

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case no: HC-MD-CIV-ACT-DEL-2016/03047

In the matter between:

MULISA KWIZI

PLAINTIFF

and

HEINRICH SHINANA
MINISTER OF SAFETY AND SECURITY

FIRST DEFENDANT
SECOND DEFENDANT

Neutral citation: *Kwizi vs Shinana* (HC-MD-CIV-ACT-DEL-2016/03047) [2018]
NAHCMD 108 (23 April 2018)

Coram: PRINSLOO J
Heard: 23 April 2018
Delivered: 23 April 2018
Reasons: 25 April 2018

Flynote: Civil Practice – Rule 98 of the High Court Rules – Provision made for the alternative to an application for absolution from the instance – Party to lead

evidence in order to satisfy the Court that it is entitled to a judgment on the issues raised by those claims.

Summary: The claim and counterclaim in this matter arose as a result of a motor vehicle accident. At the time the plaintiff was driving his vehicle bearing registration number N 83658 W and the first defendant drove the vehicle of the second defendant bearing registration number POL 8267.

On Friday 20 April 2018 at 14h12 the plaintiff filed a notice of withdrawal of his claim. On the Monday the following week, the 23rd of April 2018, counsel acting on behalf of the plaintiff confirmed the withdrawal of the action against the first and second defendant. When counsel acting on behalf of the defendants indicated that the defendants wish to pursue their counter claim against the plaintiff, counsel for the plaintiff indicated that she had no instruction to recall plaintiff's withdrawal of action and prayed to be excused, in order for the defendants to proceed with their matter on an undefended basis.

As the counsel who acted on behalf of the plaintiff had no further instruction to proceed with the trial she was excused from the proceedings and the court hereafter regarded the plaintiff to be in default and proceeded in terms of Rule 98(1) read with Rule 98(4), in the absence of the said plaintiff.

Held It has long been recognized that where in an ordinary action a party chooses not to appear at the trial or, having appeared, withdraws from the trial, the other party remaining need not content itself with an order for absolution from the instance but may elect to lead evidence in order to satisfy the Court that it is entitled to a judgment on the issues raised by those claims.

ORDER

1. Payment in the amount of N\$ 59 872.20;

2. Interest at a rate of 20 % per annum *a tempora morae* from date of judgment to date of final payment;
3. Cost of suit.

REASONS

Prinsloo J:

Introduction:

[1] The Plaintiff is Mulisa Kwizi, a major male residing in Windhoek North, Republic of Namibia

[2] The First defendant is Heinrich Shinana, a major male employed at Ministry of Safety and Security and stationed at Windhoek, Republic of Namibia. The Second Defendant is the Minister of Safety and Security in care of Government Attorneys, Independence Avenue, Windhoek, Republic of Namibia.

[3] The claim and counterclaim in this matter arose from a motor vehicle accident that occurred on the 28th day of September 2015 at the intersection of Johan Albrecht Street and Gregorowski Street. At the time the plaintiff was driving his vehicle bearing registration number N 83658 W and the first defendant drove the vehicle of the second defendant bearing registration number POL 8267.

Background:

[4] The case before me was set down for trial for the period 23 to 27 April 2018.

[5] On Friday 20 April 2018 at 14h12 the plaintiff filed a notice of withdrawal of his claim. On Monday 23 April 2018, Ms. Delpont, counsel acting on behalf of plaintiff confirmed the withdrawal of the action against the First and Second defendant. When Mr. Khadila, counsel acting on behalf of the defendants indicated that the defendants wish to pursue their counter claim against the plaintiff, Ms. Delpont

indicated that she had no instruction to recall plaintiff's withdrawal of action and prayed to be excused, in order for the Defendants to proceed with their matter on an undefended basis.

[6] As the counsel who acted on behalf of the plaintiff had no further instruction to proceed with the trial she was excused from the proceedings and the court hereafter regarded the plaintiff to be in default and proceeded in terms of Rule 98(1) read with Rule 98(4), in the absence of the said plaintiff.

[7] It has long been recognized that where in an ordinary action a party chooses not to appear at the trial or, having appeared, withdraws from the trial, the other party remaining need not content itself with an order for absolution from the instance but may elect to lead evidence in order to satisfy the Court that it is entitled to a judgment on the issues raised by those claims.¹

[8] Rule 98(1) provides:

'If a trial is called and the plaintiff appears and the defendant does not appear in person or by his or her legal practitioner, the plaintiff may prove his or her claim insofar as the burden of proof lies on him or her and judgment must be given accordingly insofar as he or she has discharged such burden, but, if the claim is for a debt or liquidated demand no evidence is necessary unless the presiding judge otherwise orders.'

And

Rule 98(4) provides:

' Subrules (1) and (3) apply to a person making a claim either by way of counter-claim or a third party notice or by any other means as if he or she were a plaintiff and subrule (2) applies to any person against whom such a claim is made as if he or she were a defendant.

