

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING:

Case no: I 3622/2014

In the matter between:

KONDJENI NKANDI

PLAINTIFF

and

THE NAMIBIA AIRPORTS COMPANY LTD

DEFENDANT

Neutral citation: *Nkandi v Namibia Airports Company Ltd* (I 3622/2014) [2018]
NAHCMD 274 (31 August 2018)

Coram: USIKU, J

Heard on: 31 August 2018

Delivered: 31 August 2018

ORDER

1. The Plaintiff is refused leave to support its claim, in terms of rule 53(2) (a);
2. The automatic bar contemplated under rule 54(3) in respect of the plaintiff's failure to file its application for leave to amend and failure to file its witness statements, within the prescribed time is upheld;
3. In the circumstances, absolution from the instance is hereby granted in favour of the Defendant.
4. The Plaintiff is directed to pay the costs of the Defendant, such costs to include wasted costs occasioned by the trial dates having had to be vacated for the period of 9-13 July 2018,(but excluding Tuesday the 10 July 2018) and such costs to include costs of one instructing and one instructed counsel.
5. The matter is removed from the roll and is regarded as finalised.

REASONS IN TERMS OF PRACTICE DIRECTIONS 61 (9)

USIKU J:

Introduction

[1] On the 08 September 2017, the court made a pre-trial order in terms of which the Plaintiff, Kondjeni Nkandi was ordered to file her witness statement(s) on or before the 13 October 2017. In terms of the same order the Defendant was directed to file its witness statements on or before 03 November 2017. By virtue of the same order the parties were directed to file their discovery affidavits and exchange bundles of discovered documents on or before the 04 October 2017.

[2] The court then set the matter down for trial for 09-13 June 2018 at 10:00.

[3] Neither the Plaintiff nor the Defendant filed witness statements to date.

[4] On 01 November 2017 the Plaintiff delivered a notice of intention to amend its particulars of claim.

[5] On the 09 November 2017 the defendant delivered its notice of objection to the proposed amendments.

[6] The Plaintiff took no further steps in prosecuting its intended amendments until the 28 June 2018, (about 6 days prior to the set down-dates) when the Plaintiff filed a notice of motion with an affidavit, applying for leave to amend its particulars of claim.

[7] In the meantime the legal practitioners for the Defendant had on 17 May 2018 forwarded an email to the legal practitioners for the Plaintiff, *inter alia*, indicating that they would apply for absolution from the instance on 09 July 2018, in view of the provisions of rule 93(5), and in view of the Plaintiff's failure to file witness statements.

[8] There is no application filed by the Plaintiff for condonation for failure to comply with the provisions of rule 52(4).

[9] Furthermore, the Plaintiff did not comply with the provisions of rule 32(9) and (10) in respect of this application for leave amend.

[10] On the set down date, Monday 9 July 2018, it was pointed out, amongst other things, that counsel for the Plaintiff was not feeling well and the matter was postponed to Wednesday the 11th July 2018.

[11] On 11 July 2018 the court made the following order:

'Having heard Mr. Mr. Maritz counsel for the Plaintiff and Mr. Totemeyer (SC) for the Defendant and having read the documents filed of record:

IT IS ORDERED THAT:

1. The matter is postponed to 31 August 2018 at 10:00 for sanctions hearing in terms of rules 53 & 54.
2. The Plaintiff is directed to file her sanctions affidavit on or before Monday, the 23rd July 2018:
 - (a) explaining reasons for her:
 - (i) non-compliance with the pre-trial order dated 8 September 2017 (failure to file witness statements);
 - (ii) non-compliance with rule 52(4) and 55(1) (failure to launch application for amendment within 10 days from 9 November 2017 and failure to apply for condonation and extension of time);
 - (iii) setting out reasons why Plaintiff posits that her rule 32(10) notice filed on 22 June 2018 constitutes compliance with rule 32 (9) and (10); and
 - (b) showing cause why:
 - (i) sanctions contemplated under rule 53(2) should not be imposed; alternatively;
 - (ii) showing cause why absolution from the instance should not be granted in favour of the Defendant.
3. The Defendant is directed to file answering papers on or before Friday, the 27th July 2018;
4. The Plaintiff is directed to file her reply, if any, on or before Wednesday, 01 August 2018;
5. The issue of wasted costs due to the vacation of the hearing set down for 9-13 July 2018 to stand over for determination at the sanctions hearing.'

