

“ANNEXURE 11”

IN THE HIGH COURT OF NAMIBIA

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| Case Title: <i>KUISEBMOND COMMUNITY HOUSING TRUST vs LUKRENTIA NDJEKELA</i> | Case No.: HC-MD-CIV-ACT-DEL-2018/01526 |
| | Division of Court: High Court (Main Division) |
| Heard before: Honourable Justice Tommasi J | Date set for hearing: Written agreement to have the matter determined on papers filed on: 12 May 2020 |
| | Delivered on: 27 May 2020 |
| | Reasons Delivered: 01 June 2020 |
| Neutral citation: <i>Kuisebmond Community Housing Trust v Ndjekela</i> (HC-MD-CIV-ACT-DEL-2018/01526) [2020] NAHCMD 209 (1 June 2020) | |
| The Order: Having read and considered heads of argument filed by both parties and having read the pleadings and other documents filed of record: IT IS ORDERED THAT: 1. Plaintiff is given a final opportunity to deliver the documents listed in defendant's form 11 to the defendant on or before 12 June 2020 or state on oath or by affirmation within 10 days of this order that such documents, are not in his or its possession, in which case the plaintiff must state its whereabouts, if known. Failure to do so will result in this court dismissing plaintiff's claim in terms of Rule 28 (13). 2. The plaintiff in his capacity as a Trustee of Kuisebmond Community Housing Trust, is ordered to pay the defendant's costs incurred in respect of the sanctions hearing, unlimited and on an attorney client scale, | |

such costs to include the costs of one instructing and one instructed counsel.

3. The matter is postponed to 17 June 2020 for a Status hearing.

Reasons for orders

Introduction

[1] The plaintiff, in his capacity as a Trustee of Kuisebmond Community Housing Trust instituted a claim against the defendant for the payment of the amount of N\$333.170.00. It is averred that this amount was collected by the defendant on behalf of plaintiff from third parties during 2009 to 2017. The plaintiff claims that the defendant failed to account for the monies received and failed to hand the money to the Trust.

[2] The defendant raised two special pleas namely, locus standi and prescription. The defendant admits having received monies on behalf of the trust but denies that same were not handed to the Trust. The defendant pleaded that she handed the money to the plaintiff, other trustees, employees of the trust and family members of the trustees authorised to receive same. Defendant specifically pleaded that she requires to further inspect documents which plaintiff must discover.

[3] This court on 31 July 2018 issued a case plan ordering the parties to discover on or before 16 October 2018. The defendant complied with the case plan. On 3 October 2018, before the date discovery became due, the plaintiff's legal practitioner withdrew. The return of service reflects that this notice was served on Mr Elias Mutilifa (plaintiff) on 20 September 2018. No discovery affidavit was filed on or before 16 October 2018. The previous managing judge ordered the plaintiff to be present at the proceedings on 6 February 2019. I became the managing judge and issued a similarly worded order, directing the plaintiff to appear on 24 April 2019. The plaintiff instructed the current legal practitioners of record who came on record and filed an affidavit of the plaintiff to explain the delay in pursuing the claim. Mr Mutilifa explained that he received the Notice of Withdrawal from his secretary on 29 November 2018 and that he did not understand the full import thereof.

[4] The court on 11 June 2019 ordered the plaintiff to file its discovery on or before 21 June 2019.

[5] On 21 June 2019 the plaintiff filed its discovery affidavit. The plaintiff discovered a list of receipts,

missing receipts and receipt cash books for the years 2009 to 2015 (duplicates)

[6] On 26 June 2019, the defendant filed a notice in terms of rule 28(8)(a) requesting the plaintiff to set out in a written statement which of the documents listed in its notice, the plaintiff has or previously had in its possession. The defendant listed *inter alia* the following documents: written resignations of trustees, minutes of meetings where: trustees were dismissed and others nominated to replace such trustees; certificates issued by the Master of the High Court pursuant to the appointment of trustees; accounting records; investigation reports in respect of the missing monies, etc. It is apparent that these are material documents required by the defendants and that these documents ought to be in the possession of the plaintiff.

