

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
REASONS: IMPOSITION OF SANCTIONS

Case no: HC-MD-CIV-ACT-CON- 2018/01261

In the matter between:

POWERLINE AFRICA (PROPRIETARY) LIMITED

PLAINTIFF

and

URBAN FARMING CLOSE CORPORATION
GERSHON BEN-TOVIM
DAVID JOHN BRUNI N.O
IAN ROBERT MCLAREN N.O

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT

Neutral citation: *Powerline Africa (Pty) Ltd v Urban Farming CC and Others* (HC-MD-CIV-ACT-CON- 2018/01261) [2019] NAHCMD 231 (09 July 2019)

Coram: USIKU, J
Delivered: 07 May 2019
Reasons requested: 29 May 2019
Reasons released: 09 July 2019

Flynote: Practice – Sanctions imposed in terms of rule 53(2) – Pleadings filed by the defendants struck out in terms of rule 53 (2)(b) and judgment granted in favour of the plaintiff – Defendants request reasons for the order – Reasons furnished.

Summary: On 07 May 2019 the court imposed sanctions against the defendants, striking out the pleadings filed by the defendants and granting judgment in favour of the plaintiff. By letter dated 29 May 2019 the defendants requested reasons for the order imposing sanctions aforesaid. Reasons furnished.

REASONS

Usiku, J:

Introduction

[1] By letter addressed to the Registrar of this court, dated 29 May 2019, which I received on 04 June 2019, the current legal practitioners for the second defendant indicate that the second defendant intends to appeal against the court order dated 07 May 2019 and requires reasons for the aforesaid order.

[2] On the 07 May 2019 this court made an order in the following terms:

'IT IS RECORDED THAT:

The first and second defendants were served with court order dated 14/02/2019 on 27/02/2019 and 04/03/2019, respectively. The first and second defendants have not filed a sanctions affidavit, ordered in terms of court order dated 14/02/2019, by the due date, nor have they filed an application for condonation. The following order is, therefore, made:

IT IS HEREBY ORDERED THAT:

1. The pleadings filed by the first and second defendants herein are hereby struck out in terms of rule 53(2)(b).
2. Judgment is hereby granted in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved, for:
 - 2.1 Payment in the amount N\$ 2 300.00;
 - 2.2 Interest on the amount of N\$ 2 300 000 a tempore marae at the rate of 20% p.a from 27/03/2019 to date of final payment;
 - 2.3 costs of suit

3. Matter is removed from the roll: Case Finalised.'

[3] The reasons for the abovementioned order appear hereunder.

Background

[4] On or about 22 March 2018 the plaintiff instituted action against the defendants for payment of the amount set out above, representing loss suffered by the plaintiff in consequence of misrepresentation allegedly made by the first and second defendants to the plaintiff.

[5] The third and fourth defendants were joined in the proceedings only insofar as they may have interest in the matter and no relief was sought against them. The third and fourth defendants did not enter appearance to defend.

[6] The matter was duly docket-allocated for judicial case management in terms of the rules of court. On the 31 July 2018 this court made an order in the following terms:

'IT IS RECORDED THAT:

The Plaintiff intends to file a notice of intention to amend the amount pleaded in para. 16.2 of the particulars of claim. The Defendants do not intend to oppose the amendment and will not consequentially amend their plea.

IT IS ORDERED THAT:

1. The joint case management report filed by the parties is adopted and made an order of court, subject to the undermentioned provisions;
2. The Plaintiff must file its intended notice to amend on or before 24/08/2018 and the time limits prescribed in Rule 52 shall apply;
3. Any request for further discovery must be made on or before 17/08/2018;
4. The response to the request for further discovery must be made on or before 07/09/2018;
5. The parties must file their respective witness statements on or before 28/09/2018;
6. The case is postponed to 24/10/2018 at 15:15 for Pre Trial Conference hearing; and
7. The parties are directed to file a joint pre-trial report on or before 18/10/2018.'

[7] On the 23 October 2018 the court made an order in the following terms:

'IT IS RECORDED THAT:

The First and Second Defendants did not comply with the court order dated 31/07/2018, in that they did not, among other things, respond to the Plaintiff's request for further discovery by 07/09/2018.

IT IS ORDERED THAT:

1. The First and Second Defendants are directed to respond to the Plaintiff's request for further discovery, on or before 09/11/2018;
2. The Plaintiff shall file its witness statement(s) on or before 23/11/2018;
3. The case is postponed to 13/02/2019 at 15:15 for Pre-Trial hearing; and
4. The parties are directed to file a joint pre-trial report on or before 07/02/2019.'

[8] The defendants did not comply with the court orders dated the 31 July 2018 and 23 October 2018. On the 14 February 2018, the court made an order in the following terms:

'IT IS RECORDED THAT:

The First and Second Defendants have not complied with the court order dated 23/10/2018, in that they have not responded to the Plaintiff's request for further discovery by 09/11/2018. The Defendants are not in court today.

