

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

Case no: I 924/2016

In the matter between:

SITTA ELKE VOIGTS

PLAINTIFF

and

HARALD GUNNAR VOIGTS

DEFENDANT

Neutral citation: *Voigts v Voigts* (I 924/2016) [2018] NAHCMD 55 (16 March 2018)

CORAM: PRINSLOO J

Heard: 06 March 2018

Delivered: 06 March 2018

Reasons: 16 March 2018

Flynote: Practice — Judicial case management — Sanctions – Rule 56 of the High Court rules – Relief from sanctions to be imposed for failure to comply with a rule, practice direction or court order – Defaulting party afforded the opportunity to make presentations on why sanctions should not be imposed – Defaulting party to show good cause.

Summary: The plaintiff failed to comply with a court order dated 08 June 2017 and the court ordered the plaintiff to file an affidavit to show cause why sanctions as contemplated in Rule 53 and 54 of the Rules of Court should not be imposed.

The plaintiff submitted in her affidavit that the failure to comply with the court order was due to the fact that the parties were engaged in settlement negotiations, with the hopes that the matter would be finalized as a result thereof. The defendant, however, unequivocally denied the alleged settlement negotiations and the plaintiff eventually accepted that there were no hopes of reaching a settlement. It thereafter took the plaintiff a period of four months to file an application for condonation for non-compliance with the relevant court order. The reasons advanced by the plaintiff are firstly, that her counsel was only available in January 2018 and as a result could not file her witness statements nor seek condonation for the late filing thereof, and secondly, financial constraints.

The plaintiff conceded that there were previous non-compliance with court orders and submitted that the reason for the non-compliances was that she was working in remote areas and could not always be reachable via electronic media and cellular phone.

The defendant however, was of the view that the non-compliances of the plaintiff became a trend since the date of instituting this action and in May 2017 already the defendant requested the court to strike the plaintiffs claim and particulars of claim because of the non-compliances.

Held that it seemingly did not occur to the plaintiff and her legal practitioner that her non-compliances were non-compliances with the court's case management orders, which would have necessitated an immediate and prompt application in terms of Rule 55, in order to be released from the binding effects of the applicable case management orders.

Held further that there can be no argument that the plaintiff's default was intentional as she instructed her legal practitioner not to file her witness statement contrary to the court order.

Held further that courts are slow in shutting the doors of justice on a litigant and that is clear from the two previous instances where the court indeed granted condonation for non-compliances.

ORDER

In terms of Rule 53(2)(b) of the Rules of Court, the Plaintiff's claims and particulars of claim are struck with costs, cost of one instructed and one instructing counsel.

JUDGMENT

PRINSLOO J:

[1] The action before me has a long and troubled history. The action was instituted on 29 March 2016 after a protracted divorce action between the parties was finalized during October 2012. The current action relates to the issue of whether a universal partnership existed between the parties and determination of the difference in the accrual between the parties' respective estates. In terms of the pre-trial order dated 08 June 2017 the parties would only proceed for purposes of the action before this court on the issue of whether a universal partnership existed between the parties and the outcome thereof would have bearing on the Claim 1 of the plaintiff in respect of the accrual.

[2] The arguments that served before me this morning emanates from a sanctions order that was made by this court on 28 February 2018 after hearing the application for condonation as set out in the Notice of Motion as discussed here under. The Plaintiff was ordered to file an affidavit by 05 March 2018 explaining her failure to file her witness statement in compliance with the court order dated 08 June 2017 and to show cause why sanctions as contemplated in Rule 53 and 54 of the Rules of Court should not be imposed.

Brief Background of the matter

[3] On 07 February 2018 the parties filed a joint status report from which the application for condonation arose and I will refer to the status report as a whole for purposes of this ruling:

