the matter was then postponed for a pre-trail hearing, set for the 26th of February 2013.

[14] In terms of the case management rules of this court it thus became incumbent on the parties and their legal practitioners to formulate a proposed pre-trial order.

[15] Rule 37(12)(c) then obliges the parties to identify all issues of fact and law to be resolved during the trial in their pre-trial proposal.

[16] The parties in this instance then indeed delivered their pre-trial proposal, duly reflecting, which issues of fact and law, were to be resolved during the trial.

[17] The proposal also addressed a number of other aspects, none of which, however, took issue with the authorization obtained, on application, to the Chief Justice, for plaintiff's counsel to act on behalf of plaintiff in terms of Section 85(2) of the Legal Practitioners Act.

[18] On 19 March 2013 the court took cognizance of the parties' pre-trial proposals and ordered that the parties were to proceed to trial on the issues formulated in paragraphs 1.1 to 1.3.6 of the parties' joint proposed pre-trial order, dated 13 March 2013.

[19] The matter was subsequently set down for trial, on the fixed roll, for the week 14 to 18 October 2013.

[20] It should also be mentioned that the defendant, in the interim, and on 9 September 2013, had launched an application to compel the plaintiff to furnish security for the defendant's costs in the main action, which application was opposed.

[21] In the answering affidavit to that application, delivered on 13 September 2013, the plaintiff's financial position was set out in detail. The defendant did however not pursue this application, which was withdrawn, by notice, on 19 September 2013.

[22] The plaintiff, who in the interim, had given notice to amend the particulars of his claim, however pursued such intended amendment, despite an objection thereto, by way of an application, launched on 21 June 2013, which application was heard on an opposed basis on 26 September 2013, on which date the sought leave to amend was granted by this Court. The amended particulars of claim were delivered on the same day and the defendant consequentially amended its plea on the 3rd of October 2013.

[23] At the commencement of the trial – on 14 October 2013 - Mr Heathcote, who appeared with Mr Dicks, then took issue with the competence of the plaintiff's counsel's to appear. He pointed out that the plaintiff's legal practitioners were precluded by law in Namibia to act on a contingency fee basis and that also no

application in terms of Rule 41 of the Rules of High Court, to be able to act on an *in forma pauperis* basis, had been made.

[24] Mr Botha, who appeared together with Ms Viljoen, countered with reference to the Section 85(2) certificate issued by the Chief Justice.

[25] It emerged during this initial exchange that, subsequent to the hearing of the amendment application, Mr Botha had addressed a further letter, dated 7 October 2013, to the Chief Justice in which he pointed out that, during the hearing of the amendment application, his and his junior counsel's right to act on an *in forma pauperis* basis had been questioned. He then proceeded to make certain further submissions in this regard. To this letter the Chief Justice responded by stating that 'he had nothing to add'.

[26] Mr Heathcote contended that he had only recently obtained knowledge of the application filed in support of the Section 85(2) application and of the subsequent letter written by Mr Botha on 10 October 2013. He complained of the fact that his client, who had an interest in the matter, was not made aware of this and also had not been granted the opportunity to state its case in this regard.

[27] The upshot of this *in limine* oral exchange between counsel was that Mr Heathcote indicated that his client would now bring an urgent substantive application for the review and setting aside of the Chief Justice's certificate in this regard.

[28] In such circumstances and although the parties had prepared for trial, thereby also incurring disbursements for having to travel from South Africa to Namibia and for accommodation, the matter could not proceed.

[29] In the threatened application, which was then brought on 15 October 2013, the following relief was sought:

'1. Condoning the applicant's non-compliance with the Rules of Court, and hearing this matter as one of urgency as envisaged Rule 6(12) of the Rules of Court.

2. That it be declared that the second respondent did not appoint third and fourth respondents' "*in forma pauperis"* in the pending action in case nr I 341/08 between applicant and first respondent; alternatively.

3. That the appointments of the third and fourth respondents by the second respondent on an *in forma pauperis* basis, as reflected in certificates issued in terms of Section 85(2) of the Legal Practitioners Act, 15 of 1995, annexed as Annexures "M5" and "M6" to the founding affidavit, be declared null and void alternatively be reviewed and set aside.

4. Ordering the first, third and fourth respondents to pay the costs of the application, jointly and severally, the one paying the other to be absolved.'