IT IS ORDERED THAT:

1. The case is postponed to 08/05/2019 at 15:15 for a Sanctions hearing;
2. The First and Second Defendants are directed to file a sanctions affidavit on or before 02/05/2019, explaining reasons for the non-compliance with the court order dated 23/10/2018 and explaining reasons for their non-appearance in court today, and showing cause why sanctions as contemplated in terms of Rule 53(2) should not be imposed;
3. Today's court must be served on the Defendants, by the Deputy Sheriff on the instructions of the Registrar at the Defendants' address furnished in terms of Rule 6, and a return of service be filed of record.'

[9] The above court order did come to the attention of the defendants on or about 27 February 2019 (see also para 9 and 10 of the defendants' affidavit filed on 3 May 2019). However, the defendants did not comply with the aforesaid court order, in that they did not file a sanctions affidavit on or before 2 May 2019. The defendants did not apply for an extension of time or for condonation of the non-compliance with the court order

dated 14 February 2019. However, on 3 May 2019 the defendants filed an application on notice of motion accompanied by an affidavit, praying that the court:

- not impose sanctions contemplated under rule 53 (2);
- discharges Messrs Tjombe-Elago Inc. as defendants' attorneys of record;
- orders Messers Tjombe-Elago to refund to the defendants the deposit
the defendants had paid.

[10] In the accompanying affidavit the defendants attempt to explain their failure to file the sanctions affidavit on or before 2 May 2019. The defendants explain that on 22 January 2019 they had instructed Tjombe-Elago Inc. to represent them as legal practitioners of record in this matter. According to the defendants, Messrs Tjombe-Elago had agreed to represent them. However, these legal practitioners did not act in accordance with the instructions and did not file any sanctions affidavit by the 2 May 2019.

[11] On the 7 May 2019 this court made the order as more fully set out in paragraph 2 hereof above. The defendants now require reasons for the aforesaid order.

Reasons for the court order dated 7 May 2019

Seriousness of the defaults

[12] The defendants were ordered by the court order dated 31 July 2018 (para 4) to respond to the plaintiff's request for further discovery, by 7 September 2018. The defendants did not comply with that order. By court order dated 23 October 2018 the defendants were ordered to respond to the plaintiff's request for further discovery by 9 November 2018. The defendants did not do so. By court order dated 14 February 2019 the defendants were ordered to file a sanctions affidavit by 2 May 2019. The defendants did not do so. The defendants had about 2^½ months (from 14 February 2019 to 2 May 2019) within which to comply with the order dated 14 February 2019.

[13] The failure to file the sanctions affidavit by 2 May 2019 is the latest breach in a series of failures by the defendants to comply with court orders. Set against the history of failures to comply with court orders by the defendants, the non-compliance with the court order dated 14 February 2019 constitutes a serious non-compliance.

[14] In other words, the court order dated 14 February 2019 does not stand on its own. It was made when the defendants were already in default of previous court orders. Therefore, the failure to comply with the court order dated 14 February 2019 makes the nature of the non-compliance a serious matter.

Lack of reasonable explanation for the defaults

[15] In terms of the court order dated 14 February 2019, the defendants were ordered to file by 2 May 2019 a sanctions affidavit explaining reasons for their non-compliance with the court order dated 23 October 2018 and explaining their reasons for their non-appearance in court on the 14 February 2019 as well as showing cause why sanctions contemplated under rule 53(2) should not be imposed. The defendants did not do so. Put differently, the defendants did not on or before 2 May 2019, explain reasons for their non-compliance with the court order dated 23 October 2018. Furthermore the defendants did not explain reasons for their non-appearance in court on 14 February 2019 nor did they show cause why sanctions contemplated under rule 53 (2) should not be imposed.

[16] Having failed to comply with the court order dated 14 February 2019, the defendants did not apply for condonation or for extension of time within which to comply with the court order. The affidavit filed by the defendants on 3 May 2019 was therefore improperly before court. In any event, even if one were to take into consideration the affidavit filed on 3 May 2019, same does not give reasonable explanation for the defendants' non-compliance with the court order dated 23 October 2018 or the court order dated 14 February 2019. A reasonable explanation is likely to arise from circumstances outside the control of the party in default, for example where the reason

for non-compliance is due to illness of the party or his/her legal practitioner or that such party was involved in some misfortune such as accident etc.

Consideration of all circumstances of the case

[17] As a result of the series of non-compliance with court orders by the defendants, the case could not progress to pre-trial conference. Considering the seriousness of the non-compliance with court orders and lack of reasonable explanation for the defaults, the imposition of sanctions in this matter was inevitable.

[18] The sanctions imposed, as more fully set out in the court order dated 7 May 2019 are proportionate to the seriousness of the defaults by the defendants, especially when viewed against the backdrop of absence of a reasonable explanation on the part of the defendants.

[19] It is for the foregoing reasons that the court order dated 7 May 2019 was made.

B.Usiku
Judge

APPEARANCES:

PLAINTIFF:

S. Vlieghe

Instructed by Koep and Partners

Windhoek

1st and 2nd DEFENDANTS:

N. Tjombe

Instructed by Tjombe-Elago Inc.

Windhoek