[7] On 16 July 2019 the plaintiff filed an additional discovery listing 1 document which appears on the list of the defendant.

[8] The defendant filed an application to compel discovery in terms of rule 28(8). The plaintiff's legal practitioner filed an affidavit stating that the plaintiff has made discovery of all the documents that relate to this matter and that the plaintiff does not have any further documents in its possession which are relevant to the matter at hand. On 30 October 2019, the court compelled the plaintiff to discover the documents as listed by the defendant on or before 29 November 2019. The plaintiff failed to comply with this court order.

[9] The parties filed a joint status report and proposed that the court postpone the matter for plaintiff to show cause why the court should not impose sanctions in terms of rule 53 (2). The parties proposed dates for compliance with rule 32 (9) and (10) and for the parties to file their respective affidavits for a sanctions hearing. The court, in accordance with the dates provided by the parties, granted the following order on 04 December 2019:

- '1. The Plaintiff shall comply with Rule 32(9) and (10) by no later than 15 January 2020.
2. If the matter is not amicably resolved, Plaintiff must file its application for condonation for non-compliance with Court order of 30 October 2019, by no later than 22 January 2019.
3. The Defendants must file their answering affidavit by no later than 26 November 2019.
4. Plaintiff to file replying affidavit by no later than 29 January 2020.
5. The case is postponed to 5 February 2020 at 14:15 for status hearing (Reason: Determination of dates for hearing of interlocutory).'

[10] On 05 February 2020, it was evident that the plaintiff again failed to bring an application for condonation as ordered on 4 December 2010. The court ordered the plaintiff to file an affidavit showing cause why the sanctions provided for in rule 53 should not be imposed for the failure to comply with the court order dated 30 October 2019 and the order of 4 December 2020. The parties filed affidavits and heads of argument herein. This court now has to determine whether to impose sanctions and if so what the appropriate sanctions would be.

Plaintiff's position

[11] The legal practitioner of plaintiff filed an affidavit explaining that there has been compliance with Rule 32 (9) and the omission to file a Report in terms of Rule 32 (10) was a complete oversight by the practitioner. The plaintiff's legal practitioner explained that she consulted with the trustees and they undertook to provide the documentation she requires to make discovery. The plaintiff's administrators provided her with documents which are not relevant to the proceedings. Further documentation was provided to her by the plaintiff during February 2020. She also stated that some of the documents are with plaintiff's erstwhile legal practitioners and others with the police. The bottom line is that plaintiff has to date not given the legal representative the documents she requires to make discovery. The legal practitioner was thus unable to give an undertaking that, in the event condonation is granted, plaintiff would be in a position to comply with the court order dated 30 October 2019.

[12] In argument plaintiff's legal practitioner submitted that:

- (a) The explanation proffered for the non-compliance with the court orders is reasonable.
- (b) There would be no prejudice to the defendant as the delay is not substantial and that the defendant in any event would benefit from the plaintiff's discovery in the litigation of this matter.
- (c) The matter has not been set down for trial, therefore no trial dates have been affected.
- (d) The plaintiff enjoys prospects of success.

[13] The plaintiff thus prays for condonation and an opportunity to file its discovery in order to bring this matter to finality.

The defendant's position

[14] The defendant submits that the plaintiff's application is improper before court as there is non-compliance with rule 55¹ as well as the court order dated 04 December 2019, which ordered the plaintiff to

comply with rule 32(9) and (10). The defendant further raised the following oppositions:

1. The sanctions affidavit is improperly deposed to as it was deposed to by the plaintiff's trustee as opposed to the legal representative.
2. The plaintiff lacks authority to conduct these proceedings.
3. The explanation proffered by the plaintiff is not proper and reasonable.
4. The defendant will suffer prejudice.