[30] The application then traversed the history of the application made in terms of 85(2) to the Chief Justice with reference to which the point was made that no application, to the Registrar, in terms of Rule 41 of the Rules of High Court, had been made and that also the Chief Justice was never requested to appoint plaintiff's foreign counsel on an *in forma pauperis* basis.

[31] It was also pointed out that it had emerged from the security for costs application that the plaintiff had a house worth approximately one million Rand and that the Chief Justice had thus not been informed that the plaintiff would not qualify for *in forma pauperis* representation. The circumstances under which defendant's legal practitioners had become aware of the correspondence addressed to the Chief Justice were explained and also the response by the Chief Justice that 'he had nothing to add', was mentioned. It was reiterated that plaintiff's counsel had conceded in court that no application in terms of Rule 41 had been brought but that reliance was placed on the very wide discretion, which the Chief Justice had, when making the appointment.

[32] It was also submitted that the Chief Justice had been brought under the impression that plaintiff's counsel would still regularize their appointment and that the decision of the Chief Justice should, in any event, be set aside as he did not have

the power to make an *in forma pauperis* appointment, as contended by plaintiff's legal representatives.

[33] In any event the defendant, as an affected party, had to be copied and should have been provided with the opportunity of a hearing on this issue, which did not happen.

[34] The plaintiff, in the answer filed of record, referred to the initial response of the Chief Justice, in which he had indicated his reservations in relation to plaintiff's counsel acting on a contingency fee basis and when the Chief Justice was then informed that plaintiff would be prepared to act on an *in forma pauperis* basis he obviously had decided to issue the certificate on that basis.

[35] It was stated that the defendant had full knowledge of the basis of counsel's authorization since 9 October 2012 and could thus already then have brought an application in terms of Rule 41(6) for the '*de-pauperisation*' of the plaintiff.

[36] Also after the full disclosure of the plaintiff's financial decision the defendant did not react to such disclosure. Again, and also subsequent to the hearing of the amendment application, where the defendant had again raised the issues of the contingency fee arrangement and the plaintiff's non-compliance with Rule 41, nothing was done to pursue the matter. Even at a late stage before trial no indication had been given of any intention to seek any relief in this regard. It was in such circumstances, so it was explained, that the further letter of 7 October was written to the Chief Justice. The issue of the lateness of the application was thus raised.

[37] It was also argued that there had been nothing that had prevented the defendant from uplifting the relevant documentation at an earlier stage and it was reiterated that the plaintiff had not consented to the bringing of an urgent application.

[38] Reliance was then placed on the provisions of Rule 37(14) of the Rules of High Court[2] in terms of which the issues raised in this application were no longer available to defendant.

[39] It was pointed out that the launching of this urgent application, at such late stage, defeated the objects of case management.

[40] Further technical objections, such as the defendant's non-compliance with Rule 53(1) were also raised.

[41] At the hearing it was then disclosed that the defendant's legal practitioners had in the interim also written a letter to the Chief Justice's Registrar to which the Chief Justice, undercover of the Registrar letter had replied that he considered himself *functus officio* in regard to the issued certificate.

[42] The court also wanted to know from Mr Heathcote what the real purpose of the defendant's belated application was, and, whether the defendant wanted to eliminate the plaintiff's legal representation and whether he would rather have it that the plaintiff should represent himself.

[43] Mr Heathcote denied that this was the aim and he declared that the application had been brought to ensure that plaintiff's legal practitioners stayed within the law and that an illegal arrangement, regarding costs should not be allowed, which would also affect his client's interests.

[44] He then referred to the relief sought in respect of which he submitted that the plaintiff's legal practitioners had never applied to be appointed to act on an *in forma pauperis* basis and that also the Chief Justice's response indicated that the appointment was made in terms of Section 85(2) in the context of which the question should now be raised, what powers could be exercised in terms of Section 85(2) by the Chief Justice. He argued that Section 85(2) does not confer any powers on the Chief Justice to appoint a foreign legal practitioner on an *in forma pauperis* basis and

[2]Rule 37(14) provides: ' Issues, evidence and objections not set out in the managing judges' pre-trial order are not available to the parties at the trial or hearing.'

that the Chief Justice's certificate should be interpreted in the context of the application made to him, which had merely indicated that plaintiff's counsel had agreed to act *in forma pauperis*. If the Chief Justice had wanted to consider an *in forma pauperis* appointment he would surely have called for more information, which he did not. The Chief Justice, according to Mr Heathcote, was simply not faced with an application for leave to sue on an *in forma pauperis* basis.

