



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**REASONS**

Case no: I 2568/2014

In the matter between:

1.1.1.1. **NATIONAL FRESH PRODUCTS (PTY) LTD**  
**PLAINTIFF**

And

**TOBIAS MUNDJELE** **DEFENDANT**

**Neutral citation:** *National Fresh Products (Pty) Ltd v Mundjele (I 2658-2014) [2016] NAHCMD 2 (18 January 2016)*

**Coram:** Schimming-Chase AJ

**Heard:** 27 July 2015

**Reasons:** 18 January 2016

**Flynote:** Practice – Pleadings - Amendment of plea to introduce special plea. Amendment lodged just before date of trial – Delay in seeking amendment of pleadings – Such applications at advanced stage of proceedings frustrate the overriding principle of judicial case management. Managing Judge should be slow to allow any late interlocutory proceedings, which might delay final determination of case – Exceptional circumstances. – Legal practitioners

appear to not have properly assisted the defendant – Defendant obtaining new legal representation who picked up an important issue which he wished to raise via special plea by the introduction of same in a notice of amendment – Defendant at the outset tendering wasted costs on an attorney and client scale – Although the actions of the defendant left much to be desired, the attitude and conduct of his legal practitioners was such that the blame for his dilatoriness could not be placed on his doorstep.

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## REASONS

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SCHIMMING-CHASE, AJ:

(b) On 27 July 2015 I made the following order:

“1. The defendant’s non-compliance with the judicial case management report filed on 22 January 2015 is condoned.

2. The defendant is granted leave to file his witness statement, which statement shall be delivered by close of business on 28 July 2015.

3. The defendant is granted leave to file a notice to amend his plea, which notice shall be delivered by close of business on 28 July 2015.

4. The plaintiff shall be entitled to exercise its right to object to the notice to amend in terms of the Rules of Court.

5. The defendant shall pay the wasted costs occasioned by the postponement of this matter on an attorney client scale, such costs to include the costs of one instructing and one instructed legal practitioner.

6. The matter is postponed to 17 August 2015 at 15h30 for a status hearing.”

(c) Reasons for the above order were requested by the plaintiff. Here are the reasons.

(d) This matter first came before me at a case management conference on 27 April 2015. The defendant's legal practitioner of record, Shikale and Associates, had filed a notice of withdrawal on 22 April 2015. However, the defendant's correspondent legal practitioner based in Ongwediva had not filed a notice of withdrawal. As such, in terms of the rules of court, this firm was still the legal representative of the defendant for purposes of appearance as well as the further conduct of this matter. At the case management conference on 27 April 2015 there was no appearance by or on behalf of the defendant, but the plaintiff was represented. In the result, an order was made setting the matter down for trial on the civil floating roll commencing on 5 to 8 May 2015 at 10h00. This court order was faxed to the attorneys of the defendant based in Ongwediva. I point out the pre-trial process was complete and that availability of the representatives for the scheduled hearing date was agreed to by the representatives before Shikale & Associates withdrew.

(e) On 5 May 2015, the plaintiff's team appeared at court together with their instructed counsel. They were prepared for trial. The defendant however appeared on his own, having also been served with the court order dated 27 April 2015. However, there was no appearance by his legal practitioner who had not yet withdrawn. The defendant himself addressed the court. He did not appear to think that his representative had withdrawn. The defendant made it clear that he was at all material times ready to proceed in this case and that his lawyer was the attorney of record based in Ongwediva, in spite of the fact that no witness statements had been filed on his behalf at the time. Accordingly, the following order was made on 5 May 2015:

“1. The matter is set down for trial on the civil floating roll from 27 to 31 July 2015 at 10h00.

2. The matter is postponed to 18 May 2015 at 15h30 for a status hearing

and for argument on the issue of the wasted costs to the plaintiff for the appearance on 5 May 2015.

3. The defendant's legal practitioner of record Ms Inonge Mainga is ordered to file an affidavit, not less than 2 days before the date allocated for the status hearing in this matter explaining why:

3.1. she failed to appear in court for the defendant on 5 May 2015;

3.2. no witness statement was filed on behalf of the defendant on 7 April 2015;

3.3 she should not pay the wasted costs for the trial set down for 5 to 8 May 2015 *de bonis propriis*.

(f) 4. Any failure to comply with the obligations imposed on the parties by this order will entitle the other to seek sanctions as contemplated in rule 53 and 54.

5. A failure to comply with any of the above directions would *ipso facto* make the party in default liable for sanctions, at the instance of the other party or the court acting on its own motion, unless it seeks condonation thereof within a reasonable time before the next scheduled hearing, by notice to the opposing party."

(g) This court order was similarly faxed to Inonge Mainga practitioners.

(h) On 18 May 2015 there was still no appearance nor any explanation by Ms Mainga. In the result, a *de bonis propriis* order was made against the legal practitioner concerned.

(i) On 22 July 2015 (3 days before the trial) the defendant applied for an order condoning short notice of an application that the plea be amended by the inclusion of a special plea of prescription (set out in the body of the application); consequentially amending the pre-trial order dealing with all issues of fact to be resolved during the trial; condoning the late delivery of the defendant's witness

statement. In the alternative the defendant applied for an order for the matter to be postponed to a date to be allocated. As regards costs the defendant prayed for the costs occasioned by the postponement to be held over and to be decided at the trial, and that the defendant pays for the costs of the application.