- '1. The matter is not ready for trial for the following reasons.
2. The court ordered the plaintiff to index and paginate the pleadings, notices and documentary exhibits to be used at the trial on or before 31 August 2017. The plaintiff failed to do so. Plaintiff denies that the documentary exhibits had to be indexed as stated by defendant.
3. The court ordered the Plaintiff to file her witness statements on or before 28 July 2017 and the defendant his by 11 August 2017. The Plaintiff failed to file any witness statements. The defendant filed his witness statements on 11 August 2017. The witness statement of the defendant is not a true witness statement as envisaged by the rules. It is merely stating that he could not file a witness statement. He is aware of the prayers of the plaintiff and did not focus on the prayers when compiling his witness statement.
4. The defendant requests that the matter be postponed for a sanctions hearing and for the plaintiff to provide reasons why her claim should not be dismissed with costs.
5. Plaintiff has indicated to defendant on 25 January 2018 per letter the following:
 - 5.1 Plaintiff shall seek directions from the court on 08 February 2018 regarding an agreement reached between the parties in a bona fide attempt to settle this action;
 - 5.2 Plaintiff shall seek condonation from this court for the late filing of the witness statement of the plaintiff as well as the late filing of the index of the court file;
 - 5.3 Court shall seek the indulgence from court to vacate the trial dates to enable the plaintiff to bring the interlocutory application as indicated and finalize such application in terms of 5.1 and 5.2;
 - 5.4 Plaintiff has directed a notice in terms of rule 32(9) for an amicable solution to the interlocutory applications application intends to bring, but to no avail. Defendant indicated that he shall oppose interlocutory applications.

5.5 Plaintiff has given an undertaking to defendant that she shall file her witness statements and condonation application before 8 February 2018.'

[4] The plaintiff hereafter accordingly filed a Notice of Motion praying for condonation for the late filing of witness statement of the plaintiff and the late filing of the index of the court file.

[5] The application was opposed by the defendant and this application was heard on 26 February 2018 and ruled on 28 February 2018, wherein the application for condonation was dismissed.

Application in terms of Rule 56 of Rules of Court:

[6] Rule 56 of the Rules of Court states as follows:

'56. (1) On application for relief from a sanction imposed or an adverse consequence arising from a failure to comply with a rule, practice direction or court order, the court will consider all the circumstances, including –

- (a) whether the application for relief has been made promptly;
- (b) whether the failure to comply is intentional;
- (c) whether there is sufficient explanation for the failure;
- (d) the extent to which the party in default has complied with other rules, practice directions or court orders;
- (e) whether the failure to comply is caused by the party or by his or her legal practitioner;
- (f) whether the trial date or the likely trial date can still be met if relief is granted;
- (g) the effect which the failure to comply has or is likely to have on each party; and
- (h) the effect which the granting of relief would have on each party and the interests of the administration of justice.

(2) An application for relief must be supported by evidence.

(3) The managing judge may, on good cause shown, condone a non-compliance with these rules, practice direction or court order.'

[7] Rule 56 is the rule that the party is to take into account in order to obtain relief from sanctions or its adverse consequences. This rule was made in order to ensure parties their rights to a fair trial when faced with the issue of sanctions.¹

[8] In terms of Rule 56 the plaintiff must show good cause as to why the court should condone her non-compliance and such application for relief must be supported by evidence.

[9] The application for relief will therefore be measured against the factors as set out in Rule 56 in order to determine if good cause was shown.

Was application for relief brought promptly and was there sufficient explanation for the non-compliances?

[10] In the affidavit deposed to and filed by the plaintiff, she averred that the application was made promptly and in compliance with Rule 56. There appears to be compliance with the court order dated 28 February 2018 but that unfortunately does not include the court order dated 08 June 2017 wherein the plaintiff was ordered to file her witness statement on or before 28 July 2017 and ensure that the court file was indexed and paginated by 31 August 2017.

[11] It is common cause that the witness statement of the plaintiff was only filed on 08 February 2018, without leave of court to do so, and by which date the file was still not indexed and paginated in terms of Rule 131(6).²

[12] The plaintiff advanced three explanations in her papers³ for the inactivity of this case and non-compliance with the case management order dated 08 June 2017, i.e.

12.1 Settlement negotiations that were ongoing between the parties;

12.2 Being out of reach of electronic media and cellular phone;

¹ Paragraph [55] *Nzianga v Carlos* (I 1077/2014) [2017] NAHCMD 364 (17 August 2017)

² (6) Despite any rule to the contrary, a civil or labour cause or matter will not be heard unless and only if all the papers filed of record in that matter are indexed before the hearing, which indexing should be in compliance with the time periods and format set out in the practice directions.

