



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

CIVIL JUDGMENT

Case no: I 283/2016

In the matter between:

ELLY KARIBO (BORN KASHUNA)

PLAINTIFF

and

BENSON NWAKIRI KARIBO

DEFENDANT

Neutral citation: *Karibo v Karibo* (I 283/2016) [2017] NAHCNLD 30 (10 April 2017).

Coram: CHEDA J

Heard: 17.01.2017; 27.02.2017; 20.03.2017

Delivered: 10 April 2017

Flynote: A legal practitioner's first duty is to the court and thereafter to his/her client – superior courts proceedings take precedence over all lower courts. A legal practitioner is not obliged to produce proof that he has an engagement in the superior court. A legal practitioner who has an uncooperative litigant should renounce agency in order to maintain his/her integrity.

Summary: In this civil matter, which proceeded up to mediation, defendant failed to attend mediation despite numerous calls by his legal practitioner. Matter could not take-off due to his non-cooperativeness. At one stage the legal practitioner failed to

attend court-connected mediation due to the magistrate court refusing her permission to do so. All superior courts take precedence over inferior courts, magistrate courts included. A legal practitioner is not obliged to produce proof to another court that he/she has to appear in the superior court. A legal practitioner who has a difficult client is obliged to renounce agency in order to save his/her integrity before the court which he/she serves.

ORDER

1. Defendant is found to have been in default on the 07 March 2017 for a court-connected mediation.
 2. The matter is postponed to 08 June 2017 for a Pre-Trial Conference at 09h00.
 3. The Chief Magistrate is ordered to distribute this judgment to all Magistrates.
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JUDGMENT

CHEDA J:

[1] This is a matrimonial matter. Plaintiff issued out summons for divorce which was defended. The matter fell under the case management system and followed all the necessary procedures up to mediation stage. The first mediation was scheduled to take place on the 21 February 2017 at 14h00 before Mr. Greyling (Senior), but, however, could not take off as Mr. Greyling could not preside over it for professional reasons.

[2] The matter was further set down for a court-connected mediation for the 07 march 2017 at 14h00. All the parties attended, but, Ms. Samuel was unable to do so as a Mr. Hangalo, the Magistrate refused her permission to do so on the basis that there was another matter before him. As a result of Mr. Hangalo's refusal, she arrived for mediation well after the set down time and defendant had also left, hence mediation was not held.

[3] Ms. Samuel's inability to attend mediation was further compounded by the fact that her attempts to contact defendant were fruitless as defendant was not answering his mobile phone despite the fact that he had been in attendance earlier on.

[4] It was Ms. Samuel's submission that subsequent to this development defendant had switched off his phone. The matter is therefore at a standstill.

[5] It should be borne in mind that introduction of a court-connected mediation was to simplify and expedite legal process and at the same time reduce legal costs on litigants. It was not a mere change of procedure for cosmetic reasons but was as a result of a well thought-out and thorough research. Therefore, it should be celebrated as a legal milestone which should be embedded in the minds of all those who seek to see a progressive jurisprudential development in the Namibian legal system. It is for that reason that, in the process the court assumed the all-encompassing power of civil litigation from litigants and their legal practitioners. Needless to say that the system has worked effectively well for civil litigation.

[6] This smooth litigation process is being threatened by some serious misunderstandings emanating from either ignorance or negligence by some magistrates in our jurisdiction.

[7] There are two issues which are a cause for concern and require urgent attention and correction, namely:

a) Duty of a legal practitioner

[8] A legal practitioner's first duty is towards the court, be it in the Magistrates, High or Supreme Courts, see *Marwa & Associates Land Surveyors v Helao Nafidi Town Council I 181/2014 (I 181/2014) [2015] NAHCNLD 50 (02/11/2015)* and *Tjimaka Tjavara & others v Chief Hosea Tjimuine & others (A 17/2015) [2015] NAHCNLD 14 (29/2/2016)*. A legal practitioner's failure to attend court impairs the dignity of the said court. This is the general rule. What then flows from this rule is the issue of hierarchy of the courts. In as much as legal practitioners are required to respect the courts by appearing before them, it should be borne in mind by all legal

practitioners and the courts that they have a duty to religiously obey the hierarchal command of appearance. A clear example is that a magistrate Court cannot refuse a legal practitioner permission to appear at the High Court or any other superior court for that matter on the basis that it has its matter already set down prior to that of the superior court. This is wrong and unacceptable. In simple terms, the High Court takes precedence over the Magistrate Court in as much as the Supreme Court takes precedence over all courts below it.

[9] It seems to me that there exists a popular belief and misconception emanating from some magistrates that they rank the same with the High Court. This view has resulted in a lot of inconvenience to the High Court and at the same time caused embarrassment to the legal practitioners who are clear as to their duty towards all courts. Legal practitioners find themselves in difficult positions as to whether to obey Magistrates who insists that their matters should be heard first and at all costs before that of a High Court. Magistrates should therefore understand that this is not correct and should stop this practice without further ado.

[10] In *casu*, the legal practitioner was supposed to attend a court-connected mediation as per the order of the High Court, as such, the said order also binds the Magistrate Court. A legal practitioner's requirement to appear before a High Court is not negotiable and should not be questioned by a magistrate. Further a legal practitioner is an officer of the court therefore, in my view, is not obliged to produce or exhibit any proof before the lower court about his/her commitment to the High Court or Supreme Court, unless the said court has a reasonable belief that the said legal practitioner may be misleading it. Legal practice is an honourable profession, therefore, a lawyer's word without more, should be taken as the truth.

[11] A legal practitioner is generally given to being truthful unless proven otherwise. I do not think there is a legal practitioner worth his salt who can take the risk of misleading the court in matters of fact, at the risk of being censured by the Law Society or the court itself. There is, therefore, a rebuttable presumption that a legal practitioner is honest. The practice of requesting a legal practitioner to produce such proof or even a medical report about his/her indisposition demeans this honourable profession and should be discouraged as this lowers the esteem of a legal practitioner.

b) Legal practitioner and client duty

[12] A legal practitioner's duty to the court is first priority and is above that of his/her client. While a legal practitioner derives his mandate from his client and has a duty to represent him/her to his best ability, he should not cling on to a mandate of representation where client's conduct will result in the legal practitioner compromising his duty towards the court. Where a legal practitioner meets some difficult client in whatever respect, he/she must renounce agency in order to save his/her own integrity, thereby promoting the proper administration of justice and above all maintaining its duty towards court which he appears before.

[13] In *casu* there was, therefore, no need for Ms. Samuel to be yoroked to a client who was uncooperative. All she should have done is to place it on record that defendant is uncooperative and was therefore withdrawing her representation.

[14] This unnecessary delay and postponement of the proceedings in this matter have no doubt negatively impacted on the otherwise smooth running process of case management would have been avoided where it not for the incorrect attitude of the magistrate.

[15] In the result, I find that defendant was in default of his attendance to a court-connected mediation which was due to be held on the 07 March 2017. In the result the following is the order of the court:

Order:

1. Defendant was in default on the 07 March 2017 for a court-connected mediation.
2. The matter is postponed to 08 June 2017 for a Pre-Trial Conference at 09h00.
3. The Chief Magistrate is ordered to distribute this judgment to all Magistrates.

APPEARANCES

PLAINTIFF:

G. Mugaviri
Of Mugaviri Attorneys, Oshakati

DEFENDANT:

E. Samuel
Of Samuel Legal Practitioners, Ondangwa