

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR REINSTATEMENT

CASE NO.: HC-MD-CIV-ACT-OTH-2019/03227

In the matter between:

GODFREY KUYONISA

PLAINTIFF

and

LINEKELA HALWOODI

FIRST DEFENDANT

OMALAETI MEDIA GROUP (PTY) LTD

SECOND DEFENDANT

Neutral Citation: *Kuyonisa v Halwoodi* (HC-MD-CIV-ACT-OTH-2019/03227)
[2024] NAHCMD 84 (06 March 2024)

CORAM: NDAUENDAPO J

Heard: 17 October 2023

Delivered: 06 March 2024

Flynote: Civil Procedure—Action struck from the roll twice and deemed finalized due to the noted non-appearance by the plaintiff's counsel—On second occasion, plaintiff argues that the legal practitioner was present – Matter appeared for inactivity in terms of r 132– Application for reinstatement—requirements to be met by applicant therefor – Rules of Court – Rule 32(9) and (10) and r 65 – whether non-compliance therewith is fatal to the

application for reinstatement, in light of the fact that the matter was struck due to the erroneously noted non-appearance by the plaintiff's counsel.

Summary:

The essence of this application is to seek the re-enrolment of the main action, which the second defendant opposes.

The second defendant, in his opposing papers raises two points *in limine*. The first point *in limine* is in respect to the plaintiff's purported non-compliance with r 65. The second defendant argues that, the plaintiff filed a founding and confirmatory affidavit on 20 April 2023 and only filed a notice of motion and r 32 (10) report two weeks later.

The second defendant argues that the plaintiff fails to provide this court with a reasonable explanation for the unreasonable delay, in bringing the application more than six months after it was struck. It was further argued that, the plaintiff merely provided this court with a detailed chronology of his laxity and remissness and further failed to show reasonable prospects of success on the main merits of the main action.

Held that: A party seeking reinstatement must provide a reasonable and acceptable explanation for the matter being struck from the roll and that he or she has good prospects of success.

Held further that: It is well noted and understood by this court that the action had been erroneously struck from the roll on 2 November 2022. However, the court order was issued on 02 November 2022 and the plaintiff only filed the application for reinstatement on 20 April 2023, six months after the matter was struck.

Held further that: Though the court recognises that the plaintiff's action had been erroneously struck, this reasoning alone does not warrant the plaintiff's disregard of the courts rules and procedure. This does not serve to detract from the need on the part of the plaintiff to file a rule compliant application.

ORDER

1. The application for reinstatement is denied.
 2. There is no order as to costs.
 3. The matter is removed from the roll and regarded as finalised.
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RULING

NDAUENDAPO J:

Introduction

[1] In this matter, the plaintiff seeks an order for reinstatement of the matter which was struck from the roll and subsequently appeared for inactivity.

Background

[2] The plaintiff instituted action proceedings against the first and second defendants on 17 July 2019, for a defamation claim.

[3] The defendants defended the action on 06 September 2019 and as per the process of judicial case management, a case plan order was issued on 20 September 2019, directing the parties to file a joint case plan 3 days before the hearing date and to appear in court on 17 October 2019, for case planning conference hearing.

[4] The parties filed a joint case plan, requesting that the matter be referred to court-connected mediation. Whereafter, it was ordered that the mediation must be concluded and the mediator must submit her report to the ADR office by no later than 06th December 2019.

[5] On 25 November 2019, the second defendant's legal practitioner withdrew as legal representative of the first defendant. The parties filed a joint status report, informing the court that, such representation was erroneously filed under the mistaken belief that the first defendant was an employee of the second defendant. As a result, the mediation could not proceed due to the absence of the first defendant. The parties therefore requested for a two months postponement in order to have the summons served on the first defendant.