³ Also with reference to plaintiff's founding affidavit in support of application for condonation dated 08/02/2018.

12.3 Financial constraints.

[13] Of the three explanations advanced by the plaintiff for her failure to file her witness statement, the ongoing settlement negotiations appears to be the predominant explanation. The court had the opportunity to have regard to the correspondence exchanged between the parties and it is clear from the said correspondence that the issue of settlement negotiations were laid to rest in no uncertain terms by Mr. Pfeiffer, acting on behalf of the Defendant.

[14] In an e-mail dated 27 September 2017, Mr. Pfeiffer informed the plaintiff's legal practitioner that his client disputed that any settlement was reached between the parties.

[15] In further correspondence dated 23 October 2017 exchanged between the legal practitioner of defendant and that of plaintiff, the alleged settlement negotiations were denied in the strongest of terms when the following was stated:

'3. I am instructed by client, and he reiterates herewith, that absolutely no settlement negotiations were conducted between his wife and himself to date hereof. My instructions is that your client is lying about this. Your client approached my client with a proposal once during September 2017 and he, having had a bad experience in the past with your client and in attempt to avoid further disputes, immediately told her to address all settlement proposals in writing through your office to my office as is standard practice when legal practitioners are representing parties. This was the end of the discussion. A week or two later my client receives your letter dated 27 September 2017 advising, to his big surprise, that the parties have reached settlement. My client vehemently denies any settlement and will attest this under oath.'

[16] I find it difficult to belief that the plaintiff could labor under the mistaken belief that there was a possibility of settlement. However, even if the court accepts that plaintiff attempted to settle this matter, it is clear from the e-mail dated 27 September 2017, to which plaintiff responded on 29 September 2017, that she knew that there was no possibility of settlement. From this date the plaintiff took a further four (4) months to file application for condonation and file her witness statement. At the time of hearing the condonation application (26 February 2018) the court file was not yet

indexed and paginated and same was done by the defendant on the instructions of this court.

[17] Although the basis for the application for condonation as well as plaintiff's prayer for relief from sanctions was reliant on the alleged settlement negotiations, no proof was placed before this court to support of the plaintiff's version.

[18] In plaintiff's attempt to justify her non-compliance with the court order, she omits to advance a reason for not seeking relief from sanctions earlier except to state in her affidavit when applying for condonation that counsel was only available for consultation in January 2018 in order to draft her witness statement. It does not explain the delay in bringing the condonation application or failure to apply for extension in terms of Rule 55 for filing of the witness statement or indexing of the court file.

[19] The plaintiff also advanced financial constraints as a reason for non-compliance. She paid her legal practitioner on 31 October 2017 already, however, the application for condonation was only filed three months after that.

Rule 55⁴

[20] The rules expressly provides for an application in terms of Rule 55 which allows a party to bring an application for and relaxation of timelines or for condonation of the non-compliance of the rules.

[21] It is quite surprising that it apparently, at no stage, seemed to have occurred to the plaintiff and her legal practitioner that her non-compliances were non-compliances with the court's case management orders, which would have necessitated an immediate and prompt application in terms of Rule 55 in order to be released from the binding effects of the applicable case management orders.

⁴ **Upliftment of bar, extension of time, relaxation or condonation**

55. (1) The court or the managing judge may, on application on notice to every party and on good cause shown, make an order extending or shortening a time prescribed by these rules or by an order of court for doing an act or taking a step in connection with proceedings of any nature whatsoever, on such terms as the court or managing judge considers suitable or appropriate.

(2) An extension of time may be ordered although the application is made before the expiry of the time prescribed or fixed and the managing judge ordering the extension may make any order he or she considers suitable or appropriate as to the recalling, varying or cancelling of the consequences of default, whether such consequences flow from the terms of any order or from these rules.

Was the failure to comply intentional?

[22] There can be no argument that the plaintiff's default was intentional as she instructed her legal practitioner not to file her witness statement contrary to the court order, yet par 9.2 of her sanctions affidavit the plaintiff stated that 'the failure to comply with the timeous filing of the witness statement and index was not intentional'. This is clearly not the correct position if one have regard to the plaintiff's affidavit in support of her condonation application wherein she stated in paragraph 12 thereof:

'12. My legal practitioner has informed me of the dates in August 2017 when my witness statement must be filed and the court file indexed. I have instructed her to leave the filing of further pleadings/documents as respondent and I are engaged in settlement negotiations.' (my emphasis)

[23] This is a perfect of example of intentional non-compliance with a court order.

