

IN THE HIGH COURT OF NAMIBIA

Case Title: SIEBERT JACOBUS BRIEDENHANN vs ELIZABETH VAN ROOI	Case No: HC-MD-CIV-ACT-DEL-2018/03700
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: Honourable Mrs Justice Rakow, AJ	Date of hearing: 28 November 2019
	Date of order: 21 January 2020
Neutral citation: <i>Briedenhann v Van Rooi</i> (HC-MD-CIV-ACT-DEL-2018/03700) [2020] NAHCMD 13 (21 January 2020) Having read the record of proceedings as well as submissions made by counsels for the applicants and the respondent: IT IS HEREBY ORDERED THAT: a) The late filing of the plea of the defendant is hereby condoned. b) The case is postponed to 11 February 2020 for a Case Planning Conference. c) The parties is to file a joint case plan if they so wish, on or before 7 February 2020. d) Costs of the application to be costs in the cause.	
Reasons for orders: <u>Background</u> [1] The Plaintiff/Respondent in the current application is Dr Siebert Jacobus Briedenahnn, a practicing Orthodontist and the Defendant/Applicant, Mrs Elizabeth van Rooi, was employed by him as an accountant. He claims that she is liable towards him for payment of N\$2 648 794.21 as damages for monies unlawfully and intentionally stolen or alternatively misappropriated from him. [2] The combined summons was filed on the eJustice system on 13 September 2018 and despite numerous attempts, could only be served on the Defendant on 18 February 2019. The Plaintiff then filed an	

application for default judgement, which could not be served on the Defendant but they managed to alert the Defendant through her daughter that they intend to apply for default judgement on 14 May 2019. On 14 May 2019, the matter was postponed to allow the Defendant to apply for legal aid, which she then did and which application was granted and Mr. Hassan Engelbrecht from the firm, Brockerhoff & Associates Legal Practitioners, filed a notice of intention to defend on behalf of the Defendant on 13 August 2019.

[3] On 27 August 2019, the matter was postponed for a status hearing to 10 September 2019 with a specific order instructing the parties to file a joint case plan no later than close of business on 5 September 2019. No joint case plan or status report was filed by the parties as ordered by the court and the court proceeded with the matter on 9 September 2019 and gave its own order regarding a case plan. It was ordered that the Defendant was to file its plea and counterclaim, if any, on or before 23 September 2019 together with some other deadlines for the filing of discovery affidavits and the filing of a case management report. It seems that this order was granted on 9 September 2019 in the absence of the parties.

[4] On 23 September 2019, the Defendant filed a status report requesting leave from the court to file a case plan before any further pleadings are filed, as the Defendant was of the opinion that a joint case plan should be filed before the matter can proceed further. The Defendant however did not file a plea on or before 23 September 2019. The plea was subsequently filed on 8 October 2019. The Defendant further filed a rule 32(10) report in which it indicated that the legal practitioners for the Plaintiff were engaged beforehand regarding the failure to file a plea as per the court order of 9 September 2019 but that an amicable solution could not be found and that in a letter dated 4 October 2019, they indicated that they hold instructions to apply for summary judgement. The plea of the Defendant further raised the issue that the allegations made in the particulars of claim of the Plaintiff are vague and embarrassing and lack averments necessary to sustain any action.

[5] On 8 October 2019, the Defendant filed the current application before court, in essence seeking condonation for the Applicant's non-compliance with the court order dated 9 September 2019 and cost of suit, should the application be opposed. From the founding affidavit of Tukondjeni Tulimevava Nanhapo accompanying this application, it seems that the matter was allocated to him in the second week of September 2019 and that he requested the Defendant to come to his office for a consultation in order to file a plea, which she did not do. She further was not prepared to consult via telephone but gave instructions for a case plan to be filed before proceeding with the matter in order to deal with issues raised in the Plaintiff's summons.

[6] The Plaintiff opposes this application for condonation on a number of grounds, including the non-compliance with rule 65(3) – failure to set out the relief claimed in the event the Honourable Court grants the application for condonation; failure to file a confirmatory affidavit by the Defendant supporting the explanation in the founding affidavit; that the legal practitioner for the Defendant is not authorized to launch the application on behalf of the Defendant and that the Defendant failed to comply with the requirements set out for applications of condonation in that it stands on two legs, one being “good cause shown” and the other “prospects of success”. Dr. Siebert Jacobus Briedenhann filed an answering affidavit and conceded that both parties were in non-compliance of the court order, understood to mean the order given on 27 August 2019.¹

The problem

[7] When going through the documents and court orders for this matter, I realized that a fundamental problem, in my opinion, created much of the situation that we find ourselves in now, and that is the court order granted on 9 September 2019, wherein the court *mero moto* provided a case plan for this matter (see rule 23(8)). The court is more than entitled to do that, to proceed in making a case plan order in the absence of a case plan filed by the parties and rule 23(2) and (3) reads as follows regarding the process and the content of such a case plan:

‘(2) Whether or not the parties submit a case plan before the case planning conference the managing judge must at that conference determine what should be included in the case plan and make it an order of court.