[6] The matter was subsequently postponed. On the dates of 30 March 2020 and 11 May 2020, the plaintiff requested for postponements to allow service of the summons on the first defendant. On 10 June 2020, the plaintiff's legal practitioner withdrew as legal practitioner and requested for a postponement to serve the notice of withdrawal on the plaintiff. The matter was set down for 16 July 2020, and the plaintiff was absent in court, as a result the plaintiff was called upon to show cause on 03 September 2020, as to why the matter should not be struck from the roll in terms of r 132(10).

[7] The plaintiff's appointed counsel filed an affidavit and appeared in court. The matter was then postponed to 22 November 2020, to allow the plaintiff to serve the summons on the first defendant. On 22 November 2020, the plaintiff filed a status report, requesting for another three week postponement to serve the first defendant. On 12 November 2020, the plaintiff filed a return of non-service and the matter was subsequently postponed to 25 February 2021 for the plaintiff to serve the summons on the first defendant. Another return of non-service was filed, and the matter was yet again postponed to 8 April 2021 at 14h15 for a status hearing for the first defendant to be traced and served.

[8] The plaintiff filed a status report a day before the hearing requesting for another postponement. As a result, the matter was postponed to 10 June 2021 for status hearing, in order for the first defendant to be served.

[9] The plaintiff failed to file a status report on or before 7 June 2021, as ordered on 8 April 2021 and on 10 June 2021, the matter was struck from the roll because it had been more than a year now since the plaintiff has been attempting to serve the summons on the first defendant. It was regarded as finalised. However, the status on the e-justice system was not changed to finalised.

[10] The matter became inactive and on 16 December 2021, a hearing notice was issued, calling upon the parties to show cause as to why the matter should not be struck from the roll and not to be re-enrolled again.

[11] The second defendant filed a status report, informing the court that the hearing notice was issued erroneously due to the fact that when the matter was struck from the roll in June 2021, the eJustice system still reflected the status of the matter as "Not Finalized", causing a hearing notice to be issued in terms of r 132 and that the plaintiff's only available remedy was to bring fresh proceedings.

[12] The plaintiff filed an application requesting an order for substituted service. The plaintiff did not address the issue of inactivity.

[13] On 31 March 2022, the court postponed the matter to 27 April 2022 for status hearing. The plaintiff persisted with the application for substituted service whilst the second defendant opposed such application. The case was subsequently postponed to 21 July 2022 for hearing of the application for substituted service. At the hearing the plaintiff withdrew the application for substituted service and costs were granted and limited in terms of r 32(11).

[14] A joint status report dated 15 August 2022 was filed, wherein the plaintiff withdrew the action against the first defendant and requested that a case plan order be issued, as the action will proceed against the second defendant.

[15] A case plan order was issued and the parties filed their respective pleadings and status report on 01 November 2022, within which they

incorporated a joint case management report, dealing with the issues of r 25 (2) of the rules of the High Court.

[16] On 2 November 2022, the matter was struck due to non-appearance by the parties.

[17] The plaintiff filed a founding and confirmatory affidavit on 20 April 2023 and a r 32 (10) report and a notice of motion on 03 May 2023.

[18] The second defendant filed an opposing affidavit on 17 May 2023. The application for reinstatement was then heard on 17 October 2023. The essence of this application was to seek the re-enrolment of the main action, which the second defendant opposes.

Bases of opposition

Points in limine

[19] The second defendant, in his opposing papers raises two points *in limine*. The first point *in limine* is in respect to the plaintiff's purported non-compliance with r 65. The second defendant argues that, the plaintiff filed a founding and confirmatory affidavit on 20 April 2023 and only filed a notice of motion and r 32 (10) report two weeks later.

[20] He also contended that the directives under r 65 are peremptory in nature and that a notice of motion must accompany the founding affidavit setting out the facts on which the relief is sought. The second defendant argued that, the founding affidavit and notice of motion, ought to have been simultaneously filed, thus the plaintiff did not comply with the provisions of r 65.

