

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING

Case no: I 2580/2011

In the matter between:

MARTIN KAUKO INDONGO
PLAINTIFF

and

SOFIA NANGOMBE

DEFENDANT

Neutral citation: *Indongo v Nangombe (I 2580/2011)* [2017] NAHCMD 261 (08 September 2017)

Coram: UNENGU, AJ

Heard: 08 August 2017

Delivered: 08 September 2017

Flynote: Civil Practice – Sanction order – 1st Defendant and legal representative to show cause why court should not impose sanctions on them for failure to attend court proceedings – Although the legal representative managed to escape sanctions, 1st defendant was ordered by court to pay the plaintiff's wasted costs on the scale of attorney and own client – Ordered further that the wasted costs be taxed and settled before the next court date.

Summary: The court made an order against the 1st defendant and her legal representative to show cause why they should not be sanctioned for failure to attend court proceedings. After the sanction hearing, the court ordered the 1st defendant to pay taxed wasted costs on the scale of attorney and own client and further that the costs be settled before the next trial date of the matter.

ORDER

- (i) The 1st defendant pays reservation fees for 18 July 2017 in respect of one instructed and one instructing counsel;
- (ii) The 1st defendant pays the plaintiff taxed wasted costs for the days 19 and 21 July 2017 on the scale of the attorney and own client occasioned as a result of the 1st defendant's failure to attend court proceedings;
- (iii) The wasted costs in para (ii) above must be paid before the next trial date.
- (iv) Failure to comply with any of the orders in paras (i) – (iii) will *ipso facto* have the effect of the 1st defendant's defence and counter-claim struck down allowing the plaintiff to proceed with his claim unopposed.
- (v) No costs order made against the legal representative.

RULING

UNENGU, AJ:

Introduction

[1] On Tuesday 18 July 2017, I postponed the matter to the 08th August 2017 and made the following order:

- '1. The matter is postponed to the 08 August 2017 at 10h00 for sanction hearing.

2. The 1st defendant or legal representative to show cause, if any, in an affidavit why sanctions provided in Rule 53 read with Rule 54 should not be imposed on both the legal representative and 1st defendant.
 - 2.1. For failure to attend the court proceedings on 18th July 2017.
 - 2.2. Why the trial could not proceed today after the date of today was agreed to and determined by the court for the trial of the matter for the 18th–19th and 21st July 2017.
 - 2.3. Why the defence of the 1st defendant and the counter-claim should not be struck and give the plaintiff the opportunity to proceed with the matter unopposed.
 - 2.4. Why the court should not grant costs of one instructed and one instructing counsel *de bonis propriis* for the 18-19 and 21 July 2017 on the scale to be determined by the court.'

Background facts

[2] On 08 August 2017, after hearing arguments from Mr Strydom, counsel for the plaintiff and Ms Hans-Kaumbi, counsel for the 1st defendant, the matter was postponed to 08 September 2017 to consider the evidence in the affidavit of Ms Hans-Kaumbi as well as submissions from both counsels in order for the court to make a proper order.

[3] The order was necessitated by the postponement of the matter due to the absence from court by both the 1st defendant and Ms Hans-Kaumbi on the 18 July 2017 when the matter was postponed from 06 July 2017, for further cross-examination by Ms Hans-Kaumbi.

[4] On 18 July 2017, when the matter was called, Mr Henry Shimutwikeneni introduced himself as appearing for the 1st defendant standing in for Ms Hans-Kaumbi. He confirmed the court that he was instructed to come and apply for a postponement on behalf of the 1st defendant. However, when shown a copy of a notice of withdrawal as legal representative for the 1st defendant from Ms Hans-Kaumbi served on the legal representative for the plaintiff, Mr Shimutwikeneni was surprised to see the document and was unwilling to take the matter further. He refused to deal with the postponement also.

[5] Mr Shimutwikeneni was completely unprepared for the day's proceedings. He kept on saying "I live it in the hands of the court", which I was not happy with. I stood

the matter down for a few minutes and told Mr Shimutwikeneni that I will not postpone the trial, that we have to go ahead. The court adjourned for Mr Shimutwikeneni to obtain further instructions. On resumption at 11h10 Mr Shimutwikeneni informed the court that they were withdrawing as legal representatives for the 1st defendant because they could not act contrary to the instructions of the client.

Discussion

[6] It is for this reason that I share with counsel for the plaintiff in his frustrations. Who said their application for a postponement will be granted, therefore it was not necessary for him to prepare for a trial? The impression created by the conduct of counsel is that he will apply for a postponement and if it is refused, to withdraw as legal representative for the 1st defendant and the court will, as a result, then be forced to postpone the matter further.

