

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
EX TEMPORE RULING**

Case no: HC-MD-CIV-ACT-CON-2016/03412

In the matter between:

**SHARON SHALLWYN SO-OABES**

**1<sup>ST</sup> PLAINTIFF/APPLICANT**

**ANTHONY SO-OABEB**

**2<sup>ND</sup> PLAINTIFF/ APPLICANT**

And

**MINISTER OF HEALTH AND SOCIAL  
SERVICES HON. DR BERNARD HAUFIKU  
DR SARAH SHALONGO**

**1<sup>ST</sup> DEFENDANT/RESPONDENT**

**2<sup>ND</sup> DEFENDANT/RESPONDENT**

**Neutral citation:** *So–Oabes v The Minister of Health and Social Services* (HC-MD-CIV-  
ACT-CON-2016/03412) [2018] NAHCMD 163 (21 May 2018)

**Coram:** USIKU, J

**Heard on:** 21 May 2018

**Delivered:** 21 May 2018

**Flynote:** Civil Procedure – Interlocutory – Application to compel discovery – Summons have not lapsed – Application to compel discovery struck from the roll.

**Summary:** The Plaintiffs instituted an action for medical negligence against the Defendants. The Combined Summons were served on the Defendants. The Defendants entered appearance to defend. The Plaintiffs set the matter down for Default judgment twice, which applications were removed from the roll twice. The Plaintiffs never re-enrolled the matter, but have filed an application to compel discovery under the same action so removed. The Defendants subsequently entered appearance to defend. The Defendants contended that, the summons have lapsed and even if they had not lapsed, the application before this court, is not properly before court and that the application to compel should be dismissed.

Held: the Combined Summons has not lapsed, as same were served on the Defendants within six months, from the date of issue;

Held: further that the Plaintiffs had taken further steps, namely: had set the matter down for default judgment, after service, within six months of services of the summons.

Held: the application to compel discovery is struck from the roll, as it is not properly before court.

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## ORDER

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1. The application to compel, filed by the Plaintiffs on 11 August 2017, is struck from the roll.
2. The Summons issued by the Plaintiff against the Defendants on 17 October 2016, have not lapsed, in terms of Rule 132 (1), and are live before this court.
3. The case is postponed to 04 July 2018 at 15:15 for a Case Planning Conference.

4. The parties are directed to file a joint case planning report on or before the 27 June 2018.
5. No costs order is made: (Plaintiffs being legal –aided).

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**REASONS IN TERMS OF PRACTICE DIRECTIONS 61 (9)**

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USIKU, J:

Introduction

[1] In the present action, the Plaintiffs sue the Defendants for medical negligence. The Plaintiffs pray for:

- (a) Payment in the amount of N\$ 6 500 000.00;
- (b) Interest on the aforesaid amount at the rate of 20% per annum from the date of judgment to the date of final payment; and
- (c) Costs of suit.

[2] The Plaintiff issued combined summons on the 17 October 2016. In terms of the return of service filed on 09 January 2017, the Defendants were served with the summons on 16 November 2016.

[3] It appears the Defendants, for one reason or other, did not enter appearance to defend and the Plaintiff set the matter down for 20 January 2017, for default judgment.

[4] On 20 January 2017, the matter was removed from the roll on account that the amount claimed was not for a liquidated demand, and there was no evidence produced on behalf of the Plaintiffs, in proof of their claim.

[5] From the record, it appears that the action aforesaid has not been re-enrolled since.

[6] On 29 June 2017 the Plaintiff, on notice of motion applied for an order *inter alia*, to compel the Defendants to furnish the Plaintiffs certain specified medical records.

[7] This application was seemingly launched as an interlocutory application forming part of the action which was removed from the roll on 20 January 2017, and which had not (and still not re-enrolled). In other words the application was not launched as a substantive application, and was not uniquely numbered as contemplated under Rule 65.

[8] That application was set down for hearing on the Residual Roll for 04 August 2017 and was removed from the roll on 04 August 2017, due to non-compliance with Rule 8(3)(e).

[9] The Plaintiff launched a similar application on 11 August 2017, for the same relief, which was duly served on the Defendants on 18 August 2017.

[10] On 23 August 2017. The Defendants gave notice to 'defend the action filed by the Plaintiffs'.

[11] On 23 August 2017, the Defendants also filed an answering affidavit to the application to compel, which was filed by the Plaintiffs on 11 August 2017. Among other things, the Defendants raised *a point in limine* that the aforesaid application did not comply with the requirements of Rule 32(9) and (10) and that summons has lapsed in terms of Rule 132 (1).

[12] On 07 February 2017 this court directed the parties to address it on the following aspects:

- (a) whether the summons had lapsed in terms of Rule 132(1), and
- (b) whether the application to compel, is properly before this court.

[13] The parties have both filed heads of argument in respect of the aforesaid aspects.

### Findings

[14] I have considered both oral and written submissions made by the parties on the aforesaid aspects.

[15] The action initiated by the Plaintiffs on 17 October 2016, was removed from the roll on the 20 January 2017, and was never re-enrolled. As such, such action could not, in the circumstances, sustain an “*interlocutory application*” in a form of an application to compel.

[16] In any event, I am of the opinion that the application to compel should have been launched as a substantive application with its own case number, and not forming part of the existing cause of action which was removed from the roll.

[17] On that basis, the application to compel stands to be struck from the roll, on account that it is improperly before this court.

[18] In regard to the issue of whether the summons has lapsed or not. Rule 132 (1) provides that summons in action for payment of debt lapses in two circumstances: namely:

- (a) where summons is not served within six months of the date of its issue, or
- (b) where, summons having been served within six months of the date of its issue, the Plaintiff has not within six months after service, taken further steps in the prosecution of the action.

[19] In the present matter summons was issued on 17 October 2016. In terms of the return of service filed on 09 January 2017, the summons were served on the Defendants on 16 November 2016. Therefore, summons was served within six months of their issue.

[20] It is also common ground that the Plaintiffs have set the matter down for default judgment for the 20 January 2017. Therefore, the Plaintiff had taken further steps, after service, in the prosecution of the action. The matter is now before a managing judge.

[21] For the foregoing reasons, I issue the order as appearing at the beginning of this ruling.

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B Usiku  
Judge

APPEARANCE:

PLAINTIFFS/APPLICANTS:

L Shikale

Of Shikale & Associates, Windhoek

DEFENDANTS/RESPONDENTS:

J Ncube

Of the Office of the Government  
Attorney, Windhoek