

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No: I 5066/2014

In the matter between:

S T **PLAINTIFF**

and

P T **DEFENDANT**

Neutral Citation: *S T v P T* (I 5066/2014) [2018] NAHCMD 162 (12 June 2018)

CORAM: PRINSLOO J

Heard: 25 April 2018

Delivered: 24 May 2018

Reasons: 12 June 2018

Flynotes: Civil Practice – Compliance with Rule 32 (9) and (10) before launching an application – Role of 32 (9) and (10) reiterated.

Summary: The plaintiff sought for a relief to bring an application have the order for restitution of conjugal rights granted to the defendant be rescinded and set aside. However, due to delays caused by issues surrounding the withdrawal and appointment of legal practitioners of record, the application to rescind the restitution of conjugal right's order was not properly done before this court.

The plaintiff's erstwhile legal practitioner made submissions that she was of the view that her withdrawal as legal practitioner of record was done properly and the appointment of the offices of Dr Weder Kauta and Hoveka properly substituted her as legal practitioners of record.

The plaintiff also filed an affidavit explaining that indeed, the erstwhile legal practitioner of record informed him of her intentions to withdraw and that the offices of Dr Weder Kauta and Hoveka would replace her mandate. The plaintiff further submitted that due to the lack of activity on his instructions and/or the matter, he decided to take matters into his own hands by instructing the offices of Ueitele and Hans Inc. to further deal with his matter.

The defendant is however of the view that the erstwhile practitioner of record's withdrawal was improperly and not in terms of the rules of court and further that the offices Ueitele and Hans Inc. had no authority to approach and contact the offices of the defendant's legal practitioners in dealing with this matter.

Held – It is not for this court to punish the plaintiff for the poor execution of his wishes on the matter when the legal practitioners appointed could not do so.

Held further that – It must also be borne in mind that this matter involves the status of the parties and this court cannot do injustice to a party wherein the default in any nature is not of his or her own doing.

ORDER

- a) Application for condonation of the late filing of rule 32 (10) report and notice of representation is granted.
- b) Application for rescission of the court order (restitution of conjugal rights) dated 16 November 2017 is granted and Plaintiff is allowed to defend the defendant's claim.
- c) Application for rescission of court order dated 26 October 2017 dismissing Plaintiff's claim is granted and Plaintiff is allowed to proceed with his claim against the Defendant.

RULING

PRINSLOO, J:

Introduction

[1] The provisions relating to Rule 32 (9) and (10) has received much debate in terms of how parties must satisfy the requirements thereof. What is true is that practitioners have seemingly differing methodologies or techniques that is perceived to be the correct procedure in relation to the fulfilment of the requirements provided in Rule 32 (9) and (10). This matter again brings about the scenario wherein practitioners have differing ways in its interpretation and application. In addition, this court is called upon to determine when it is appropriate for a legal practitioner to act on behalf of a client wherein such client is on the face of it, still represented by another legal practitioner on record. Furthermore ancillary thereto, this court must make determination in relation to a condonation application and opposition filed thereto.

Background

[2] This matter involves a rather unfortunate series of events in terms of which the plaintiff had approximately three different legal practitioners working on the plaintiff's file. This matter has a long history as well, dating back to 2014 when the combined summons were issued. Court order dated 26 October 2017 struck the plaintiff's claim as well as the defence to the defendant's counterclaim. The defendant in this matter was granted an order for restitution of conjugal rights by this court in court order dated 16 November 2017 with a return date of 25 January 2018. I will now look at the events that transpired in respect of the plaintiff's legal representation.

The issue surrounding the withdrawal of the plaintiff's legal practitioner

[3] Ms Isabella Agenbach, practicing under the name and style of Agenbach Legal Practitioners & Mediators at 19 George Hunter Street, Windhoek, Republic of Namibia, represented the plaintiff from 2015 until 22 June 2017, where she filed her notice of withdrawal, in which such notice indicated that the offices of Dr Weder, Kauta & Hoveka would be appointed or take over as legal practitioners of record in respect of the plaintiff. The return of service in respect of the notice of withdrawal was dated and served on the plaintiff on 27 October 2017 respectively. In Ms Agenbach's affidavit, she further states that the notice of withdrawal incorporating the notice of representation was served on the offices of Tjituri Law Chambers and the offices of Dr Weder, Kauta & Hoveka as well as with the Registrar's office on 22 June 2017. The withdrawal, Ms Agenbach submits, was in compliance with Rule 44 of the High Court rules.