[15] The defendant argues that the plaintiff has a history of not complying with court orders and that this current application is merely a repeat of the previous non-compliances. It is the defendant's position that the plaintiff has failed to satisfactorily explain the reason for its non-compliance and the failure to either bring a rule compliant condonation application and or an application for the extension of time. The defendant avers that from the plaintiff's own affidavit, there appears to have been documents provided which could have been discovered as partial compliance to the court orders, however the plaintiff failed to do that too.

[16] The defendant submits that it has suffered continued prejudice as the costs of litigating this matter has placed a financial burden on her and her husband's finances as they are unable to meet their legal fees. The defendant further submits that it intends to call several witness to testify in her defense at trial, however the long delay in prosecuting this matter could result in the witnesses failing to properly recollect the facts at trial.

[17] The defendant prays for the following orders:

1. For the plaintiff's combined summons, particulars of claim, and replication be struck;
2. For the plaintiff to pay the defendant's taxed wasted costs occasioned by this action, such costs to include the costs of one instructing and one instructed counsel.
3. For the costs awarded to be paid by the plaintiff in his personal capacity, alternatively in his capacity as trustee of the Kuisebmond Community Housing Trust.
4. Further and or alternative sanctions as envisaged in rule 53.

Legal principles

[18] In determining this matter, the court is guided by the rules of court and in particular rule 1(3) which

¹ 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.

states that the overriding objective of the rules is to facilitate the resolution of the real issues in dispute, justly and speedily, efficiently and cost effectively, as far as practicable. Rule 17 (2) further provides that, the control and management of cases filed at the court is the primary responsibility of the court and the parties and their legal practitioners must cooperate with the court to achieve the overriding objective, thus non-compliance with the case management orders are in direct conflict with the rules of court and against the interest of bringing matters to finality.

[19] On the other hand I must bear in mind that the rules are to serve the interest of justice and must do justice between the parties. In *Donatus v Ministry of Health and Social Welfare 2016 (2) NR 532 (HC)*, Masuku J, at page 541, para 32, stated as follow when confronted with a similar scenario:

‘ It is clear from the foregoing that the court, in applying sanctions to an errant party, exercises a discretion and has at its disposal a panoply of alternatives in terms of punishing a party that is in default of a court order or direction. In this regard, it would seem to me that the court should enter an order that is just, appropriate and fair in all the circumstances. It would seem to me that the court has to consider the case at hand; its nuances; the nature of the non-compliance; its extent; its effect on the further conduct on the proceedings; the attitude or behaviour of the party or its legal representative, to mention some of the considerations, and thereafter make a value judgment that will at the end meet the justice of the case.’

Application of the law

[20] The plaintiff herein has failed to make proper discovery of documents for a considerable time. The first delay was occasioned by the fact that the plaintiff’s legal practitioners withdrew. The plaintiff however took more than five months to instruct the current legal practitioners. The plaintiff’s complied with the order of court to discover but this evidently did not suffice. When requested to make additional discovery, the plaintiff complied albeit incompletely. It was at this stage that the plaintiff was required to deliver a written statement giving full particulars in respect of each document which was required i.e whether plaintiff or its agent has in its possession or which it had but no longer have in its possession and those to which the plaintiff has a valid objection but offered a blanket statement that they do not have any other documents in their possession.

[21] This clearly cannot be the case since the trust must have those documents which are required by statute. It is also clear that the plaintiff had certain documents in its possession but now no longer has same in

its possession. Had the plaintiff taken the time to properly respond to the request of the defendant, it would have narrowed the dispute surrounding the discovery of documents. The plaintiff could have approached this court for an extension but opted rather not to comply with the court orders.

[22] This dispute between the parties has been pending since 2017 and both parties want to bring finality to the matter. The court take cognizance of prejudice pleaded by the defendant and would have to give an order which would mitigate the prejudice suffered by the defendant.

[23] This court would be completely justified to show its disapproval for the conduct of the plaintiff in the strongest terms. I however consider that this matter is near finalization and that dismissing the plaintiff's claim would be quite severe. The court would mark its disapproval by making an appropriate cost order.