[45] In support of the alternative relief applied for he submitted that it should have been realized that the defendant would have an interest in the matter which would be affected and that the defendant should thus have been allowed to be heard on the matter. As his client was in such circumstances not given *audi,* the decision of the Chief Justice also fell to be set aside on that basis.

[46] Mr Heathcote's arguments were far more extensive than reflected in the summary above. However in view of the decision to which I have come in this matter, I do not deem it necessary to deal with these arguments in any greater detail and also with the case law cited by him.

[47] Mr Botha, on the other hand, rested his argument on three pillars: 1. the lateness of the application, as a result of which it should be dismissed due to the self-created urgency pertaining thereto; 2. the total disregard of the case management regime on the part of the defendant; and 3. in any event that the Chief Justice had exercised his powers legitimately, which included the power to impose the conditions on him and his legal team to act on an *in forma pauperis* basis.

[48] He submitted more particularly that an Application in terms of Rule 41(6)[3] of the Rules of High Court could have been brought at a much earlier stage - that the defendant had knowledge of the issued certificate for more than a year in which they could have obtained copies of the underlying application.

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[3] (6) When a person sues or defends *in forma pauperis* under process issued in terms of this rule, his or her opponent shall, in addition to any other right he or she may have, have the right at any time to apply to the court on notice for an order dismissing the claim or defence or for an order debarring him or her from continuing *in forma pauperis*, and upon the hearing of such application the court may make such order thereon, including any order as to costs, as to it seems meet.'

[49] Even after a full disclosure of the plaintiff's financial position, made in the course of the aborted application for security of costs, and after raising the issue again during the hearing of the amendment application, the defendant failed to react until the 15th of October 2013 to bring any application - and this they also only did after being alerted in court as to the desireability/requirement of bringing a substantive application, during the *in limine* oral exchange of 14 October 2013.

[50] He then went on to submit forcefully that both in the case management- and pre-trial procedures the point was not raised or identified as an interlocutory issue or as an *in limine* objection that would require determination at the trial. To raise the issue now belatedly would clearly defeat the objects and purpose of the case management process.

[51] In defence of the Chief Justice's certificate he submitted that same was duly considered, on application, in which it was made clear that counsel had not been appointed in terms of Rule 41 and in any event sufficient information had been placed before the Chief Justice for him to make his determination.

[52] The fact that an application in terms of Rule 41 had not been made in the High Court did not oust the Chief Justice's power to grant authorization to sue *in forma pauperis*.

[53] In reply counsel for the defendant countered the arguments raised in respect of the self-created urgency by re-iterating that it was only realized, belatedly, and upon perusal and after upliftment of the documentation, at the eve of the trial, in what context the Chief Justice's authorization had been granted. He also made the point that the Rule 41 procedure had never been followed and that accordingly the mechanism created by Rule 41(6) was not available to the defendant.

[54] I must confess that - after listening to argument - and upon consideration of the underlying factual premise - I would in the normal course have upheld Mr Botha's

argument, on the self-created urgency of the defendant based on the belated bringing of this urgent application at the commencement of the trial. On the other hand I accept Mr Heathcote's assurances that the defendant was only fully upraised of the actual basis on which the Section 85(2) application to the Chief Justice had been made at a late stage. It is also clear - particularly in circumstances in which the defendant's legal practitioners repeatedly voiced their concerns and objections in regard to the contingency fee issue and *in forma pauperis* issue for some time - that an investigation in this regard could prudently have been launched at a much earlier stage and that any application based on an early and timeous appraisal of the underlying documentation - could thus have been made at a much earlier stage. At the latest any such application should have been brought after the full disclosure of the plaintiff's financial position, which had been obtained in the course of the security for costs application. Yet the oral bringing of this application was delayed until the morning on which the trial was due to commence, whereafter it was delayed even further to enable the defendant to bring the substantive interlocutory application.

[55] However - and as indicated to counsel during argument - it would have not served any purpose to strike this application simply from the roll, thereby allowing it to linger without disposing of it expeditiously, here and now.

[56] I indicated to counsel that this may well be an instance where the court should exercise its discretion in favour of hearing the merits of the application in spite of the defendant's failure to meet the requirements pertaining to the hearing of urgent applications.

[57] In this regard it was noticed that Mr Heathcote had opened his oral address by reminding the court that this was an urgent interlocutory application. I agree. And this brings me to the crux of the matter.