(3) The case plan must address the following -

- (a) whether the plaintiff intends to apply for summary judgment and the proposed dates for filing the necessary papers in respect thereof, the proposed date of hearing the summary judgment and the proposed dates for the filing of heads of argument;
- (b) whether the defendant intends to except to or apply to strike out the plaintiff's particulars of claim and if so, the basis of the exception or strike out and a proposed date for the hearing of that exception or application to strike out, the dates for filing all necessary papers in respect of the exception or strike out, as well as the dates for filing heads of argument;
- (c) whether or not there will be notice given of any irregular proceedings or security for costs sought;
- (d) dates for the filing of the plea, replication and, in case of a counterclaim, the plaintiff's plea thereto;
- (e) the dates for filing of discovery affidavits by all parties; and
- (f) any issue that may be appropriately dealt with at that early stage or on which the managing judge's direction is sought by the parties.’

¹ See Answering affidavit of Siebert Jacobus Briedenhann par. 6.4.

[8] It seems from the reading of rule 23(2) that the content of the case plan should, whether a case plan was filed or not, be determined at the case planning conference. There should therefore be some sort of discussion around the content of a case plan. In practice, proposed case plans are agreed among legal practitioners and then filed before the date for the case planning conference and routinely accepted by judges and approved from chambers in the absence of the parties and before the date of the case planning conference. This happens without hearing the parties as there is already some form of agreement between the parties when the proposed case plan is filed. The same however will not happen if one or both of the parties are unrepresented. Then the matter will be dealt with in open court on the date for the case planning conference and such conference will then take place with a subsequent case plan order being made.

[9] Although not raised in the current arguments, the court is of the view that the crux of this matter is centered on the question as to what is to happen when both parties are represented by legal practitioners but they fail to file a draft case plan, although ordered to do so. The answer must be clear, the case planning conference is then to take place and the issues raised under rule 23(3) must be addressed during such a conference and, although the managing judge can then proceed to determine what should be included in the case plan, the content thereof should be discussed with the parties. In the current matter, this did not happen. From the court order of 9 September 2019, it is clear that the case planning conference did not take place as envisaged on 10 September 2019 (as per the court order of 27 August 2019) and it took place in chambers and in the absence of the parties. Their input was therefor never given or taken into consideration.

[10] The result of this, is that the Plaintiff never got to indicate that they intent to apply for summary judgement (or not) as it seems to be an option that they would like to exercise from the reading of the various papers, neither did the Defendant get to indicate that they intend to except or apply to strike out the Plaintiff's particulars of claim, which according to their plea, seems to be the case. What is important to note however, is the prohibition under rule 23(7):

'If no indication is given that an application or proceeding in terms of subrule 3(a), (b) or (c) will be made or initiated, the part failing to do so is precluded from bringing such proceeding unless-

- (a) it is an application seeking security for costs; or
- (b) the managing judge on good cause shown determines otherwise.'

[11] In the present instance, the Defendant already on 23 September 2019 indicated that they would still like to have the opportunity to file a case plan. Although this was no longer an option, and perhaps not the appropriate request, the court understood it as an attempt to participate in a case planning conference or at

least to be provided with an opportunity to give input to the case plan, including a possibility to have the matter referred to the alternative dispute resolution process.

Where does it leave the current application for condonation?

[12] The current application before court is one seeking to condone the late filing of the plea of the Defendant. This plea was filed, although there was a request from the Defendant to allow the parties to file a case plan, which was filed in the form of a status report dated 23 September 2019. No response was forthcoming on that request and the Plaintiff proceeded to file a notice of set down for default judgement to be granted, which then prompted the Defendant to file a plea as well as the current application.

[13] In light of the issues raised *mero moto* by this court above, I see no other option as to grant the application for condonation filed by the Applicant/Defendant, and to make an appropriate order to allow for a Case Planning Conference to take place and to amend the current case plan to allow for input from the parties to be included in the case plan.

In the result, I make the following order

- a) The late filing of the plea of the defendant is hereby condoned.
- b) The case is postponed to 11 February 2020 for a Case Planning Conference.
- c) The parties is to file a joint case plan if they so wish, on or before 7 February 2020.
- d) Costs of the application to be costs in the cause.

E Rakow

Acting Judge

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicants	Respondent
Mr. Nanhapo	Ms Losper

<i>Brockerhoff & Associates Legal Practitioners</i> <i>On instruction of the Directorate of Legal Aid</i>	<i>ENSafrica Namibia</i>
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