The extent to which the party in default has complied with other rules, practice directions or court orders:

[24] Plaintiff concedes that there were previous non-compliances with court orders but explain the said non-compliances as being a result of her working in remote areas and not always being reachable via electronic media and cellular phone. On this score, the court must remark that I find it hard to belief that the plaintiff did not have access to any communication devices for such an extended period of time without any indication before this court as to the period that she was unreachable and working in the said remote areas.

[25] The non-compliances of the plaintiff became a trend since the date of instituting this action and in May 2017 already, the defendant requested the court to strike the plaintiffs claim and particulars of claim because of her non-compliances with the court orders.

[26] In spite of the fact that the plaintiff was acutely aware of the consequences of non-compliance with a court order, she yet again failed to comply with the very next court order of 08 June 2017 after condonation was granted to her on 11 May 2017 for prior non-compliance with this court's order.

Can the trial date or the likely trial date still be met if relief is granted?

[27] The plaintiff's case is that the trial date can still be met and that there was no waste of court resources and time. It was further argued that plaintiff wanted to vacate the court date and the court in turn refused to vacate the date.

[28] It is indeed so that the court refused to vacate the date. At the time when the status report was filed there was nothing before me to convince me to vacate the date. The hearing date was set eight (8) months prior. The status report was filed on 07 February 2018 in respect of a trial that was due to commence at 06 March 2018.

[29] At the time that the court was requested to vacate the trial date the application for condonation was not even filed yet. The plaintiff therefor apparently expected of the court to vacate the trial date on the strength of a status report only.

[30] Rule 96(3) provides that when a matter has been set down for hearing a party may, on good cause shown, apply to the judge not less than 10 court days before the date of hearing to have the set down changed or set aside. No good cause was shown to convince this court to vacate the hearing date.

The effect which the failure to comply has or is likely to have on each party

[31] There is also the issue of prejudice for the defendant. Plaintiff argued that there is none. However, defendant was brought to court at the instance of the plaintiff. Defendant had to incur the costs to prepare for trial in spite of the non-compliances of the plaintiff, in order to remain in the clear and sanction free in this matter.

[32] This matter dates back to 2016 and I cannot disregard the adverse consequences that the substantial delay by the plaintiff in prosecuting her case has on the defendant.

The effect which the granting of relief would have on each party and the interests of the administration of justice

[33] Counsel on behalf of the plaintiff insisted on her clients' fair trial as envisaged by article 12(1)(a) of the Constitution, stating further that 'if the doors of justice is closed to her she will have to approach the Supreme Court for appropriate relief.'

[34] Interestingly enough, now that the writing is literally on the wall for the plaintiff after her latest condonation application did not succeed, this is the argument advanced, while plaintiff was grossly reckless to instruct her counsel not to comply with the relevant court order and then seeks to convince the court that her rights will be prejudiced. Counsel went as far as to draw the analogy, quite inappropriately, that if the court should strike the claim of the plaintiff it would be like having a dog tied to a pole with a short chain and beating it with a stick. It is safe to assume that the imposition of sanctions would then be the proverbial stick.

[35] Courts are slow in shutting the doors of justice on a litigant and that is clear from the two previous instances where the court indeed granted condonation for non-compliances.

[36] The plaintiff who showed a blatant disinterest in the prosecution of her claim now seek the indulgence of this court. How far should the court indulge the plaintiff in this matter? If the plaintiff did not avail herself of her procedural right, which are contained in Rule 55 of the Rules of Court, then she cannot now be allowed to complain if she faces sanctions.

Conclusion:

[37] Having considered all the factors as set out and discussed above my ruling is as follows:

In terms of Rule 53(2)(b) of the Rules of Court, the Plaintiff's claims and particulars of claim are struck with costs, cost of one instructed and one instructing counsel.

JS Prinsloo
Judge

APPEARANCES

PLAINTIFF:

Visser

Instructed by Petherbridge Law Chambers,

Windhoek

DEFENDANT:

Dicks

Instructed by Behrens and Pfeifer, Windhoek