[9] It is clear that the defendants in respect of their claim in reconvention should be afforded the same opportunity as that of the plaintiff in convention. The matter

¹ Herbstein and Van Winsen The Civil Practice of High Courts of South Africa, Fifth Edition Vol 1 at page 889; Sayed v Editor, Cape Times 2004 (1) SA 58 (C) at 66-67.

of *Matyeka v Kaaber* 1960 (4) SA 900 (T) is in support hereof. In *the Matyeka* case it was held that although claims in convention and reconvention are normally dealt with *pari passu*, the Court has the inherent power to grant judgment by default on a counterclaim before the claim in convention is disposed of. In the cited matter, the plaintiff failed to file a plea to the defendant's counterclaim. Hill J on page 904 C-G states the following:

'In the light of the authorities referred to I have no doubt that although claims in convention and in reconvention are normally dealt with *pari passu*, the Court has the inherent power to grant judgment by default on a counterclaim before the claim in convention is disposed of and I think that where the circumstances of the case warrant it such procedural relief should be extended to the defendant. I may add that I am unable to find any compelling reason for restricting a judgment by default on claims in reconvention to cases where the conventional and reconventional claims are entirely unrelated as suggested in *Smith, N.O v Brummer, N.O. and Another*, supra at p. 362.

In principle the defendant has the right to institute a separate action on his own claim and he would then be entitled to judgment by default without being delayed by any proceedings instituted by the plaintiff. He should, therefore, not be penalised merely because, for the sake of convenience, he has joined his action with that of the plaintiff.

A case much in point is *S.A. Fisheries and Cold Storage v Yankelowitz*, 23 S.C. 667, 16 C.T.R. 1040. There the defendant in a suit pleaded to the declaration and filed a claim in reconvention. The defendant in reconvention not having filed his plea in time after demand was barred from pleading. It was held that the plaintiff in reconvention was entitled to judgment by default.

In giving judgment DE VILLIERS, C.J., said:

"If the defendant in this case had instituted a separate action for the amount of the debt he would certainly have been entitled to take advantage of the Rule, and the case could have been set down by default. I do not think he should now be penalised, because, instead of instituting a separate action, he has brought his action by way of a claim in reconvention. I think he ought to have the same rights as if he had been the plaintiff in convention."

The pleadings:

[9] The claim of the defendant is for damages suffered resultant of the accident that occurred and it is the case of the defendants that the plaintiff was caused solely as a result of the negligent driving of the Plaintiff, who was negligent in on or more of the following respects:

- a. Plaintiff failed to yield his vehicle at the yield sign;
- b. Plaintiff attempted to join the main road at a time when it was not safe to do so and therefor entered the First Defendant's right of way and collided with the vehicle he was driving;
- c. Plaintiff failed to keep a proper lookout;
- d. Plaintiff failed to apply his brakes timeously or at all;
- e. Plaintiff failed to avoid a collision when he could have and should have done so by exercise of reasonable care.
- f. Plaintiff failed to keep proper control of his motor vehicle in the prevailing circumstance.

[10] As is evident from the particulars of claim, the claim is not for debt or liquidated demand. It was thus necessary for the court to receive evidence from the plaintiff and other witnesses in order for the defendants to discharge the burden of proof as far as such is rested on it, before the defendant could move for judgment.

Case for the Defendants

[11] The plaintiff called two (2) witnesses to testify on their behalf.

Mr. Heinrich Shinana:

[12] Mr. Shinana testified that he is the first defendant in this matter and is employed with the Second defendant as a Deputy Commissioner in the Namibian Police Air Wing.

[13] He stated that on Monday 28th of September 2015 at approximately 07:00 he was driving a Toyota Corolla motor vehicle with registration number POL 8267. He was driving from the Southern direction to the Northern direction on the main street, Johann Albrecht Street. He drove past the Total filling station towards the intersection of Johann Albrecht Street and Gregorowski Street. As he was about to reach the intersection the Plaintiff's vehicle suddenly appeared from his left side and attempted to turn right into Johann Albrecht Street with the intent to drive in a Southern direction.

[14] According to the witness the plaintiff did not yield to the traffic on the main street, that being Johann Albrecht Street and as the plaintiff attempted his right turn an accident occurred.

[15] The witness further stated that he was about 15 meter from the intersection when the plaintiff arrived but about 7 meters away when the plaintiff entered the intersection and he applied his brakes to avoid a collision but the distance was not sufficient to avoid or prevent the collision.

[16] The first defendant confirmed that both vehicles sustained damage.

Mr. Leopard Alfeus

[17] Mr. Alfeus testified as an expert witness. He stated that he is a mechanic and currently employed with Leo Panelbeaters CC, Windhoek. He has 40 years continuous experience in repairing damaged motor vehicles and truck, determining it is economical to repair such, determining the extent and value of damage to vehicles and determining the value of motor vehicle parts (in new and second hand condition).

[18] Arising from his experience the witness was personally familiar with each of the following expert capacity:

- a. the fair and reasonable cost of parts required for the repair of vehicles;
- b. what parts and labour are necessary to effect repairs to damaged motor vehicles.

[19] He assessed the damage to motor vehicle POL 8267 and confirmed that the vehicle was damaged in an accident and the damage suffered by the Second Defendant amounts to N\$ 59 872.20.

[20] During March 2016 the witness effected the repairs to the vehicle of the second defendant, i.e. POL 8267, and confirms that the charges as per his invoice were fair, reasonable and market related.

Conclusion:

[21] Having considered the facts before me and as the matter proceeded unopposed I am satisfied that the Defendants are entitled to the relief they seek. The defendants have proven their claim on a balance of probabilities.

[22] As a result I make the following order:

1. Payment in the amount of N\$ 59 872.20;
2. Interest at a rate of 20 % per annum *a tempora morae* from date of judgment to date of final payment;
3. Cost of suit.

JS Prinsloo

Judge

APPEARANCES:

For the Defendants:

F Khadila
of Government Attorneys