

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: I 181/2014

In the matter between:

MARWA & ASSOCIATES LAND SURVEYORS

PLAINTIFF

And

HELAO NAFIDI TOWN COUNCIL

DEFENDANT

Neutral citation: *Marwa and Associates Land Surveyors v Helao Nafidi Town Council* (I 181-2014) [2015] NAHCNLD 50 (2 November 2015)

Coram: CHEDA J

Heard: 19 October 2015

Delivered: 02 November 2015

Flynote: A legal practitioner's first duty is towards the court and public and not his/her client. The dignity of the court should be protected from errant and disobedient legal practitioners. A legal practitioner who fails to attend court for no reason impairs the dignity of the court and should be censured by paying costs *de bonis propriis*.

Summary: A legal practitioner who was aware of the sitting of the court where he was representing the other party failed to attend court and no reason was given. A legal practitioner who acts in this manner deserves censure in the form of punitive costs, *de bonis propriis*.

ORDER

1. The matter is postponed to 16 November 2015 at 09h00.
2. Mr. Nyambe is ordered to pay today's wasted costs *de bonis propriis*.

JUDGMENT

CHEDA J:

[1] This is a matter which is pending before this court under case management, having been so allocated in terms of Rule 23 of the Rules of this Court. The parties are represented by Mr. Nyambe of Messrs Shikongo Law Chambers and Mr. Aingura of Messrs Aingura Attorneys respectively.

[2] The matter had progressed reasonably well until it reached mediation stage. However, there was no mediation report filed of record to date. The matter was postponed to 20 October 2015 at 09h00 for a Status Hearing.

[3] On the 20 October 2015 Mr. Nyambe did not appear in court, no reason was given save that Mr. Aingura told the court that he had advised him that he was on his way despite the fact that this was at 09h20. Mr. Aingura further purported to represent him as well which was not proper.

[4] I advised Mr. Aingura that it has unethical and unprofessional to do so and postponed the matter to the 16 November 2015 and also ordered punitive costs against Mr. Nyambe. It is for the above orders that I have decided to write a judgment concerning Mr. Nyambe's conduct in particular.

[5] Lawyers are officers of the court and as such have an unwavering duty towards the court by according it the utmost respect. A lawyer cannot do as he pleases towards the court. It has now become a practice, though a bad one for some lawyers to disregard their duties towards court.

[6] It is appropriate that lawyers should be advised of their duties towards the courts be it the lower or higher courts and what is expected of them by the profession in general. A lawyer cannot break the rules of the court or attempt to supersede them by placing clients' interest needs above the laws of the court. A lawyer does not hold office in a constitutional or statutory sense of the term. He is not an officer of the State or a Government, he, infact, is the officer of the court, he was admitted to practise.

[7] His first duty is to the court and public not to the client, and, wherever, the duties of his client conflict with those he owes as an officer of the court in the administration of justice the former must yield to the later. A lawyer should, under no circumstances diminish the dignity or decorum of the courtroom. He infact among other conducts diminishes the dignity of the court by not being punctual, shabbily dressed and being poorly prepared.

[8] Above all, a lawyer should be considerate of the time constraints and pressures on the court's effort to administer justice and make every effort to comply with schedules by the court.

[9] Mr. Nyambe decided not to come to court at the set date and time with no explanation. This type of conduct is unacceptable as it is a flagrant disrespect for the court as he treated it with disdain.

[10] This type of conduct is infact unprofessional and unworthy of a legal practitioner. The court had no alternative, but, to express its displeasure by ordering wasted costs for that day's hearing against him *de bonis propriis*.

[11] It is trite that these courts will not hesitate to order costs against a legal practitioner who:

- a) wilfully disobeys a court order,
- b) acts dishonestly and/or
- c) acts in an errant manner.

[12] This is a time honoured principle and has been followed in many jurisdictions, see *South African Liquor Traders Association v Chairperson, Gauteng Liquor Board 2009 (1) SA 565 (CC) at 582* where O'Regan J (as she then was) remarked:

"An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy."

[13] The same principle was applied in *Khunou and Others v M Fihrer & Son (Pty) Ltd and Others 1982 (3) SA 353*. The courts are so strict with the application of this principle designed to whip errant legal practitioners into place to an extent that legal practitioners' duties to the courts are to be adhered to, such that even a legal practitioner's failure to properly prepare his/her documents on the excuse that his/her members of staff failed to do so is not excusable by the courts, see *Rufaro Mining and Geological services (Pty) Ltd v The Association for the Development of Small Scale Mines (High Court of Zimbabwe) HC 2987/2002* (delivered on 17/4/2002).

[14] Mr. Nyambe was no doubt errant and his disregard for the court's rules cannot be countenanced and as such the court must show its displeasure by ordering costs *de bonis* against him. This tardiness cannot be allowed to continue unabated as it reduces the court to some useless and toothless institution which in fact is not.

[15] I make this order with full knowledge that it is the practice of these courts not to be hasty in ordering such costs as they are punitive and therefore can only and should only be resorted to where the court feels that its dignity being is threatened and therefore should be restored and protected. This point was ably highlighted in *Thunder Cats Investments 49 (Pty) Ltd v Fenton 2009 (4) SA 138 at 151*:

“An order to hold a litigant's legal practitioner liable to pay the costs of legal proceedings is unusual and far-reaching. Costs orders of this nature are not easily entertained and will only be considered in exceptional circumstances.”

It is for the above reasons that I postponed this matter in order to allow progress and at the same time ordered punitive costs against Mr. Nyambe.

[16] In light of the fact that the order for punitive costs was made in Mr. Nyambe's absence it is, therefore, reviewable.

Order:

1. The matter is postponed to 16 November 2015 at 09h00.
2. Mr. Nyambe is ordered to pay today's wasted costs *de bonis propriis*.

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M Cheda
Judge

APPEARANCES

PLAINTIFF: M.M. Nyambe
Of Shikongo Law Chambers, Ongwediva

DEFENDANT: S. Aingura
Of Aingura Attorneys, Oshakati