[4] With the submissions made in Ms Agenbach's affidavit, she was of the belief that Mr Maritz was appointed in her view as the practitioner of record in view of the notice of withdrawal filed by her and as a result, focused on other matters that required her attention. She further submits that, with the order issued by this court on 18 September 2017 requiring Ms Agenbach to comply with Rule 44 (7), she was caught off guard and although trying to make arrangements to be released from Justice Unengu

AJ's court wherein she was engaged with a matter, she was not granted leave to attend to the court order issued from this court.

[5] Ms Agenbach further testified that with the court order dated 18 September 2017 having escaped her attention until 25 October 2017 and not being able to attend the court proceedings dated 26 October 2017 wherein the plaintiff's claim was struck, she respectfully submitted that her inability to attend to this court's orders was not done in bad faith and genuinely believed her withdrawal to have been in compliance with Rule 44.

[6] Seemingly, there seems to have been a miscommunication between the plaintiff and Ms Agenbach, as Ms Agenbach submits that she was instructed by the plaintiff that if she is to withdraw, Mr Maritz is to be appointed as the practitioner of record and as a result, such was done. As a result, Ms Agenbach totally withdrew from the matter and had it "out of sight and out of mind" until issues arose wherein Mr Maritz assured her that it will be sorted.

Plaintiff's submissions

[7] The affidavit filed in respect of the plaintiff corroborates the issues mentioned in Ms Agenbach's affidavit. The plaintiff submits that on the 27th of October 2017, he was called by the office of Mr Maritz informing him that there was a document to be signed by him, turning out to be the notice of withdrawal by Ms Agenbach.

[8] The plaintiff further submits that from the date he signed the notice of withdrawal to the date he made a surprise visit to Mr. Maritz's office on 5 December 2017, he did not meet with Mr. Maritz. On that date, Mr. Maritz informed the plaintiff that the court was of the view that Ms Agenbach's withdrawal was not properly done. Mr Maritz then sent the plaintiff to have a look at the court file and determine whether Ms Agenbach has filed a proper notice of withdrawal in order for him to come on record. The plaintiff further avers that Mr Maritz informed him to come back the next day, 6 December 2017.

[9] Upon returning to Mr Maritz's office, the plaintiff avers that Mr Maritz was unable to see him and that he should come back in January 2018. The plaintiff further submits that Mr Maritz's secretary gave him a copy of a court order dated 16 November 2017 wherein the court granted a restitution of conjugal rights to the defendant with a return court date of 22 February 2018.

[10] The plaintiff further avers that due to the state of the uncertain legal representation issue, he instructed his son to pick up his file from the office of Mr Maritz and find him an alternative legal practitioner to take on his case. The plaintiff submits that on 7 December 2017, his son approached the offices of Ueitele & Hans Inc. and scheduled an appointment for 18 January 2018 as the office was closing for the holidays on 8 December 2017.

[11] During consultations on the 18th of January 2018, the plaintiff indicates that he met with Ms Hans-Kaumbi of Ueitele & Hans Inc that advised him that a rescission for the restitution of conjugal rights had to be brought before court on the 22nd of February 2018. The plaintiff then further averred that Ms Hans-Kaumbi contacted Ms Agenbach to get further information on the matter as it was unclear from the file provided by the plaintiff and she confirmed that she no longer was on the matter due to the notice of withdrawal and affidavit filed. The plaintiff further avers that Ms Hans-Kaumbi further attempted to communicate with Mr Maritz and Mr Jantjies (who was on record for the defendant) whom both were not reachable. Ms Hans-Kaumbi managed to communicate with Mr Jantjies telephonically regarding the matter and scheduled an appointment with Mr Jantjies for the 26th of January 2018 to resolve the matter amicably. On the said date Mr Jantjies could not attend the meeting scheduled and advised Ms Hans-Kaumbi that she could file the application for rescission.