[21] The second point *in limine* raised by the second defendant is non-compliance with r 32 (9) and (10). The second defendant submits that the application for reinstatement is an interlocutory application as envisaged in terms of r 32. It was argued that, as soon as the plaintiff noted that the action

was erroneously struck from the roll, the plaintiff ought to have properly engaged in terms of r 32 (9) and thereafter file the r 32 (10) report and only after the procedural step, should the plaintiff had filed the application. The second defendant argued that, the r 32 (10) report must set out the details and steps taken in an attempt to have resolved the matter. According to the second defendant, the plaintiff contacted him and only filed their r 32 (10) report two weeks after filing their founding affidavit. Furthermore, it was argued that, though the defect is not fatal, it warrants punitive costs.

[22] On the basis of the points *in limine* raised by the second defendant, he prays that the application be struck from the roll with punitive costs.

Opposition against the merits of the application

[23] The second defendant in essence argues that, the plaintiff tendered an explanation as to the issue of their presence in court but fails to provide an explanation to this court as to what happened from the time the matter was struck in November 2022 to now and the plaintiff fails to provide an explanation as to why he did not bring the application immediately after the matter was struck.

[24] The second defendant argues that the plaintiff fails to provide this court with a reasonable explanation for the unreasonable delay, in bringing the application more than six months after it was struck. It was further argued that, the plaintiff merely provided this court with a detailed chronology of his laxity and remissness and further failed to show reasonable prospects of success on the main merits of the main action.

[25] It was further argued by the second defendant that, costs were issued against the plaintiff for the failed substituted service application, an allocuatur and writ of execution has since been issued and the plaintiff has been in default in paying the legal fees. The second defendant therefore argued that the plaintiff should not be permitted to persist with the action until he satisfies the writ and should the plaintiff proceed with the action, the second

respondent will be faced with a situation where it will not recover the legal costs.

[26] The second respondent argues that, the plaintiff has failed to prosecute its case since summons had been issued and that the respondent has been held hostage by this matter for four years, while the plaintiff continues to drag its feet and disregard the processes and directives of the court.

Reinstatement

[27] The plaintiff in his founding affidavit argues that the matter appeared before Honourable Justice Ndauendapo and that his legal practitioner, Mr Cupido, appeared for the matter, which such hearing was heard on 02 November 2022.

[28] The plaintiff further submits that, on the same date, Mr Cupido also appeared before Honourable Justice Miller, who had struck the matter for non-appearance. Plaintiff stated that the matter had been struck in error and prays that the matter be reinstated.

[29] Plaintiff submitted that, the court made an error when striking the matter from the roll for non-appearance whilst the plaintiff's legal counsel appeared and that it would be unjust to the plaintiff if the matter was not reinstated.

[30] The plaintiff submits that, any issues raised by the second defendant relating to the question of whether the matter was wrongfully reinstated, whether the plaintiff was entitled to reinstate the matter and whether the only recourse was to issue fresh summons, are moot. Plaintiff further argues that, the second defendant is precluded from opportunistically raising these matters when it had in fact already agreed to the matter proceeding and engaged in the proposal to move forward and further failed to challenge the reinstatement.

Discussion

[31] It is important to consider the relevant facts of this application. I do not find it necessary to deal in much detail with the law applicable to applications for the reinstatement and with the merits of the application.

[32] In so far as it is necessary, the legal principles applicable to applications for reinstatement, in accordance with the rules of the High Court, are set out in the matter of *Standard Bank Namibia Limited v Bezhuidenhout*¹, where the court stated that:

[7] ... It is common practice that a matter that has been struck from the roll is only enrolled after the delivery of a notice of motion applying for reinstatement, accompanied by an affidavit explaining the reasons for non-compliance and dealing with the question of the prospects of success. Once that has been done and the court is satisfied with the application, it may re-enroll the matter.'

