

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2021/01536

In the matter between:

NATALIA NDAPANDULA ISAK

PLAINTIFF

and

CHIRSTOPH SEIMELO

FIRST DEFENDANT

NAMIBIA CIVIL AVIATION AUTHORITY (NCAA)

SECOND DEFENDANT

Neutral citation: *Isak v Seimelo* (HC-MD-CIV-ACT-DEL-2021/01536) [2024]
NAHCMD 182 (19 April 2024)

Coram: SCHIMMING-CHASE J

Heard: 4 March 2024

Delivered: 19 April 2024

Flynote: Practice — Rules of court — Rule 33 — Whether rule 33(1) places a limitation on a litigant to be examined on psychological well-being — Whether exact non-compliance would render a notice null and void — Substantial compliance with the rule would meet the purpose thereof.

Practice — Judicial case management — Overriding objectives — To finalise matters speedily and cost effectively.

Practice — Judicial case management — Delay in finalising matters — Parties must genuinely assist the court in the task to finalise matters in terms of the disposal benchmarks — In appropriate cases, courts will mete out punitive measures to the parties in default, to demonstrate its condemnation of actions taken by parties that are viewed to delay the finalisation of cases, and thus increasing costs and demonstrating inefficiency.

Practice — Dismissal of proceedings — Application for dismissal of action on grounds of failure to prosecute action within reasonable time — Factors to consider — Length of delay — Explanation for delay — Prejudice caused by defendant — Effect of delay in respect of trial — Extent to which defendant contributed to delay

Summary: This is an application by the defendants seeking to dismiss the plaintiff's action, which was instituted on 16 April 2021, on the premise that the plaintiff is unacceptably delaying the finalisation of the matter, which is prejudicial to the defendants. The plaintiff opposes the application.

The plaintiff is employed by the second defendant as an assistant legal officer. She sued the first defendant, who is the chief legal counsel of the second defendant, for allegedly assaulting her, seeking, inter alia, damages of N\$5 million for alleged pain and suffering, bodily harm and humiliation. The plaintiff alleged in her particulars of claim that due to the assault, she suffered head injuries that permanently altered her way of life. As a result of the head injuries, she was advised by her doctor to reduce any physical activity to avoid triggering recurrences. The plaintiff alleged that she also suffers from heightened trauma, which requires continuous medical treatment, and which has the potential to become chronic. She alleges that she further suffered psychological trauma, which requires continuous medical treatment, and has potential of developing into a mental health post-traumatic stress disorder.

The second defendant is sued by means of vicarious liability. The defendants denied the plaintiff's claim and plead that the plaintiff apparently threatened the second defendant's employees. The defendants further counterclaimed against the plaintiff for alleged defamatory statements made by the plaintiff and seeks, inter alia, N\$700 000 in damages.

On 20 June 2023, this matter effectively came to a halt when the defendants filed a notice under rule 33(2) requesting the plaintiff to submit herself for a medical examination to assess her psychological well-being, after she filed a report on 30 March 2023, which deals with her psychological well-being. The defendants allege that the plaintiff has failed to submit herself for examination and has delayed the matter effectively. The defendants are of the view that given that the plaintiff intends to call an expert witness to testify on her psychological well-being, they are entitled to call their own expert witness to assess her psychological well-being. Thus, it is vital to their defence that their own expert assesses the plaintiff as envisaged under rule 33.

The plaintiff argued that the rule 33(2) notice by the defendants is null and void as the defendant was not given 15 days within the meaning of the rule to submit to an examination. The plaintiff raised a further point that a psychological assessment did not fall within the meaning of bodily injury envisaged by rule 33. In addition, the plaintiff alleged that the doctor procured by the defendants to psychologically assess the plaintiff was undertaken by the defendants in breach of the Public Procurement Act 15 of 1995 ('PPA') as the second defendant is a public enterprise which is subject to the PPA.