[12] The above primarily sets out the events that took place before this matter coming before this court for a rescission application. Having set out the events as

above, I will now move on to deal with the events that transpired before the application for rescission was filed before this court.

[13] Before the rescission application was filed, the plaintiff's legal practitioner of record, Ms Hans-Kaumbi, filed a condonation application for failing to file her notice of representation and the report in terms of Rule 32 (10) timeously and not bringing the condonation application timeously as well. In her affidavit accompanying the application, Ms Hans-Kaumbi submits that it was error from their messenger in that all the documents mentioned were to be filed on 30 January 2018 but instead they were filed in a staggered manner, resulting in the notice of motion superseding the notice of representation and the report in terms of rule 32 (10). She further submits that when she noticed the error, she addressed it with her counterpart, Mr Jantjies, who then indicated that he would take up issue with it, hence the condonation application filed by Ms Hans-Kaumbi.

[14] Following the above, the defendant through Mr Jantjies then filed a notice of opposition to the condonation application and this court ordered¹ that the defendant should file its answering affidavit on or before 5 March 2018 and the plaintiff to file its replying affidavit on or before 19 March 2018 and further that the plaintiff's heads of argument should be filed on or before 18 April 2018 and the defendant to file its heads of argument on or before 20 April.

[15] For purposes of this ruling, I will not address the averments made in the answering or replying affidavits but the heads of arguments instead. However, before dealing with the heads of argument filed by the parties, Ms Hans-Kaumbi filed a condonation application for filing her heads of argument one day after the initial date in which they ought to have been filed. It's safe to say that condonation can be granted in this respect as the defendant took no issue in this regard.

Defendant's submissions

¹ Through court order dated 1 March 2018.

[16] The defendant submits that the plaintiff's legal practitioner had on 18 January 2018 no authority to approach the defendant's legal practitioner as no notice of representation was filed at the time. The defendant submits that the reliance placed by the plaintiff on the phone call and informal meeting requested does not comply with the objectives of rule 32 (9) and is as a result not complied with. The defendants further submit that at the time of filing the rescission application as well as the condonation application, the office of Mr Maritz never formally withdrew as legal practitioners of record.

[17] The defendant cites *Standard Bank Namibia Limited v Gertze* (I 3614/2013) [2015] NAHCMD 77 (31 March 2015) wherein Parker J (as he then was) made the following observations in respect of rule 32 (9) and (10):

'[5] In holding that rule 32(9) and (10) are peremptory provisions, I reasoned in *Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (12 March 2015), para 6 thus:

'Considering the use of the word "must" in Rule 32(9) and (10) and the intention of the rule maker as set out in Rule 1(2) concerning the overriding objective of the rules (see *The International University of Management v Torbitt* (LC 114/2013) [2014] NALCMD 6 (20 February 2014)), I conclude that the provisions of rule 32(9) and (10) are peremptory, and non-compliance with them must be fatal.

[6] In *Mukata*, having found that the plaintiff had failed to comply with rule 32(9) and (10), the application for summary judgment (ie the interlocutory application which the plaintiff had launched) was struck from the roll. By a parity of reasoning, I should strike the rule 61 application, which is also an interlocutory proceeding, from the roll. I respectfully decline Mr Van Vuuren's invitation that I dismiss the application.'

[18] The defendant submit that the plaintiff has failed to meet the requirements of rule 32 (9) and (10) and the application should on that basis be dismissed with costs. The defendant further submits that the abundance of case law on the requirements of

condonation application are concrete and that any relief granted by this court would be solely based on the indulgence of the court.

Applicable law

[19] It was submitted by the plaintiff that rule 32 (9) was achieved between the parties and that the only issue raised in this regard is compliance in terms of rule 32 (10) filing of the report as envisaged in the rule. In this regard, the plaintiff holds the view that the purposes of rule 32 (10) is the confirmation that the parties have engaged in rule 32 (9) activities and that it is to confirm to court of that as well.