[33] In the matter of *Denk v The Chairperson of the Disciplinary Committee for Legal Practitioners*,² this court held that:

'A party seeking reinstatement must provide a reasonable and acceptable explanation for the matter being struck from the roll and that he or she has good prospects of success.'

[34] It is well noted and understood by this court that the action had been erroneously struck from the roll on 02 November 2022. However, the court order was issued on 02 November 2022 and the plaintiff only filed the application for reinstatement on 20 April 2023, six months after the matter was struck.

[35] This court agrees with the contentions of the second defendant that, though the plaintiff provided an explanation as to the matter being struck from the roll, the Plaintiff failed to provide this court with an explanation as to why it

¹ *Standard Bank Namibia Limited v Bezhuidenhout* (HC-MD-CIV-ACT-CON 2017/03248) [2021] NAHCMD 177 (20 April 2021).

² *Denk v The Chairperson of the Disciplinary Committee for Legal Practitioners* 2018 NAHCMD 405 (14 December 2018).

took the plaintiff 6 months to file an application for reinstatement and the plaintiff further fails to address any prospects of success.

[36] It is well noted that the court may have erred in striking the plaintiff's main action. However, the Plaintiff has since the inception of the main action case in July 2019, failed to timeously prosecute the matter. The Plaintiff further delayed in launching the application for reinstatement and had only done so after receiving a notice that the matter has been inactive. The factors that the court must consider, when deciding whether to grant the application has not been advanced by the plaintiff.

[37] There has been an ordinate delay in the finalization of the matter, which is owing to the Plaintiff's conduct. In addition to the clear improper application filed by the plaintiff, there is no condonation application before this court, in respect of the delayed filing of the application for reinstatement and/or an affidavit outlining the reasons for the delay.

[38] Regarding the second defendant's *points in limine* raised, where a party does not comply with certain practice directions in motion court proceedings, especially as in this case, where the plaintiff has not sought indulgence for filing of the r 32 (10) report late and failed to seek indulgence for filing of the reinstatement application late and has further failed to comply with the rules of the court in respect to reinstatement applications, the court cannot indulge such a party. The contention on behalf of the second defendant, that there was no proper consultation as envisaged by the rules and that the plaintiff filed the application before even having engaged and found a solution to the matter, is agreed with. The court pronounced itself on the issue of not complying with r 32 (9) and 32 (10), in the matter of *Bank Windhoek Ltd v Benlin Investment CC*,³ where the court held that legal practitioners should take preemptory provisions in question seriously and make every effort to fully engage in the process of attempting to resolve matters amicably.

[39] Though the court recognises that the plaintiff's action had been erroneously struck, this reasoning alone does not warrant the plaintiff's

³ *Bank Windhoek Ltd v Benlin Investment CC* 2017(2) NR 403 (HC).

disregard of the courts rules and procedure. This does not serve to detract from the need on the part of the plaintiff to file a rule compliant application explaining the cause of the non-compliance to the court and meeting all the requirements of an application for reinstatement.

[40] If this court was to sympathise with the plaintiff and grant the application, this court would be setting a precedent that, applications can be brought before court that barely meet the requirements of the rules.

[41] In this regard, I am of the view that in the peculiar circumstances of this case, that the application for reinstatement must fail.

Costs

[42] The general rule is that costs follow the results. However, in this case, the application for reinstatement was prompted by the erroneous removal of the matter by the court and as such, it will not be fair for the applicant to be mulcted with costs. Therefore, in the exercise of my discretion, there shall be no order as to costs.

Order

1. The application for reinstatement is denied.
2. There is no order as to costs.
3. The matter is removed from the roll and regarded as finalised.

NDAUENDAPO
Judge

APPEARANCES

PLAINTIFF:

B Cupido
Of Isaacks & Associates Inc.

2ND DEFENDANT:

K Kamuhanga
Of Katuna Kamuhanga (Kamuhanga
Hoveka Samuel Inc.)