[7] The problem with the absence of the 1st defendant from court started already on 08 June 2017 and continued till 18 July 2017. The concern is that the 1st defendant was already booked off sick for days when she was supposed to be in court for cross-examination of the plaintiff by her counsel to continue. She is not the only defendant in the matter but with others whose side of the story was never heard.

[8] To make matters worse, is that the legal representatives for the plaintiff are not always informed in advance about her absence from court through her illness. This was always done a day before the trial date or on the date of trial – without proper proof for the absence from court proceedings. Copies of a health passport even certified is not sufficient proof and a justification for a litigant to stay away from court proceedings as the 1st defendant in the matter on two occasions has done.

[9] A hospital health passport submitted by the 1st defendant contains confidential information of the particular patient, therefore, not accessible by the public. It follows therefore that, it is not a public document and a certified copy thereof is not sufficient proof of the contents in it. In any event, medical reports are only handed in court proceedings with the consent of the other parties. (See *Mahomed v Schaik* 1978(4) SA 523(N) at 527).

[10] Coming back to the order that the 1st defendant and her counsel to show cause, if any, on 18 July 2017 for their absence from court proceedings and the reason why such order was made.

[11] I reiterate once again that this case is too old and has been postponed many times, mostly at the request of the 1st defendant. Wasted costs were tendered and paid time and time again but did not cure the delays for speedy resolution of the case. The plaintiff is also entitled to a fair trial which is guaranteed in article 12(1) of the Namibian Constitution.

[12] The Rules of the High Court which took effect on 16 April 2016 in rule 1(2) provide as follows:

‘(2) These are rules for the conduct of proceedings in the court and for giving effect to the provisions of Article (12) of the Namibian Constitution and the overriding objective set out in sub-rule (3) governs the application of these rules.’

[13] Meanwhile sub-rule (3) provides as follows:

‘(3) The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly, efficiently and cost effectively as far as practicable by –

- (a)
- (b) Saving costs by among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter;
- (c)
- (d) Ensuring that cases are dealt with expeditiously and fairly;
- (e) Recognizing that judicial time and resources are limited and therefore allotting to each causes an appropriate share of the court's time and resources, while at the same time taking into account the need to allot resources to other causes; and
- (f)’

[15] Rule 17 provides for the application of the overriding objective by court and states as follows:

'(1) The court must seek to give effect to the overriding objective referred to in rule 1 when it exercises any power given to it under these rules or in interpreting any other rule of procedure or practice direction applicable in court.

(2) Under these rules the control and management of cases filed at the court is the primary responsibility of the court and the parties and their legal practitioners must co-operate with the court to achieve the overriding objective.' (Emphasis added)

[17] In the present matter cooperation from the 1st defendant and the legal practitioner, even though mandatory, in my opinion is non-existence, making it difficult for the court to give effect to the overriding objective referred to above.

[18] I want also to refer to annexure 10 of Practice Directions which provides guidelines for delivery of judgments in the High Court. In terms of item 11 on annexure 10 of the Practice Directions the table under which this case falls, the judgment in the matter is long overdue even if we start counting from April this year. The timeline within which to deliver the judgment in this matter is only four months unless the Judge President has granted permission for more time.

[19] On 08 June 2017, after a heated and rowdy fight over why the trial could not proceed in the absence of the 1st defendant, the court determined a date and postponed the matter for three days, 18-19 and 21 July 2017 for continuation of trial. Ms Hans-Kaumbi was reluctant to suggest a postponement date after the court on numerous occasions requested her to do so. She was also expressly told that the days 18-19 and 21 July 2017 were for trial, that she tells the client accordingly and that the court will grant her permission to withdraw from the matter should there be any problems for the trial not to proceed. Counsel was also requested to inform the other party and the court in advance, not a day before 18 July 2017 of any problem which could hinder the trial to proceed.

[20] As it turned out on 18 July 2017, the warning of the court was totally ignored. Instead, of informing the plaintiff and the court well in advance of problems which would be in the way of the trial to go ahead, the 1st defendant decided to file her application for a postponement on 17 July 2017 at 14:15. This was completely short notice to the plaintiff to reply because the following day 18 July 2017 the trial must go ahead.

