



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: I 1784/2016

In the matter between:

FRANCISCA NEAVERA OLIVER

RESPONDENT/PLAINTIFF

and

VINCENZIO MAXIMILLIAN OLIVER

APPLICANT/DEFENDANT

Neutral citation: *Oliver v Oliver* (I1784/2016) [2017] NAHCMD 201 (26 July 2017)

Coram: MILLER AJ

Heard: 21 JULY 2017

Delivered: 26 JULY 2017

ORDER

Having heard both counsel for the plaintiff/respondent and the defendant/applicant –

IT IS ORDERED THAT:

1. The late filing of the application to amend the plea is condoned.
2. Paragraph 5 of the plea is amended in accordance with the relevant prayer in the Notice of Motion.
3. The last sentence of the plea is amended by the substituting the sum of N\$ 60 000.00 with the sum of N\$ 40 000.00.
4. The amended plea must be filed by not later than noon on 1 August 2017.
5. A replication, if any, must be filed by no later than noon on 7 August 2017.
6. The matter is placed on the case management roll for 14 August 2017 at 14h00 for a pre-trial conference.
7. As a mark of my displeasure, with the conduct of the applicant, the applicant must pay the costs of the respondent on the scale as between attorney and client.

RULING

MILLER AJ:

[1] This interlocutory application is all about an application by the defendant in the main action to amend his plea to the particulars of claim. That application became opposed, hence this hearing and the judgment to determine the fate of the application.

[2] Stripped of all the niceties and excess the amendment concerns no more than to place in issue the purpose of a payment of N\$ 20 000.00 the applicant made to the respondent somewhere in 2015. It does not appear to me on the papers presently before me that there is any dispute concerning the fact that the payment was indeed made. The issue is and remains for what it is worth, as to which obligation of the applicant the payment was to be allocated.

[3] In order to place the matter in perspective it becomes necessary to have a look of the pleadings filed thus far.

[4] The action instituted is based on the alleged non-performance on partial non-performance of, insofar as it is relevant, certain obligations the applicant assumed in terms of a settlement agreement concluded between the parties as long ago as 1998 and which was made an order of court, when the marriage between the parties was dissolved. The obligations were the following:

- a. The applicant was to transfer the immovable property to the respondent (the plaintiff in the main action). By agreement the property was sold and the respondent claims the nett profit. That is contained in the second claim.
- b. The applicant had to pay to the respondent an amount of N\$ 100 000.00, which was referred to before me as the judgment debt. I will continue to refer to it as such for want of a better description. It is common cause that an amount of N\$ 40 000.00 had been paid. Hence on the pleadings as they now stand the respondent's claim 1 seeks payment of the outstanding balance on N\$ 60 000.00. This incidentally is what this application is all about.
- c. The applicant had to pay all educational costs of the children born from the marriage. This obligation became part of the mix during the exchange of pleadings. The applicant set about responding to the particulars of claim in a

haphazard fashion. The first plea was filed on 15 July 2016 and was terse to the extreme. It did no more than to raise a defence of prescription.

[5] Come 13 January 2017 the applicant had second thoughts. The plea was amplified by an averment that the N\$ 20 000.00 was paid towards the educational costs of the children. In addition the applicant now admitted that it owed the respondent N\$ 60 000.00 in respect of the judgment debt. What effect this had on to plea of prescription initially raised is still an issue for reasons that I cannot discern. The plea of prescription was apparently dropped.

[6] The respondent did not seek judgment in the sum of N\$ 60 000.00 based on the belated admission of liability. The reason for not doing so equally remains clouded in mystery.

[7] Not content to have the matter proceed on the pleadings as they then stood the applicant filed a further plea on the 22nd of February 2017, apparently without any objection to it.

[8] The plea of prescription was once again repeated in respect of both claims 1 and 2 Curiously though the admission that the applicant owed the respondent N\$ 60 000.00 in respect of claim 1 was repeated verbatim, despite the fact that it was also alleged that claim 1 had become prescribed.

[9] That brings me to the present application. The applicant now seeks to amend paragraph 5 of the plea which contains the obligation that N\$ 20 000.00 had been paid towards the children's educational costs. What the application now seeks to do is to allege that the amount was actually paid in part settlement of claim 1 leaving an admitted balance of N\$ 40 000.00 in respect of that claim. The respondent alleges that it was a part payment towards claim 2. The respondent argues before me that what the applicant seeks to do is to withdraw an admission. The applicant agrees with the respondent on that score. I am far from persuaded that an admission will be withdrawn.

I prefer in view of the conclusion I have reached, not to chase after yet another hare that will jump up in the process. I will simply assume for present purposes that the respondent is correct.

[10] Mr Vaatz who represents the applicant explains by way of an affidavit filed that he had simply and unfortunately perhaps misunderstood the instructions he received from the respondent regarding the true purpose of the payment of N\$ 20 000.00 and what it was intended for.

[11] Ms Angula who represents the respondent appears to accept that as a fact and I will do likewise.

[12] The respondent claims however that she will suffer prejudice if the amendment is allowed, insofar as it may impact on the plea of prescription.

[13] I do not understand why that should be the case. If the issue of the correct allocation of the payment of N\$ 20 000.00 is raised it falls to be decided by the trial judge. Depending on how the issue is resolved it may or may not impact on the plea of prescription ultimately.

[14] That is however a far cry from saying that there is prejudice at this stage. Both parties have already set out their stalls on this issue. I remind myself that the applicant stance is that the payment reduces claim 1 by the amount.

[15] The respondent stance is that it reduces claim 2 by the same amount and interrupts prescription. Given all this the trial court's decision will cadit quaestio for the loses.

[16] In my view the issue for what it is worth at the end of the day should be raised and I am inclined to allow that to happen. Regrettably to simply allow the application in the form in which it presently stands will not signal the end of the applicant's woes.

[17] By virtue of some considerable degree of carelessness in the preparation of the papers two issues remain. They are the following:

- a. The condonation of the late filing of the application; and
- b. The amendment of the admission in the last sentence in the plea which should be amended, if the application is to be granted by substituting the admission of an indebtedness in the amount of N\$ 60 000.00 with an amount on N\$ 40 000.00.

[18] Neither of these form part of the application and Mr Vaatz sought to move those by way of an application from the bar which is unsatisfactory in itself and not in compliance with the Rules of this Court.

[19] I have the option to be either dogmatic or pragmatic in my approach. I choose the latter option, if for no other reason than to give effect to the overriding principles of the Rules which are to determine the real issues between the parties as expeditiously as possible.

[20] As matters stand at present the finalisation of this relatively simple case has been delayed for over a year because of the fiddling with the pleadings on the part of the legal practitioner of the applicant and which at the end of the day serves nobody's interest.

[21] I mention in passing that in moving the application for condonation from the bar Mr Vaatz sought to impress upon me that the application was filed only six days later than it was suppose to be filed, as if that in itself was the care to the problem.

[22] What all this means is that apart from the belated application for condonation the plea in its present form will have to be amended beyond what is prayed for by the applicant in the hope that somehow there is some finality as to what is in issue and what is not.

[23] I consequently make the following orders –

1. The late filing of the application to amend the plea is condoned.
2. Paragraph 5 of the plea is amended in accordance with the relevant prayer in the Notice of Motion.
3. The last sentence of the plea is amended by substituting the sum of N\$ 60 000.00 with the sum of N\$ 40 000.00.
4. The amended plea must be filed by not later than noon on 1 August 2017.
5. A replication, if any, must be filed by no later than noon on 7 August 2017.
6. The matter is placed on the case management roll for 14 August 2017 at 14h00 for a pre-trial conference.
7. As a mark of my displeasure, with the conduct of the applicant, the applicant must pay the costs of the respondent on the scale as between attorney and client.

K Miller
Acting Judge

APPEARANCES

APPLICANT: Mr Vaatz
Of Adreas Vaatz & Partners, Windhoek

RESPONDENTS: Ms Angula
Of Angula Co. Inc. Legal Practitioners, Windhoek