Held that, the provisions of rule 33 are invoked when a party's own state of health is relevant to the dispute, and where the dispute results from a damages claim for alleged bodily injury or death. The plaintiff claims bodily injury and long-term psychological damage. The defendants are entitled to file a notice in terms of rule 33, as part of preparation for their defence.

Held further that, it may be that the notice is not in exact compliance with the rules of court on this aspect, but to argue that it is null and void is overreaching.

The notice substantially complies with rule 33.

Held further that, in any event, rule 33(4) provides the plaintiff opportunity to object to the dates proposed by the defendants and offer alternative dates within five days of receipt of the notice. Rule 33(6)(a) prescribes that should no objection be lodged, the terms of the notice shall be deemed to have been accepted by the other party. It is common cause that no objection was lodged by the plaintiff.

Held further that, the principles to be applied in considering whether to dismiss the plaintiff's action for inexcusable delay is that where there is a delay in finalising proceedings, a mere delay and the resulting prejudice are not sufficient in the justification of dismissal of an action. What must be present in the instance is that an inordinate and inexcusable delay exists that leads to an abuse of the process of court. This is a factual enquiry which entails the reasons for the delay, which may be inferred from the circumstances of the case.

Held further that, the courts must be accessible to all and, thus, this court must be slow to exercise its power to dismiss an action summarily on account of abuse of process and should only use the same 'sparingly', and 'only in very exceptional cases'.

Held further that, this is such an exceptional case. The plaintiff's explanation for the delays are weak and unpersuasive. The plaintiff's conduct was in the circumstances inexcusable and unnecessarily prejudicial to the defendants. The court exercises its discretion and dismisses the plaintiff's action.

ORDER

1. The plaintiff's action is hereby dismissed and regarded as finalised.

2. The plaintiff is ordered to pay the defendants' costs for the action, which costs include one instructing and one instructed counsel, where employed.
3. The plaintiff is ordered to pay the defendants' costs of this application limited by rule 32(11).
4. The matter is postponed to **3 June 2024 at 15h30** for a status hearing to determine the further conduct of the defendants' counterclaim.
5. The parties must file a joint status report outlining the further conduct of the matter on or before **29 May 2024**.

JUDGMENT

SCHIMMING-CHASE J:

[1] This is an application by the defendants for the dismissal of the plaintiff's action on the grounds that the plaintiff has impermissibly delayed the proper prosecution and finalisation of the action, which was instituted by her three years ago, on 16 April 2021. The defendants allege that the plaintiff's conduct in this matter is in conflict with the overriding objectives of judicial case management, and prejudicial to the defendants in the conduct of their defence to the action. The plaintiff opposes the application.

[2] At all material times, the plaintiff and defendants are legally represented by the same legal practitioners of record. I mention this to highlight, at the outset, that the parties to this action have had the benefit of considered legal advice.

[3] The plaintiff is a major female employed by the second defendant as an assistant legal officer. The first defendant is also employed by the second defendant as its chief legal counsel.¹

[4] Briefly, the plaintiff claims damages against the defendants² in the amount of N\$5 million (together with interest and legal costs) for pain, suffering, bodily harm and humiliation allegedly suffered at the hands of the first defendant who allegedly assaulted the plaintiff on 24 February 2021 at the second defendant's premises, during working hours and in full view of the second defendant's employees. The particulars of the assault as pleaded are that the first defendant 'aggressively and violently punched, slapped, and wrestled with the plaintiff'. He also supposedly 'grabbed and pushed' the plaintiff.

[5] As a result of this apparent assault by the first defendant, the plaintiff alleges, in her particulars of claim, that she suffered bodily injury and head injuries, which have permanently altered her way of life. The plaintiff alleges further that as a result of the injuries allegedly sustained, she was advised by her doctor to reduce any physical activity to 'avoid triggering recurrences'. The plaintiff alleges that she also suffers from heightened psychological trauma, which requires 'continuous medical treatment, and which has the potential to become chronic, should the plaintiff not recover'. This is alleged to have the potential of developing into a mental health post-traumatic stress disorder.

[6] The plaintiff's claim against the second defendant is based on vicarious liability, and the duty, as alleged, to, inter alia, create a safe working space for the plaintiff as an employee.

[7] The defendants defended the action on 22 April 2021. In summary, it is denied that the first defendant assaulted the plaintiff. The defendants plead that it was the plaintiff who threatened the second defendant's employees with

¹ The second defendant is the Namibia Civil Aviation Authority ('NCAA') a juristic civil aviation regulatory body established in terms of s 8 of the Civil Aviation Act 6 of 2016, with the main object being a civil aviation regulatory body.

² Against the defendants, jointly and severally, the one paying the other to be absolved.

violence and/or harm, after attempts were made to prevent the plaintiff from leaving the workplace with certain documentation alleged to be in the lawful property of the second defendant. The defendants also deny the extent of the injuries suffered by the plaintiff, and deny that the plaintiff is entitled to any compensation. Resultantly, the defendants pray for an order that the plaintiff's claim be dismissed with costs. The defendants instituted a counterclaim for damages in the amount of N\$700 000 against the plaintiff, alleging that the plaintiff authored and published certain defamatory statements between February and June 2021. The plaintiff denies that she defamed the defendants.

[8] Before I consider this application, and for purposes of context, I mention that this matter has been case managed by me in terms of the rules of court since its inception, on 16 April 2021. Just a little of three years later, and despite regular case management, the matter is still not anywhere near ready for allocation of trial dates.

[9] What gave rise to this particular application for dismissal relates to the attempts by the defendants to arrange for the plaintiff to submit to a medical examination in terms of rule 33. From the founding papers in this dismissal application, the defendants allege that the dilatory conduct of the plaintiff in failing to submit herself timeously, or at all, to a medical examination, creates prejudice and an unnecessary escalation of legal costs in preparing for this matter. The defendants contend that they are resultantly unable to meet a vital aspect of the plaintiff's case. The defendants also take issue with what they term unnecessary delays caused by the plaintiff's failure to abide by judicial case management, and in particular the provisions of rule 1(3).³

³ Rule 1(3) provides that the overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by -

- (a) ensuring that the parties are on an equal footing;
- (b) saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter;
- (c) dealing with a cause or matter in ways which are proportionate to -
 - (i) the amount or value of the monetary claim involved;
 - (ii) the importance of the cause;
 - (iii) the complexity of the issues and the financial position of the parties;

[10] On 13 February 2023,⁴ this court made an order giving directions for the delivery of witness statements and expert witness statements between the plaintiff and the defendants. This is because the parties requested more time to deliver expert witness statements in their signed joint proposed pre-trial order. The plaintiff was directed to deliver outstanding witness statements on or before 31 March 2023. The defendants were ordered to deliver their witness statements on or before 21 April 2023.

[11] On 30 March 2023, the plaintiff, instead of filing the expert witness statement, filed of record a document titled 'Comprehensive Psychological Report of Natalia Isak' ('the report'). The document filed contains what purports to be a psychological assessment, by a clinical psychologist, dated November 2022. I say purported because, despite a pre-trial order directing the parties to file expert witness statements and the principles relating to the law and procedure for calling an expert witness,⁵ no such statement was filed by or on behalf of the plaintiff. The defendants inexplicably did not take issue with this.

[12] The matter was then postponed to 8 May 2023 for a further pre-trial conference. On 2 May 2023, the parties again requested additional time to file amended proposed pre-trial orders and additional witness statements. The matter was then postponed to 10 July 2023 for a final pre-trial conference, in a court order dated 7 May 2023. The parties were ordered to file the joint proposed pre-trial order, and all other necessary documents on or before 3 July 2023.

[13] On 20 June 2023, the defendants filed a notice in terms of rule 33(2) in

(d) ensuring that cases are dealt with expeditiously and fairly;

(e) recognising that judicial time and resources are limited and therefore allotting to each cause an appropriate share of the court's time and resources, while at the same time taking into account the need to allot resources to other causes; and

(f) considering the public interest in limiting issues in dispute and in the early settlement of disputes by agreement between the parties in dispute.

⁴ This is not the first order relating to pre-trial in this matter.

⁵ High Court Rule 29(2).

terms of which the plaintiff was to submit herself to a psychological examination and assessment by a certain Dr Willem Annandale ('Dr Annandale'), inter alia, to determine the extent of the plaintiff's 'emotional problems'. It is alleged by the defendants that the plaintiff, to date, refuses to comply with the notice under rule 33(2). The defendants allege that the plaintiff failed to comply with this court's orders and rules, and they now apply to court for an order dismissing the plaintiff's action. The application was launched on 9 February 2024, after directions for filing papers were provided in a court order. In addition to an order dismissing the plaintiff's claim, the defendants seek costs, such costs to include the costs of one instructing and one instructed counsel, where employed. The defendants seek a punitive costs order in the event that the plaintiff opposes the application for dismissal.

[14] The first defendant deposed to the affidavits in support of the application. He states that after the plaintiff filed the report on 30 March 2023, Mr Kavendjii, the defendants' legal practitioner, transmitted correspondence to the plaintiff's legal practitioner, Mr Amoomo, on 31 May 2023. The letter informed Mr Amoomo that the defendants had engaged Dr Annandale (a clinical psychologist) to evaluate the plaintiff on 9 June 2023 between 09h00 and 16h00 and on 12 June 2023 between 09h00 and 16h00. Mr Kavendjii impressed upon Mr Amoomo that 'it is paramount that we complete and/or finalise all outstanding matter[s]' before the pre-trial conference which is to be held on 10 July 2023.

[15] Mr Amoomo responded that the proposed dates and times were too short notice for his client. He also indicated that the defendants' request to evaluate the plaintiff did not comply with rule 33 of the rules of court and should be ignored because it '... did not meet the required standard of rule 33'.⁶

[16] Consequently and on 20 June 2023, the defendants delivered their notice in terms of rule 33(2). The notice reflects that the examination would be conducted by Dr Annandale at Office Number 22, Reuning Street, Klein Windhoek on '30 June 2023 at 09:00 – 25:00⁷ & 3 July at 09:00 – 15:00'. The

⁶ At this stage, the defendants had not yet file the a notice in terms of rule 33(2).

⁷ This may just be a typographical error. It is presumed that it should read '15:00'.

plaintiff was also informed in the notice that she may have her own medical advisor present during the examination. An offer for remittance for reasonable expenses under rule 33(3) was also made by the defendants to the plaintiff in the amount of N\$300.

[17] The plaintiff was further informed in the notice that should she object to the notice, she must do so within five days from service of the notice in terms of rule 33(4), and should she object to the place, date or time of the examination, she should 'furnish an alternative date, time or place for such an examination'. (Emphasis added.)

[18] The plaintiff did not object to this notice, and she failed to attend the examination as requested in the rule 33(2) notice on any of the dates suggested in the notice.

[19] According to the first defendant, Dr Annandale was booked and reserved for the period as set out in the rule 33(2) notice and, thus, the defendants incurred costs after the plaintiff did not attend the examination. He pointed out that the conduct of the plaintiff and her lawyers aggravated the dispute even further given that the plaintiff never even objected to the rule 33(2) notice as prescribed by rule 33(4).

[20] This notwithstanding, the first defendant stated that on 4 July 2023, the parties jointly signed a proposed pre-trial order in terms of rule 26,⁸ and filed the same of record. In this report, the parties advised that the plaintiff had filed her 'expert report' on 30 March 2023, and that the defendants had filed a rule 33(2) notice for the plaintiff to be evaluated by Dr Annandale. The parties reported that once the assessment was completed, the defendants would file expert reports within 15 days of the plaintiff undergoing an evaluation. It was also reported that arrangements were being made to comply with the defendants' rule 33 notice.

[21] On 10 July 2023 and after appearance by the legal practitioners of record of the plaintiff and the defendants, this court postponed the matter again to 11

⁸ This proposed pre-trial order is signed by both legal practitioners of record.

September 2023 for a pre-trial conference. This was done in order to again accommodate the parties in the conduct of the medical examination in terms of rule 33.⁹

[22] A dispute then arose between the parties on the plaintiff's failure to attend the scheduled examination, which resulted in costs to the defendant. This resulted in a further pre-trial order on 11 September 2023, postponing the matter for sanctions to 2 October 2023. On 2 October 2023, the matter was postponed to 23 October 2023 for the parties to file a joint proposed pre-trial order. The question of costs related to the aborted appointment with Dr Annandale was left for determination at the end of the trial.

[23] On 23 October 2023, the matter was still not ready for allocation of trial dates, as the defendants indicated their intention to apply for dismissal of the plaintiff's case. The court gave directions for the filing of papers for this application. Subsequent to this order, the defendants launched the application and filed founding papers as well as an application for condonation for the late filing of the application. The plaintiff then filed a notice seeking to set aside the application for condonation and application for dismissal as an irregular step. The application was struck, and the parties were given new directions to file a comprehensive application, together with founding, answering and replying papers. The matter was set down for hearing on 4 March 2024.

[24] Turning to the plaintiff's grounds of opposition; four reasons are provided by the plaintiff. The first reason is that the notice in terms of rule 33 is null and void because the defendant failed to comply with the notice period prescribed by rule 33(2)(a), namely, that the date of the examination should not take place less than 15 days from the date of notice.

[25] According to the plaintiff, the timeframe provided to her by the defendants for the evaluation by Dr Annandale constituted short notice and she could not attend to the evaluation. She states that this was communicated to Mr Kavendjii by Mr Amoomo in a letter dated 1 June 2023. In the result, the plaintiff states

⁹ There is a typographical reference to rule 36 in the order.

that it was not necessary for her to respond to it.

[26] The plaintiff's second reason is that she was advised by her lawyers that rule 33 only applies in instances of death or physical harm, and that a psychological evaluation does not fall within the prescripts of rule 33. Thus, the notice in terms of rule 33 is invalid for this reason, and the related pre-trial order is void and unenforceable as it is premised on the defendants' misrepresentation of rule 33 to court.

[27] The third reason is that the second defendant, being a public enterprise, failed to comply with the provisions of the Public Procurement Act 15 of 1995 ('PPA') when the services of Dr Annandale were procured. In the result, the plaintiff claims that Dr Annandale's appointment renders the notice equally defective. The plaintiff also alleges that Dr Annandale is biased given the words 'a psychological assessment of the Ms Natalia's pre-morbid functioning malingering or symptoms' as contained in the apparent defective rule 33 notice.

[28] The fourth reason is that any agreement or compromise foreshadowed by the signed joint proposed pre-trial order of 4 July 2023 was not an agreement or compromise because no consensus was reached.

[29] On the merits, the plaintiff disputes her non-compliance with court orders, or the rules of court, or the overriding objectives of judicial case management. She states that the defendants were informed numerous times about their non-compliances and, thus, any delay was caused by the defendants. The plaintiff mentions a letter by the defendants, regarding the presence of her own psychologist at the evaluation with Dr Annandale, as the same was counterproductive. She also states that once the notice is rule compliant she will respond thereto.

[30] The plaintiff further states that she believes that the defendants are using the rules of court, particularly the rule 33 procedure, to obtain psychological evaluations, which they are otherwise unable to lawfully obtain, to assist them in an internal hearing against her.

[31] The plaintiff also avers that her health is deteriorating and that her caretakers have prohibited access to electronic devices as per medical instructions.

[32] In argument before court, Mr Amoomo, appearing for the plaintiff, argued persistently that the defendants' notice under rule 33(2) did not comply with the rules of court and is, thus, null and void. He argued further that, given the 'nullity' of the notice, same was not before court and no objection could be lodged thereto. No authority was provided for this contention.

[33] In this regard, I accept that the plaintiff was not provided the entire 15 days as called for by rule 33(2). It would have behoved the plaintiff to file a notice in terms of rule 61. Instead, the plaintiff chose to rest on her laurels and do nothing. It is also clear that rule 33(4) provides for an opposition to be lodged within five days after service, and that the person delivering the objection must state the nature and grounds of the objection. This was not done at all by, or on behalf of, the plaintiff. Any belated allegation of lack of consensus falls short in the absence of a proper notice of objection by the plaintiff. The joint proposed pre-trial order of 4 July 2023, including other reports by the parties and uploaded of record, gave rise to court orders because it was suggested that attempts were being made to comply with the court's order. Not once, did the plaintiff raise any of the points it now raises.

[34] Consequently, I find this point to be profoundly unmeritorious; the defendants' notice is substantially compliant and the issue of the timeframe could have been canvassed by the two admitted legal practitioners, appearing for the parties, and acting in terms of, inter alia, rule 1(3).

[35] I also point out that the report filed on behalf of the plaintiff on 30 March 2023 does not in any way comply with rule 29(2), or with the legal principles applicable to the receipt of opinion evidence. This is after the plaintiff indicated she needed time to file expert witness statements. Yet, the plaintiff has much to say about the defendants' rule 33 notice being null and void, and has taken no

action to correct this state of affairs. I say this bearing in mind that the earlier joint proposed pre-trial order makes it apparent that expert evidence will be utilised by both parties, and also that it is the plaintiff who draws the onus to prove her damages. To date, the plaintiff has not delivered a proper expert report or witness statement. I also note that the expert statements are all that would be necessary to set the matter down for trial.

[36] As regards the point that the examination called for does not fall within the provisions of rule 33, it is clear that it permits a party to require any party claiming damages for alleged bodily injury or damages resulting from the death of another person, to submit to a medical examination. It is equally clear, simply from the plaintiff's particulars of claim, that the damages she alleges she suffered arise from a head injury she allegedly sustained as a result of the assault. She also alleged that due to the head injury, she suffers untold post traumatic harm. (emphasis added)

[37] The defendants are accordingly entitled to have the plaintiff examined in order to prepare for trial, especially since the plaintiff intends to rely on her own expert (although this has not been done yet) to prove her damages. The argument on behalf of the plaintiff on this point is equally meritless, and borders on spurious. In fact, Mr Phatela, for the defendants, succinctly argued that in order for the defendants to counter the plaintiff's intended expert evidence on her psychological well-being, the defendants must be able to assess the plaintiff's psychological well-being, as well.

[38] In addition, I fail to understand how the plaintiff could take it upon herself to file a document dealing with her 'injury' which is not rule compliant, and then to effectively thwart the defendants' attempts to also obtain an expert to examine her since May 2023. This is clear ex facie her answering affidavit.

[39] As regards the issue raised regarding Dr Annandale's procurement, if the plaintiff had an issue with this aspect she should have taken the matter on judicial review. The decision stands, in the absence of an order by court setting

it aside.¹⁰ I further take note that the plaintiff's evidence as regards the procurement of Dr Annandale's service is of no assistance to this court as no particularity is provided to this court on this aspect. I therefore reject this point of the plaintiff, as well.

[40] Finally, the issue relating to the plaintiff's allegation that the pre-trial order was unenforceable, as it is premised on the defendants' alleged misrepresentation of rule 33, I reject this argument. The order should not have been signed in that event.

[41] In the premises, I find that the defendants substantially complied with rule 33.¹¹ I am also of the view that the plaintiff's explanation proffered for her non-compliance with the notice is neither satisfactory nor reasonable. It is weak and unpersuasive and falls to be rejected.

[42] This court must now consider whether the plaintiff's conduct amounts to abuse of this court's processes and warrants this court's discretion to dismiss her action, as prayed for by the defendants.

[43] The Supreme Court in *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd*¹² summarised the principles that should be applied in considering applications for dismissal of an action on account of delay. A mere delay and the resulting prejudice are not sufficient in the justification of dismissal of an action. What must be present in the instance is that an inordinate and inexcusable delay exists that leads to an abuse of the process of court. This is a factual enquiry which entails the reasons for the delay, which may be inferred from the circumstances of the case. It was found

¹⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

¹¹ In *Torbitt and Others v International University of Management* 2017 (2) NR 323 (SC) it was held that merely because peremptory provisions are peremptory, such peremptory provisions will not by implication be held to require exact compliance where substantial compliance with them will achieve the object of the legislature. The modern approach manifests a tendency to incline towards flexibility.

¹² *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC) para 80.

that abuse of the court processes would be where the litigant continues with the proceedings without having any intent to finalise the action and where the delay is prejudicial to the defendant.

[44] The Supreme Court also confirmed that even where abuse has been established, it remains a matter of discretion for the court as to whether or not to dismiss the action.¹³

[45] In *Rainier Arangies t/a Auto Tech v Quick Build*¹⁴ the Supreme Court stated the following in relation to a 12 year delay by the plaintiff in prosecuting his action within a reasonable time –

‘The events outlined above show that the respondent’s prosecution of his action was dilatory as evidenced particularly by three very long periods of delay: a period of nearly two years to respond to appellant’s request for further particulars; a period of three-and-a-half years to amend its particulars of claim after lodging its plea to the counterclaim; and a further period of four years from the lodging of its amended particulars of claim until the matter was finally enrolled for trial in June 2009. Delays of this sort in litigation are harmful, costly and inappropriate. They impair ‘the inexpensive and expeditious institution, prosecution and completion of litigation’, and at times also threaten the fair adjudication of civil proceedings. It is to avoid the harm caused by such delays that the high court recently introduced a system of judicial case management in civil matters in the high court. The goals of that system are to ensure that the adjudication of civil disputes is expeditious and fair, and the timely and diligent compliance with the rules of the courts will facilitate the achievement of those goals.’

[46] For the period 30 March 2023 to date, the blame for any delay can only be placed on the doorsteps of the plaintiff. Firstly, a non-rule compliant report was filed on 30 March 2023. From that date, and despite representations made to court, the plaintiff failed to make any attempt to be examined by a psychologist. Instead, and despite a pre-trial order dated 4 July 2023, the plaintiff on her own version, refused every opportunity to be examined, culminating in the unsuccessful arguments presented at the hearing of this

¹³ Ibid para 80(g).

¹⁴ *Rainier Arangies t/a Auto Tech v Quick Build* 2014 (NR) 187 (SC).

application. I find that the absence of any diligence to complete this procedure, knowing full well that it is the only impediment to finalising the pre-trial stage renders the defendant's explanation for the delay entirely unpersuasive.

[47] The conduct of the plaintiff and her legal team fly in the face of the overriding objectives of judicial case management and manifest an overly technical and, at times, disingenuous explanation for the failure to comply with the rules of court and court process for over a year. This is inexcusable in the circumstances and clearly prejudices the defendants who have to prepare their defences and place their own expert evidence for trial purposes. I find the plaintiff's conduct to be an abuse of process and I find the delay to be inexcusable.

[48] I reiterate that the main action was instituted by the plaintiff on 16 April 2021. The defendants pleaded to the claim and counterclaimed against the defendants on 26 July 2021. At the time of delivering this judgment, three years have lapsed since the action was instituted and approximately 304 days have lapsed since the defendants filed their notice under rule 33(2). This matter is nowhere closer to being finalised. As at April 2024, the matter remains at pre-trial stage.