[20] Interestingly enough, the defendant who did not actively partake in the effort to settle the matter amicably and in the spirit of the rules of court is now the one who argues that there was non-compliance with specific rule. A party can clearly not frustrate the process and then rely on the rule to wage it like a weapon against the opposing party.

[21] The report in terms of rule 32(10) was filed by the plaintiff albeit a day or so late, which delay was explained to the satisfaction of the court. I am thus satisfied that there was compliance with rule 32.

[22] On the issue of the rescission application, the case of *Transnamib Holdings Ltd v Bernhardt Garoëb* (SA 26/2003) [2005] NASC 4 (04 August 2005) illustrates the position held by the Supreme Court in dealing with an application for rescission of judgment, where the court held at para 9 that:

'In a long line of judgments the courts have by precedent distilled the essential criteria by which to determine whether "good cause" has been shown for default judgments to be rescinded or varied. In *Leweis v Sampoio* 2000 NR 186 (SC) at 191G-H this Court approved the following content given to the requirements implied by that phrase in *Grant v Plumbers (Pty) Ltd*, 1949(2) SA 470 (0) at 476-477:

“(a) He must give a reasonable explanation of his default. If it appears that his default was willful or that it was due to gross negligence, the Court should not come to his assistance.

b) His application must be bona fide and not made with the intention delaying the plaintiff’s claim.

c) He must show that he has a bona fide defence to the plaintiff’s claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.”

[23] Having regard to the detailed explanation filed on affidavit by the plaintiff, he explains the steps to follow up on the progress of his matter and did not sit back and idle on the outcome after placing his matter in the hands of legal professionals, and as a result, the plaintiff was not in willful default.² It must be noted that the plaintiff, for all purposes, had the best intentions when it came to ensuring that his matter progressed as it should and that is admirable. Looking at the volume of affidavits filed in this matter, it is quite clear that fault cannot be bestowed on the plaintiff as it is the legal professionals that had no due diligence in ensuring that their client’s interests are best served. To some extent, the plaintiff was left in the dark in terms of the progress in his matter and it is only when he actively took over his file and appointing the offices of Ueitele & Hans Inc. that the matter proceeded as it ought to have been.

[24] The onus is on the plaintiff to show that his application for a rescission is bona fide and that he has a *bona fide* defence. With reference to the plaintiff’s affidavit, it is clear that there is a triable defence to the defendant’s counterclaim.

² *Neuman (Pty) Ltd v Marks* 1960 (2) 170 S.R. at pg. 173A-B:

“The true test, to my mind, is whether the default is a deliberate one – i.e. when a defendant with full knowledge of the set down and of the risks attendant on his default, freely takes a decision to refrain from appearing”

Conclusion

[25] As to a Court's approach in regard to such a rescission application it was stated in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 711E that –

'An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide.'

[26] This court does not wish to punish the plaintiff for the poor execution of his wishes on the matter when the legal practitioners appointed could not do so. Judging from the facts, the plaintiff had no willful intentions to unreasonably delay this matter before court.

[27] Had the legal practitioners of record and duly appointed as such had properly executed their brief, this matter would not have endured to this point and would have been presumably finalized by now. It must also be borne in mind that this matter involves the status of the parties and this court cannot do injustice to a party wherein the default in any nature is not of his or her own doing.

[28] My order is therefore as follows:

- a) Application for condonation of the late filing of rule 32 (10) report and notice of representation is granted.
- b) Application for rescission of the court order (restitution of conjugal rights) dated 16 November 2017 is granted and Plaintiff is allowed to defend the defendant's claim.

- c) Application for rescission of court order dated 26 October 2017 dismissing Plaintiff's claim is granted and Plaintiff is allowed to proceed with his claim against the Defendant.

JS Prinsloo

Judge

APPEARANCES:

PLAINTIFF:

A D Hans-Kaumbi
of Ueitele & Hans Inc., Windhoek

DEFENDANTS:

A Jantjies
of Siyomunji Law Chambers, Windhoek