[58] What both counsel overlooked, in my respectful view, was the impact - on the urgent interlocutory application - of the case management- and pre-trial orders made in this case.

[59] Those orders are, clearly, simple interlocutory orders designed to regulate the procedures and more particularly the case management procedures on the road to trial laid down by the Rules of Court. See for instance: *Government of Namibia and Others v Africa Personnel Services (Pty) Ltd.* [4]

[60] Although it is correct, as was pointed out by Mr Botha, that no indication was given in the case management process, that the *in forma pauperis* appointment of counsel would be an issue, requiring determination before trial, and that by allowing the application at this belated stage, the object and purpose of the case management process would be defeated - the argument failed to take into account that also simple interlocutory orders stand until varied.

[61] It should be mentioned - in fairness to Mr Botha - that foreign counsel took note - and placed reliance in the answering papers - filed on behalf of the plaintiff - that Rule 37(14) of the Rules of High Court expressly states that *'issues, evidence and objections not set out in the managing Judge's pre-trial order are not available to the parties at the trial or hearing'*.

[62] This provision, in my view, takes into account the binding nature of pre-trial orders and the underlying legal principles that the courts will not readily or lightly vary their own simple interlocutory orders.[5]

[63] Inexplicably Namibian counsel of the defendant failed to address this point at all. They also failed to take into account that pre-trial orders stand unless reconsidered, varied or rescinded on *good cause* shown.[6]

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[4]2010 (2) NR 537 (HC) at page 546 paragraph [28] – [32]

[5]See *Government of Namibia and Others v Africa Personnel Services (Pty) Ltd op cit* at paragraph [29].

[6]See *Government of Namibia and Others v Africa Personnel Services (Pty) Ltd op cit* at paragraph [30].

[64] In the absence of any application for the reconsideration, variation or rescission of the pre-trial order made on 19 March 2013 - directing the parities to trial, on the issues formulated, by agreement between the parties, and as incorporated into the order, the pre-trial order of this court continues to stand.

[65] This order clearly did not- and still does not permit the defendant to raise this *in limine* interlocutory issue.

[66] The absence of any application for the variation or rescission, or even an application for its reconsideration, in my view, constitutes a material, if not absolute barrier, to the urgent interlocutory application, brought on behalf of the defendant herein, at least until such time that that obstacle, on *good cause* shown, has been removed.

[67] The application can in such circumstances therefore not be granted.

[68] It is further clear, in the circumstances of this matter, where the trial was set down for hearing on the fixed roll - for 14 to 18 October 2013 - and where this judgment is given on the last day available during that week - that the case will have to be postponed and that the further conduct of this case will continue to have to be subjected to the case management process.

[69] It would also not serve any purpose to turn a blind eye to the concerns raised on the part of the defendant. I cannot ignore the self-admitted fact that the plaintiff's legal practitioners have not applied for leave to sue on an *in forma pauperis* basis and that - in all likelihood - any such application, to the Registrar, may fail the means test set by Rule 41. The issue thus still requires determination.

[70] In this regard I take cognisanze of Mr Heathcote's first argument that the Chief Justice's certificate should be viewed in the context of the application made to him in terms of Section 85(2) and in the course of which it had merely been indicated to him that plaintiff's counsel would be willing to act on an *in forma pauperis* basis.

The underlying documentation bears this argument out. This issue is thus open to reconsideration.

[71] Plaintiff's counsel continue to be willing to act on this basis - at least I have not understood them to contend the contrary. I therefore deem it appropriate to afford them the opportunity to formalise this issue.

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

1. The urgent interlocutory application brought by defendant, on 15 October 2013, is hereby dismissed with costs, such costs are to include the cost of two instructed- and one instructing counsel.

2. The plaintiff is directed to bring an application in terms of Rule 41 of the Rules of High Court or to launch an application, direct to this Court, for leave to sue *in forma pauperis*, on or before 29 November 2013.

3. In so far as it is necessary I hereby vary the pre-trial order of 19 March 2013 to allow for the interlocutory hearing of any such application.

4. The matter is postponed for a status hearing to 4 February 2014 at 15h30 to determine the further conduct of these proceedings.

H GEIER

Judge

APPEARANCES

APPLICANT/DEFENDANT:	R Heathcote SC (with him G Dicks) Instructed by GF Köpplinger Legal Practitioners, Windhoek
RESPONDENT/PLAINTIFF:	J J Botha SC (with him L Viljoen) Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek