



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE RULING

CASE NO: I 3465/2015

In the matter between:

PAULUS SHINDANO KAHOLONGO

PLAINTIFF/RESPONDENT

and

PAULUS PAULUS

DEFENDANT/APPLICANT

Neutral citation: *Kaholongo v Paulus* (I 3465/2015) [2017] NAHCMD 241
(15 August 2017)

Coram: MILLER AJ

Heard: 15 AUGUST 2017

Delivered: 15 AUGUST 2017

Released: 24 AUGUST 2017

ORDER

Having heard **Mr Small** for the applicants and **Mr Jantjies** for the respondents on –

IT IS ORDERED THAT –

1. The applicant's/defendant's application is dismissed.
2. The applicant/defendant to pay plaintiff's/respondent's costs.
3. The matter is placed back on Justice Masuku's case management roll who is the Managing Judge.
4. The matter is postponed to Wednesday, 6 September 2017 at 15h15 for a status hearing.

RULING

MILLER AJ:

[1] What is before me is an application at the instance of the Defendant in the main action. Essentially what the application seeks to achieve is an order reinstating the plea and counterclaim filed by the Applicant in the main proceedings before my brother Mr Justice Masuku who is also the managing Judge.

[2] It is common cause between the parties that the Applicants plea and counterclaim were struck by Mr Justice Masuku consequent upon the failure on the part of the Applicant to comply with case management procedures and orders of the Court made in the cause of the case management process.

[3] The notice of motion is supported by an affidavit deposed to by the Applicant. The affidavit falls into two parts, Firstly there is an acknowledgement on the part of the Applicant that he has indeed on various occasions failed to comply with court orders. He

seeks to explain that by advancing the argument that at some stage during the course of the proceedings his Legal Practitioners of record withdrew due to financial considerations, and that so to speak he was left to fend for himself. It was during the period that the Applicant was not represented by a Legal Practitioner that the defaults which I have mentioned took place. It would appear from the papers that the Applicant was only spurred into action once more, once it came to his notice that his plea and counterclaim had been struck by the court, and that he consequently faced the inevitable result which is an application for a default judgment on the main claim instituted by the Plaintiff.

[4] It is true that in general the courts will adopt a more lenient approach towards lay litigants and be inclined to condone non-compliance with the Rules of this Court and the orders. Having said that I need only add that there comes a time when such leniency can no longer be extended. The question is whether in the instant case that time has come and gone.

[5] The overall impression one gains from the reading of the Applicant's application, and the circumstances and the atmosphere in which this litigation progressed, is an indifference on the part of the Applicant to the proceedings during the time that he was not represented. It is apparent and not contested that the Applicant during that period took no steps whatsoever to participate in the proceedings in order to bring it to the stage where the issue or issues as they were became crystallised and placed before the Court to adjudicate finally upon the matter. In fact the proceedings went no further than the case management report and where it stalled. It remains stalled at that point until today. If any further evidence is required as to the indifference of the Applicant, it is evidenced, by the fact that even this present application was brought on a date somewhat later when the order of the Court required it to be filed by a certain date.

[6] The principles applicable were conveniently formulated by my brother Damaseb JP in the matter of Telecom Namibia Limited –V- Michael Nangolo and 44 others, which

was delivered on the 28th of May 2012. The principles are the following and I quote from the judgment:

- ‘1. Condonation is not a mere formality and not simply for the asking. The party seeking condonation bears the onus to satisfy the Court that there is sufficient cause to warrant the grant of condonation.
2. There must be an acceptable explanation for the delay on non-compliance.
3. The explanation must be full detailed and accurate, and filed as soon as the non-compliance has come to the fore. An application has been made without delay.
4. The degree of delay is a relevant consideration.
5. The entire period during which the delay has occurred and continued, must be fully explained.
6. There is a point beyond which the negligence of the legal practitioner will not avail the client who is legally represented (legal practitioners are expected to familiarise themselves with the Rules of the Court).’

[7] Although paragraph 6 of the portion I quoted above refers to the negligence of legal practitioners it equally applies albeit to a lesser extent to litigants who appear in person. As I had indicated in the case of unrepresented persons the Court may adopt a more lenient approach but only up to a point. The convenience of the unrepresented litigant is not the only consideration. Other considerations are relevant and must be weighed including the prejudice and inconvenience to the plaintiff in the present matter and more importantly perhaps the convenience of the Court itself. Ultimately the object of the Rules of this Court, seek in essence to expedite and finalise matters as conveniently and as expeditiously as possible.

[8] It is true that these considerations are at times at tension and in so doing I must weigh those considerations where they are at tension with one another and afford the weight to each of those it deserves in the circumstances of the case. Where there has been a substantial delay and non-compliance on a number of occasions, the issue of delay becomes more prominent than it would be in cases where there has been non-compliance over a short period of time. In circumstances where the delay spans a

lengthy period of time and there is little or insufficient explanation for it, the Courts will be more reluctant to exercise its discretion in favour of the errant litigant.

[9]In considering this matter I have considered the submissions made by Counsel for both the Applicant and the Respondent, and weighed the different considerations against one another according to their strength and persuasion in order to arrive at a decision based upon my inherent judicial discretion. Having done so I am of the view that the relief sought by the Applicant should not be granted.

[10] In the result, the orders which issued are the following:

1. The applicant's/defendant's application is dismissed.
2. The applicant/defendant to pay plaintiff's/respondent's costs.
3. The matter is placed back on Justice Masuku's case management roll who is the Managing Judge.
4. The matter is postponed to Wednesday, 6 September 2017 at 15h15 for a status hearing.

K MILLER
Acting Judge

APPEARANCES

PLAINTIFF/RESPONDENT: Mr Small
Of Francois Erasmus & Partners, Windhoek

DEFENDANT/APPLICANT: Mr Jantjies
Of Siyomunji Law Chambers, Windhoek