[12] In his sanctions affidavit counsel for the Plaintiff explained amongst other things that: the file relating to this matter got missing or was inadvertently archived, shortly after the Defendant filed its notice of objection to the proposed amendments, but prior to the expiry of the 10 days' period provided for in rule 52(4) had lapsed. Due to the file having gone missing, the file was forgotten.

[13] It is common cause that in this matter, the Plaintiff has failed to comply with:
(a) the provisions of rule 52(4) and 55(1) in that she failed to lodge its application for amendment within 10 days from 9 November 2017 and has failed to apply for condonation for failing to comply with rule 52(4).

(b) the provisions of rule 32(9) and (10), in that she failed to seek an amicable resolution of the dispute before delivering the application for leave to amend. As a consequence she could not have filed the details of the steps taken to have the matter amicably resolved. In the sanctions affidavit there is no argument that there was real compliance with the provisions of rule 32(9) and (10). (See paragraphs 12 and 14 of the sanctions affidavit by Mr Maritz filed on 23 July 2018).

(c) the pre-trial order dated 8 September 2017 in that she failed to file witness statements.

[14] The reasons for all such non-compliance was that the file got missing and was forgotten.

[15] It is also common cause that on 08 September 2017, the main matter was set down for trial for 09-13 July 2018. It is also common cause that by 09 July 2018 the Plaintiff was not ready for the trial

[16] For the present purpose, the Plaintiff being the *dominus litis*, is required to satisfy the court that there is sufficient cause to warrant the indulgence of the court in her favour. There must be an acceptable explanation for the delay or non-compliance which is full, detailed and accurate. The degree of the delay is also a relevant consideration.

[17] The crucial question is whether the explanation put forth by the Plaintiff constitutes an acceptable explanation for the non-compliance or the delay. In other words, the issue now is whether the Plaintiff has shown good cause for the delay or the non-compliance. Put differently can it be said that in the circumstances of this particular case the Plaintiff has put forth something that entitles her to ask for the indulgence of the court?

[18] In my view the Plaintiff (or her legal practitioners) ought to have put her/their diary in order when she resolved to file her notice of intention to amend. At such moment the relevant dates, taking into account possible scenarios, would have been diarised. In my opinion an explanation that the file got missing and that the file got forgotten, is not an acceptable explanation in the circumstances. If accepted, in circumstances of the present case, it would create a dangerous precedent. In my opinion, the fact that the errors or misfortune that befell the Plaintiff were primarily caused by the legal practitioners, cannot save the Plaintiff in this matter. The fact remains that the Plaintiff was not ready to proceed with the trial when the set down dates were granted on 08 September 2017 and made no effort since then to prepare for the trial or prosecute her intended application for leave to amend till it was late.

[19] As the matter stands, the set down dates for 09-13 July 2018, were not changed as no application was made to have same changed in terms of rule 96(3). Accordingly it was expected that the Plaintiff, being *dominus litis*, should have been ready to proceed on the set down dates.

[20] For the foregoing reasons, I am not satisfied that the Plaintiff has put forward an acceptable explanation, and I reject same.

[21] As regards the costs, I am of the view that the general rule, that costs follow the event should apply. I see no reason why the general rule should not be applied in this matter. I am further satisfied that the nature of the matter was complex enough to justify service of two instructed counsel.

[22] In the result, I make following order:

- a) The Plaintiff is refused leave to support its claim, in terms of rule 53(2)(a);
- b) The automatic bar contemplated under rule 54(3) in respect of the plaintiff's failure to file its application for leave to amend and failure to file its witness statements, within the prescribed time is upheld;
- c) In the circumstances, absolution from the instance is hereby granted in favour of the Defendant.
- d) The Plaintiff is directed to pay the costs of the Defendant, such costs to include wasted costs occasioned by the trial dates having had to be vacated for the period of 9-13 July 2018, (but excluding Tuesday the 10 July 2018) and such costs to include costs of one instructing and two instructed counsel.
- e) The matter is removed from the roll and is regarded as finalised.

B Usiku

Judge

APPEARANCE:

PLAINTIFF:

C J Mouton

instructed by Ellis Shilengudwa Inc., Windhoek

DEFENDANT:

R Totemeyer

instructed by Dr, Weder, Kauta & Hoveka Inc.,
Windhoek