[24] For the afore-going reasons this court would afford the plaintiff a final opportunity to deliver the documents to the defendant on or before 12 June 2020; or state on oath or by affirmation within 10 days of the order that such documents, are not in his or its possession, in which case the plaintiff must state their whereabouts, if known. Failure to do so will result in this court dismissing plaintiff's claim in terms of Rule 28 (13)

Costs

[25] The defendant prays for punitive costs, unlimited on an attorney client scale, to be granted against Mr Mutilifa, a trustee of the plaintiff being the representative who instituted this claim on behalf of the plaintiff. The defendant seeks these costs as it contends that the plaintiff unreasonably persisted with litigation of this matter, besides the fact that it failed to make rule compliant discovery, the plaintiff failed to approach the court in terms of the rules in order to make an application for extension of time to file its discovery when it became apparent that it would not meet the deadline, and failed to file a condonation application in terms of rule 55.

[26] The honourable Masuku J in deciding on the issue of granting punitive costs in the case of *Lazarus v The Government of the Republic of Namibia (Ministry of Safety and Security)*,² quoted the passage from the South African Constitutional Court case of *Black Sash Trust v Minister of Social Development*³ which laid down

² (I 3954/2015) [2017] NAHCMD 348 (1 December 2017).

³ (CCT48/17) [2018] ZACC 36; 2018 (12) BCLR 1472 (CC) (27 September 2018).

the guidelines for granting personal costs orders as follows:

[5] The common-law rules for granting a personal costs order against persons acting in a representative capacity were based on what this Court in *Swartboo* described as conduct that was “motivated by malice or amount[ed] to improper conduct”. In many cases the formulation of Innes CJ in *Vermaak’s Executor*, that the representative’s “conduct in connection with the litigation in question must have been *mala fide*, negligent or unreasonable”, has been followed.

[6] When public officials were guilty of acting in *mala fides* (bad faith), courts have in the past made personal costs orders against them. Costs orders have been given against judicial officers where they have acted in bad faith. In *Regional Magistrate Van Winsen* AJ held that it “is the existence of *mala fides* on the part of the judicial officer that introduces the risk of an order of costs *de bonis propriis* being given against him”. A similar approach was taken in *Moecca* in which an order to pay costs *de bonis propriis* (from his or her own pocket) was made against an administrative official. He had handled this enquiry so badly and had made an order so inappropriate that the Court held that, on the assumption that *mala fides* must be shown, that it had.’

[27] I have no doubt that the same test may be applied *in casu*, this court is of the opinion that the current facts do not warrant punitive costs against Mr Mutilifa, as he merely acted in his position as trustee of the plaintiff in the litigation of this matter. It is common cause that the plaintiff has litigated this matter in a poor fashion, however, there were numerous factors which contributed to this, and I therefore find that Mr Mutilifa is not to blame in his personal capacity.

[28] I have stated that the conduct of the plaintiff herein warrants this court to impose punitive costs. However no punitive costs shall be awarded against the trustee of the plaintiff in his personal capacity.

[29] In the result I make the following order:

1. Plaintiff is given a final opportunity to deliver the documents listed in defendant’s form 11 to the defendant on or before 12 June 2020 or state on oath or by affirmation within 10 days of this order that such documents, are not in his or its possession, in which case the plaintiff must state their whereabouts, if known. Failure to do so will result in this court dismissing plaintiff’s claim in terms of Rule 28 (13).
2. The plaintiff in his capacity as a Trustee of Kuisebmond Community Housing Trust, is ordered to pay the defendant’s costs incurred in respect of the sanctions hearing, unlimited and on an attorney client scale,

such costs to include the costs of one instructing and one instructed counsel.

3. The matter is postponed to 17 June 2020 for a Status hearing.

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| Judges' signature: | Note to the parties: |
| | Not applicable |
| Counsel: | |
| Plaintiff | Defendant |
| Ms. T lileka On behalf of Plaintiff Sisa Namandje & Co. Inc. | Ms. E Yssel On behalf of Defendant Engling, Stritter & Partners |
| Matter heard on the papers. | Matter heard on the papers. |