[49] The first referral for pre-trial was made on 24 January 2022. Mediation failed in November 2021 because the plaintiff failed to file documents within the relevant time limits. Witness statements were filed by both parties during February 2022. Since then, there have been over 15 orders related to pre-trial issued by this court. Pleadings closed in August 2022. The case management of this matter has been extraordinarily frustrating with correspondences being uploaded willy-nilly by both parties for the court to consider. This is unacceptable and prejudices the court in its functions. I will mention that the defendant carries some of the blame for delays pre-March 2023, but the majority of the fault and cause for delay lies with the plaintiff.

[50] In 2014, this court adopted a new set of rules, which was accompanied by the judicial case management system for, inter alia, the speedy finalisation of

matters. The overriding objectives are set out in rule 1(3), which are to, inter alia, finalise disputes before court efficiently, speedily and cost effectively. Thus, it is clear that the judicial case management system was enacted to ensure that matters are finalised timeously and at the lowest costs for litigants.

[51] In addition, there are clear disposal benchmarks contained in the practice directions issued by the Judge President, and the plaintiff appears determined to delay this matter in an inexcusable fashion. Practice direction 62(1) provides that this court's disposal benchmark for civil causes measured from issuance of initiating process to finalisation of the matter is, in the case of fixed roll cases, 18 months and, in the case of floating roll cases, 12 months. Three years later in this matter, and the court is still dealing with the procedure relating to the receipt of expert evidence and both parties have not been of assistance, although a substantial part of the delay lies with the plaintiff.

[52] Parties are required in terms of rule 1(3) to genuinely assist the court in the task to finalise matters in terms of the disposal benchmarks. In appropriate cases, courts will mete out punitive measures to the party(ies) in default, in order to demonstrate their condemnation of actions taken by parties that are viewed to delay the finalisation of cases, and thus increasing costs and demonstrating inefficiency.

[53] I am alive to the fact that the courts must be accessible to all and, thus, this court must be slow to exercise its power to dismiss an action summarily on account of abuse of process and should only use the same 'sparingly', and 'only in very exceptional cases'.¹⁵

[54] I have held that the defendants' notice under rule 33(2) substantially complies with the rules of court and that the plaintiff's explanation for her non-compliance therewith is unsatisfactory and unreasonable. I have considered the evidence adduced by the parties and find that the plaintiff, who is *dominis litis* in these proceedings, has effectively brought this matter to an abrupt halt since March 2023. This is an exceptional case, where the court will meet out punitive

¹⁵ Ibid para 26; See also *Rainier Arangies* supra fn 13 para 20.

measures for the reasons advanced.

[55] I am of the considered view that the interests of justice dictate that matters must be finalised speedily. It cannot be said that keeping this matter on the roll any further would be in the interests of justice. The plaintiff's explanation, which I have rejected above, remains unsatisfactory and she has failed to take this court into confidence. I accordingly find that this is a case where the plaintiff's conduct has been dilatory and no adequate explanation for such dilatoriness has been proffered, thus, the court must exercise its discretion and dismiss the plaintiff's action as prayed for by the defendants.

[56] As I conclude, I must consider the issue of costs. Given that the plaintiff's claim is dismissed and, thus, the matter is brought to finality, I exercise my discretion and grant the defendants costs in their favour.

[57] For the foregoing reasons, the following order is made:

1. The plaintiff's action is hereby dismissed and regarded as finalised.
2. The plaintiff is ordered to pay the defendants' costs of the action, such costs to include the costs of one instructing and one instructed counsel, where employed.
3. The plaintiff is ordered to pay the defendants' costs of this application for dismissal, limited by rule 32(11).
4. The matter is postponed to **3 June 2024** at 15h30 for a status hearing to determine the further conduct of the defendants' counterclaim.
5. The parties must file a joint status report outlining the further conduct of the matter on or before **29 May 2024**.

E M SCHIMMING-CHASE

Judge

APPEARANCES

PLAINTIFF:

K Amomo
Of Kadhila Amomo Legal Practitioners,
Windhoek

DEFENDANTS:

T Phatela
Instructed by Kangueehi & Kavendjii Incorporated,
Windhoek