(j) As this matter has to be heard I do not delve into any detail concerning the factual basis of the plea of prescription, save to point out that Mr Barnard, appearing on behalf of the defendant as instructed counsel, with the instructing legal practitioner of record, appearing again subsequent to coming back on record, argued that based on the particulars of claim read with the witness statements on behalf of the plaintiff made it apparent that at the very least that the plaintiff's claim had entirely prescribed or a significant portion thereof had prescribed.

(k) In this regard I must point out that Mr Barnard appears for the first time as instructed counsel for the defendant, instructed by the erstwhile legal practitioner of record, Shikale and Associates who inexplicably came back on record via notice of representation. With regard to the plea of prescription Mr Barnard submitted that it was a good plea and that he had only noticed the facts giving rise to the special plea when he was preparing for trial.

(l) Ms van der Westhuizen, appearing for the plaintiff as before, indicated that the application was opposed and that she will deal with the merits of same during argument. She pointed out at the outset that there was non-compliance with rule 32(9) and on that basis the interlocutory application should summarily be struck from the roll. I must mention that at the outset of the proceedings when the matter was opposed, I stood the matter down in order for Mr Barnard to discuss certain anomalies that I had noted, specifically with regard to affidavits filed by the defendant's legal practitioners and dealt with below, but I also gave them an opportunity to consider the matter in terms of rule 32(9) and to report to court whether or not that had been complied with. Ms van der Westhuizen also pointed out that should the court be inclined to grant the application for leave to amend and to introduce the special plea, a postponement would be required in order to enable her to obtain instructions on

the special plea.

(m) Apart from the objection to the lack of following of the rule 32(9) procedure, Ms van der Westhuizen argued on the merits that the application for leave to amend should be dismissed as it had been brought at an unacceptably late stage and as such fell to be dismissed along the lines as done by the full bench of this court in IA Bell Equipment Company Namibia (Pty) Ltd v Road Stone Quarries CC<sup>1</sup>. She pointed out that the plaintiff was ready to proceed and should her submissions be successful that the trial be permitted to proceed with the defendant essentially being in default.

(n) It is true that this application for leave to amend is being brought what can only be described as an unacceptably late stage. This is the type of behaviour that the court frowned upon in the IA Bell matter. At the pre-trial stage these issues should have been sorted out way in advance. However the facts in the IA Bell matter are different.

(o) I pause that this point to deal shortly with the conduct of the legal practitioners of the defendant. As stated above the instructing legal practitioner for the defendant withdrew and then came back on record later on to appear as instructing counsel in this matter. The correspondent legal practitioner in Ongwediva did not comply with the court orders referred to above. In some way or form, an affidavit deposed to by the correspondent legal practitioner of the defendant, Ms Inonge Mainga, was filed with court on 12 June 2015, sometime after the order of 5 May 2015. It was specifically arranged that the order of 5 May 2015, in view of its potential prejudice to that legal practitioner was faxed directly to her office on 6 May 2015. In the affidavit on 12 June 2015 the legal practitioner sought to allege that the cause of the delays had been due to the failure of the defendant to pay her account and that he refused to attend at her offices or at the offices of the erstwhile instructed counsel to finalise witness statements. There was also an allegation that the defendant failed to settle invoices from instructed counsel. She further stated that she tried to get the defendant to attend at the offices for consultation but he refused to do so. In

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<sup>1</sup>(I 601/2013 and I 4084/2010) [2014] NAHCMD 306 (17 October 2014)

addition, she states that on 15 April 2015 her notice of withdrawal as legal practitioners was sent to Shikale & Associates but it was apparently not immediately served on the plaintiff's legal practitioners. I point out that no notice of withdrawal from the legal practitioners concerned was attached to the affidavit of Ms Mainga.

(p) The defendant on the other hand stated that in his affidavit dated 21 July 2015 that his relationship with his attorney Ms Mainga was not good, that they did not consult face to face and that she took instructions via telephone and never kept him informed of events.

(q) In spite of the belated explanation of the legal practitioner, what is really difficult to understand especially coming from an officer of the court, is that the court could not be informed at the outset of the situation. To date, there is still no notice of withdrawal from Ms Mainga in the court file. There is no explanation by Ms Shikale on the question of the notice of withdrawal of Ms Mainga, considering she is back on record and could have assisted the court.

(r) In this instance, I cannot on the facts before me place the blame for conduct that is clearly prejudicial to the plaintiff squarely on the defendant. The defendant attended the court appearances by himself every time. He indicated that he was still being represented by his legal practitioner in Ongwediva. He indicated that he wanted to continue with this matter and that he was very intent on defending this matter until the end.

(s) The defendant has the funds to litigate in this matter and at the outset of the proceedings Mr Barnard submitted that it was his instructions that the defendant tendered costs for a postponement on an attorney and client scale.

(t) I am in agreement and understand the frustrations of the plaintiff, having prepared to come to court this time again prepared and not have the matter dealt with immediately. However, as previously stated, this is not a matter where the blame can be placed squarely on the defendant and I believe that the conduct of the legal practitioner concerned exasperated the situation. The

defendant did not deserve to have the trial continue in his 'absence' in these circumstances. The court has a responsibility to dispense justice and in order to do so, both sides must be considered.

(u) It is on these bases and on these particular and exceptional facts alone, that the order dated 27 July 2015 was made, and this case should not, in the absence of a full and acceptable explanation on the particular facts, be used as any authority going against the clear principle that the court should be slow to allow any late interlocutory proceedings with serve to frustrate the principle of judicial case management.

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Schimming-Chase  
Acting Judge



APPEARANCES

PLAINTIFF:

Ms van der Westhuizen

Instructed by Engling, Stritter & Partners

DEFENDANT:

Mr Barnard

Instructed by Shikale & Associates