



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: HC-MD-CIV-ACT-CON-2017/00939

In the matter between:

ELIZABETH NIES

PLAINTIFF

and

KENNETH THIONGO KASUMA

FIRST DEFENDANT

Neutral citation: *Nies v Kasuma* (HC-MD-CIV-ACT-CON-2017/00939) [2020]
NAHCMD 111 (24 March 2020)

Coram: PARKER AJ

Heard: 3, 4 March 2020

Delivered: 20 March 2020

Reasons: 24 March 2020

Flynote: Costs – Postponement – General rule that party seeking postponement must pay wasted costs – Nevertheless, peculiar facts and circumstances can serve as exception to general rule – In instant case, in the absence of peculiar facts and circumstances, court ordering party seeking postponement to pay wasted costs.

Summary: Costs – Postponement – General rule that party seeking postponement must pay wasted costs – Nevertheless, peculiar facts and circumstances can serve as exception to general rule – In instant case court finding that conduct of counsel for party seeking postponement amounted to dereliction of duty, unpreparedness and inexcusable delay – Accordingly, court finding that no peculiar facts and circumstances existed to serve as exception to the general rule – Consequently, court granting wasted costs order.

ORDER

1. The matter is postponed to 10 March 2020 at 11H00 for a status hearing for the sole purpose of allocating a date for continuation of trial.
2. Plaintiff must pay the wasted costs for 3 – 5 March 2020.

JUDGMENT

PARKER AJ:

[1] During an ongoing civil trial Ms Mondo, counsel for plaintiff, applied for postponement. Mr Amoomo (with him Ms Ndilula), counsel for respondents, strenuously opposed the postponement. I allowed the postponement. In our rule of practice a court may refuse an application for postponement if in the opinion of the court the postponement is sought to delay proceedings or the delay occasioned by the postponement cannot be compensated by appropriate costs order. In the instant matter, it was my view that the application for postponement ought to be granted. Consequently, in the exercise of my discretion I granted the application with costs

and made the order appearing hereunder. Ms Mondo has asked for reasons for the costs order. Here are my reasons.

- ‘1. Matter is postponed to 10 March 2020 at 11H00 for a status hearing for the sole purpose of allocating a date for continuation of trial.
2. Plaintiff must pay the wasted costs for 3-5 March 2020.’

[2] With the greatest deference to Ms Mondo, it would seem counsel does not understand when the law demands that a presiding judge should give reason for his or her decision. In the English language ‘reason’ means ‘a cause, explanation, or justification’. In the instant matter, I gave the justification why plaintiff was mulcted in wasted costs in the chapeau of the order. That is the reason for the costs order. It must be remembered ‘reason’ is not synonymous with ‘judgment’, which this present prose is. Nevertheless, for the sake of Ms Mondo I shall continue.

[3] In the chapeau of the order, I noted that ‘it is due to the conduct of plaintiff’s counsel (Ms Mondo) that the trial could not continue on the set down dates’ First, Ms Mondo, upon her own confession, has no knowledge as to how in terms of the law of evidence and the rules of court, a document can be admitted as part of the record of proceedings. Second, she does not know the difference between the witness statement of a witness and the expert report of such expert witness, and how such expert report could be admitted as forming part of the record of proceedings. Such was Ms Mondo’s unfortunate lack of knowledge of these rudimentary aspects of the law of evidence and rules of court that it drew a sympathetic remark from Mr Amoomo that it is not a shame for Ms Mondo to have admitted her lack of knowledge of the aforementioned aspects for the law of evidence and the rules of court. Mr Amoomo made that sympathetic remark in order to rebuff Ms Mondo’s attempt to shake off her fault in the trial not proceeding as set down.

[4] And what is more; as Mr Amoomo reminded the court, the last sitting of the court in these proceedings was on 14 November 2019, yet it was only when the trial was about to continue that Ms Mondo was fretting about the unavailability of her

witnesses and the fact that two of them had not filed witness statements with their expert reports annexed thereto. Further, accordingly to Ms Mondo she had subpoenaed Hon. Councillor Kandji to give evidence. But there was no affidavit of service filed of record to indicate that. Indeed, Hon. Councillor Kandji had in fact been subpoenaed. When at long last an affidavit of service surfaced, it was clear that the Honourable Councillor had been subpoenaed on 25 February 2020, that is, shy of seven days before the set down date for continuation of trial. There was no cogent and satisfactory explanation from Ms Mondo why she acted at the last minute. Her conduct in itself constituted unworthy professional conduct. Indeed, even if the psychiatry witness, the psychology witness and Hon. Councillor Kandji were in attendance at the court they could not give evidence because Ms Mondo had failed to file any witness statements made by them, as required by the rules.

[5] Lest I forget, Ms Mondo's conduct amounted to dereliction of duty, unpreparedness and inexcusable delay which should have attracted costs *de bonis propriis* against her (see *Katjaimo v Katjaimo* 2015 (2) NR 340 (SC)). I restrained my hands from granting costs *de bonis propriis* because such costs were not argued.

[6] The general rule is that party seeking postponement should pay wasted costs unless peculiar facts and circumstances serve as an exception to the general rule (*Christian Metropolitan Life Namibia and Another* 2007 (1) NR 255 (HC)). I find no peculiar facts and circumstances that could serve as exception in these proceedings. Consequently, I made the order appearing in para 1 above.

C PARKER
Acting Judge

APPEARANCES

PLAINTIFF: R Mondo
Nixon Marcus Public Law Office, Windhoek.

DEFENDANT: K. Amomo (with him N Ndilula)
Kadhila Amomo Legal Practitioners, Windhoek