[21] This is the conduct of the 1st defendant and her counsel during the time leading to the 18 July 2017. In my view it is improper, arbitrary, unreasonable, irresponsible and selfish behavior on the part of the 1st defendant and her legal representative to file papers in the time they did. To say the least. No steps were taken to guard against any prejudice the plaintiff would suffer as a result of that conduct.

[22] I also do not accept some of the things stated by Ms Hans-Kaumbi in her affidavit as they have not been confirmed by the sources of her information. She states what the secretary of Unengu, AJ told her as if facts. On what basis, I do not know. Besides, counsel knew very well what I told her when the matter was postponed to 18 July 2017. The court made it very clear to her what to do if there were problems for the trial not to proceed. A chamber meeting with the Judge was unnecessary. There was none to discuss with the Judge in chambers. The same goes with what her client and Mr Shimutwikeneni told her. Their versions to her were not confirmed therefore, are inadmissible hearsay stories.

[23] Further, it is incorrect to state on oath that the health status of the 1st defendant was not in dispute while her absence from court was the bone of contention. Counsel also states that she left for the United Kingdom to attend training by the Commonwealth Telecommunications Organisation (CTO) on behalf of the Communications Regulatory Authority of Namibia (CRAN) because she knew that the matter would not proceed as the instruction from her client is that she would like to be present when the matter proceeds so she had no instructions to proceed in her absence and had she forced her to proceed then she would have acted contrary to her client's instructions and would have acted unethically and would risk disciplinary hearing.

[24] What I gather from the statement is that she knew before hand that the matter will not proceed on the postponed date because her client told her she will not come to court. That instruction is important to counsel than the directive given to her by the court to appear and if there was any problem for her not to continue cross-examining the plaintiff, the court will give her permission to withdraw as counsel for the 1st defendant. Counsel elected rather to obey the client's instructions and to

disobey the directive the court gave her which is a failure to comply with the provisions of rule 17 not to cooperate with the court.

[25] The affidavit filed by Ms Hans-Kaumbi was considered. However, as pointed out above, the affidavit is replete with unconfirmed hearsay evidence. An old affidavit of 2012 by the 1st defendant was attached which does not explain why she (first defendant) should not be sanctioned in one or the other manners stipulated in the order.

[26] That brings me to sanctions to be imposed and who to be sanctioned. On 08 August 2017 during the hearing, I pointed out that I will not consider imposing sanction provided for in the Rules 53 and 54 of the High Court Rules.

[27] Similarly, I will also not at this stage consider striking down the defence and counter-claim of the 1st defendant. But counsel or the 1st defendant will pay wasted costs of plaintiff's instructing and instructed counsel for the days the matter was supposed to run. Plaintiff suffered prejudice as a result of the conduct of the 1st defendant and messed up with my court roll as well. The provisions of Rules 1 and 17 are clear and do not need further elaboration. The control and management of cases are the responsibility of the court. Meanwhile, parties and their legal representatives have an obligation to cooperate with the court to give effect to the overriding objective.

[28] This case is too old and has exceeded its disposal time line of four months far back. Therefore, I request litigants and legal practitioners involved to cooperate so that the matter is not delayed again in the future. I must mention also that, even though it was not done at the beginning of the hearing of the matter, Ms Hans-Kaumbi asked for condonation for not doing what the court directed her to do. I shall condone the failure. It is possible that she might have thought that her personal presence in court on 18 July 2017 was not required and as such I will not order cost against her. Unfortunately, the 1st defendant will not escape the costs against her. That costs order will be a taxed wasted costs order on the scale of attorney and own client.

[29] I must caution though that in future, should it happen again that the trial is delayed without good cause, the guilty party will be excluded from participating in the court proceedings.

[30] Accordingly, it is ordered that:

- (i) The 1st defendant pays reservation fees for 18 July 2017 in respect of one instructed and one instructing counsel;
- (ii) The 1st defendant pays the plaintiff taxed wasted costs for the days 19 and 21 July 2017 on the scale of the attorney and own client occasioned as a result of the 1st defendant's failure to attend court proceedings;
- (iii) The wasted costs in para (ii) above must be paid before the next trial date.
- (iv) Failure to comply with any of the orders in paras (i) – (iii) will *ipso facto* have the effect of the 1st defendant's defence and counter-claim struck down allowing the plaintiff to proceed with his claim unopposed.
- (v) No costs order made against the legal representative.

Unengu
Acting Judge

APPEARANCES

PLAINTIFF : JAN Strydom
Instructed by Fisher, Quarmby & Pfeifer,
Windhoek

DEFENDANTS : A Hans-Kaumbi
Instructed by Ueitele & Hans Inc., Windhoek