



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

JUDGMENT

Case no: I 207/2015

In the matter between:

JARON NATANGWE IITA

PLAINTIFF

and

HERTHA NEJUOU ETUHOLE IITA (born ANGULA)

DEFENDANT

Neutral citation: *lita v lita* (I 207/2015) [2017] NAHCNLD 37 (08 May 2017).

Coram: CHEDA J

Heard: 20.03.2017; 27.03.2017

Delivered: 08 May 2017

Flynote: An instructing legal practitioner must appoint a correspondent whose address of service is within a flexible radius of the Registrar's Office (High Court). The court, should where circumstances demand, leniently treat a litigant who is not well versed with legal principles in a matrimonial matter even where his/her legal practitioner is at fault, as matrimonial matters are highly emotional and result in a person's change of status. A legal practitioner who fails a client should personally pay for the wasted costs.

Summary: An instructing legal practitioner appointed a correspondent, but, did not comply with the rules relating to address of service. The matter was set down for a Pre-Trial Conference. Both the instructing and instructed legal practitioners for

defendant did not attend court, although they signed a Pre-trial Conference report, though it was defective. The sanction provisions in the rules were not invoked as the matter was matrimonial. The court exercised its judicial discretion and indulged the defendant by allowing the matter to proceed to trial with defendant's legal practitioner being ordered to pay the hearing's wasted costs.

ORDER

1. Defendant's legal practitioner shall continue to represent defendant until the matter is finalised.
2. The parties/legal practitioners shall comply with all the requirements regarding preparations for trial.
3. Defendant's legal practitioner shall pay costs for the hearing of the 27 March 2017 and such costs to be taxed

JUDGMENT

CHEDA J:

[1] This is a matrimonial matter which has fallen under case management category. The plaintiff is represented by Dr. Weder, Kauta & Hoveka Inc. while defendant is represented by Siyomunji Law Chambers of Unit 1, of Corner Church and Bismark Street Windhoek, through its correspondent Messrs Samuel Legal Practitioners, Ondangwa.

[2] The proceedings are at a stage where a Pre-Trial Conference was to be held on the 20 March 2017. A Pre-Trial report was filed by the parties on 22 March 2017 at 09h00 and the matter was heard on the 27 March 2017.

[3] On the 27 March 2017, Ms. Tjihero, counsel for the plaintiff is the only one who appeared in court while there was no appearance for the defendant as Ms. Samuel had filed a Notice of Withdrawal as correspondent. The said Pre-trial order was duly signed by both legal practitioners, however, the said order was defective in

that defendant's legal practitioner had not complied with the rule regarding service as stipulated in Rule 14 (3) (b) of which the said rule reads:

Rule 14 (3) when a defendant delivers a notice of intention to defend he or she must in that notice –

(a) ...

(b) appoint an address within a flexible radius from the office of the registrar, not being a post office box or *poste restante*, for service on him or her of all documents in that action.

[4] A Windhoek address for the purposes of proceedings in Oshakati, a distance of 700± kilometres is not in accordance with the rules.

[5] Defendant, therefore, has two short comings, firstly, neither herself nor her legal practitioner and even the correspondent's legal practitioner appeared in court as required by the rules and no explanation as to what the current position is, was given. Secondly, they failed to provide an address for service in terms of the rules.

[6] This court, has, for time without number advised and warned legal practitioners that they should carry out their mandates professionally and diligently. That expectation is, indeed lacking in the instructing legal practitioner.

[7] The civil proceedings in this jurisdiction are now firmly administered under the case management system which effectively took away the important powers from litigants and their legal practitioners and hence made them court-driven. It is for that reason that these courts view any transgression by litigants and/or their legal practitioners with a jaundice eye. In order to rein in errant legal practitioners a sanctions provision was inserted in the new rules for that purpose. These courts will therefore not be found wanting where such situation demands.

[8] Any litigant who fails to comply with these rules and in the absence of any reasonable explanation as to the said failure stands the risk of censure. This case is deserving of one. While it will be fitting to censure defendant, the court has to give a serious consideration of the sanction bearing in mind the circumstances surrounding the case and that each case is to be determined on its own merits.

[9] This is a matrimonial matter. It is trite that these courts are loathe to punish litigants in matrimonial matters as they are highly emotional and at the same time involve litigants' change of status. I am alive to the fact that defendant has always shown a desire to defend this action and has been let down by her legal practitioners.

[10] While it is generally held that a litigant cannot be excused for the failure of adequate representation by his/her legal practitioner, I am of the considered opinion that this stance should be tempered with mercy in this jurisdiction as the majority of the population is not entirely legally literate and they, therefore, give all their trust to their legal practitioners and have no clue as to the competency or otherwise of such legal practitioners. It will therefore be unjust to willy-nilly condemn and punish them at the slightest opportunity.

[11] In my opinion the courts should be seen to equally serve both the mighty and weak, the literates and illiterates. Above all, the court will be failing in its duty, if it does not take cognisance of the fact that the western legal system is regarded as anathema to them. They should be made to feel that they are part of the legal system. One of the sanctions involves the dismissal of defendant's defence which I am of the considered view that it will not be in the best interest of justice in the circumstances.

[12] It is for that reason that I have used my judicial discretion and order that the matter proceeds to trial. It is clear that defendant's legal practitioners are seized with this matter and are better placed to conclude it. It will not be fair to abandon defendant midstream.

[13] For the above reasons, defendant will be spared the wrath of the court with regards to sanctions. Defendant's legal practitioner is to blame for the delay in this matter and deserves to be personally punished for his sloppy work. The following is the order of court:

Order

1. Defendant's legal practitioner shall continue to represent defendant until the matter is finalised.

2. The parties/legal practitioners shall comply with all the requirements regarding preparations for trial.
3. Defendant's legal practitioner shall pay costs *de bonis propriis* for the hearing of the 27 March 2017 and such costs to be taxed.

M Cheda
Judge

APPEARANCES

PLAINTIFF:

G. Mugaviri
Of Mugaviri Attorneys, Oshakati

DEFENDANT:

A. Samuel
Of Samuel Legal Practitioners, Ondangwa