

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

JUDGMENT

Case No: I 1/2017

In the matter between:

**KAMBWA TRADING CC
(CC/2004/0656)**

RESPONDENT/PLAINTIFF

and

**ELINA GIDEON
INNOCENT INVESTMENT CC**

**FIRST APPLICANT/DEFENDANT
SECOND APPLICANT/DEFENDANT**

Neutral citation: *Kambwa Trading cc v Gideon* (I 1/2017) [2019] NAHCNLD 19 (25 February 2019)

Coram: CHEDA J

Heard: 19 February 2019

Delivered: 25 February 2019

Flynote: A party who initiates legal proceedings is expected to bring it to finality within a reasonable period - The court cannot continue to condone parties who abuse the court's

discretion - Courts will dismiss their claims and will be eligible to pay costs at a higher scale.

Summary: Respondent sued applicant in the amount of N\$700 000. Applicant defended and the matter was referred to case management in terms of the rules. Respondent neglected to comply with rules of court, court order and time lines. Applicants applied for dismissal in terms of rule 53(2)(c) which was not opposed on the date of hearing. Its legal practitioners submitted from the bar that Respondent filed a notice of opposition that very morning. This was irregular. In light of the respondent lack of zeal in pursuing its claim the matter was dismissed with cost at a higher scale.

ORDER

1. Respondent's/plaintiff's claim against applicants/defendants is dismissed in terms of Rule 53(2)(c) of the Rules of High Court;
 2. Respondent/plaintiff shall pay costs as between attorney and client scale and the said costs shall be taxed.
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JUDGMENT

CHEDA, J:

[1] This is an interlocutory application. The brief historical background of this matter is captured hereunder.

[2] The plaintiff (now respondent) is a close corporation registered in terms of the law of the Republic of Namibia and operating in Oshikuku. First defendant is a lady and was previously employed by plaintiff while second defendant is a close corporation registered in terms of the laws of Namibia and is operating in Oshikuku. Defendants

who are now applicants in these proceedings. Ms Kishi is representing both first and second applicants, while respondent is represented by Ms Mainga. Applicants' relief is as couched in the Notice of Motion thus;

- a) 'respondent/plaintiff's claim be dismissed in terms of Rule 53(2)(c) of the Rules of court;
- b) costs of suit; and
- c) further and/or alternative relief.'

[3] On the 15 January 2016 respondent issued out summons in this court against both applicants wherein it claimed the sum of N\$700 000. The allegations against them is that during the period from 2014 to 2015 they unlawfully and wrongfully misappropriated goods or cash from its business. Therefore, plaintiff claimed the said amount jointly and severally from the defendants.

[4] The matter was defended and therefore fell into the opposed matters and eventually under case management.

[5] On the 1 July 2016 the parties filed a proposed pre-trial order, wherein time lines were set down for filing discovery affidavits. Applicants complied, but, respondent did not. Respondent was given three opportunities to file a discovery affidavit but failed to do so. The mediation hearing was postponed to the 23 January 2017 for mediation referral. This matter did not take place and was postponed to 27 February 2017 for status hearing and mediation referral. Respondent was further indulged to file a discovery affidavit but did not comply. As a result of non-compliance for the second time the matter could not be referred to mediation on the 27 February 2017. On the 26 June 2017, respondent's legal practitioner sought a further postponed to the 11 September 2017 for status hearing, (this was the fifth opportunity for respondent to file the discovery affidavit). On the 10 October 2016 respondent's brought an application to file discovery which was granted. A further mediation was set down for the 16 October 2017, but, did not take place as respondents did not attend.

[6] The matter was transferred to another legal practitioner on the 21 November 2017. It was set down for trial on the 8 to 9 May 2018 but, did not take place as respondent's legal practitioner asked for a postponement to 25 June 2018 to allow parties to agree to a trial date. On the 25 June 2018 the matter was again postponed to 23 to 24 October 2018 for trial. As of October 2015, respondent had not filed witnesses' statements and discovery affidavit and no application for condonation for non-compliance had been filed.

[7] It is for the above reasons that applicants are applying for the dismissal of respondent's claim in terms of Rule 53(2)(c) of the Rules of the High Court. Ms Mainga did not file opposing papers, but, made submissions from the bar. She submitted that she fell ill towards the end of 2017 and as such she could not file other documents. She also argued that the last court order did not specify that respondent should file its papers. This argument cannot stand because the rules of court are clear as to what should be done as respondent was already barred at that stage.

[8] The fact that this matter has not been handled in compliance with the rules of court admits of no doubt. I accept that Ms Mainga was indisposed sometime towards the end of the year as this was pointed out in a different matter where she was expected to appear. This, therefore, is a reasonable excuse. This, however, was only for that period. This matter has a very bad track record which she ought to have been aware of and tackled with zeal. Sight should not be lost that this matter goes back to 2016 and nothing meaningful was being done in, 2016, 2017 and part of 2018 despite numerous court orders calling upon the parties to comply. The explanations which were being given are to say the least very flimsy and are therefore rejected.

[9] It is clear therefore that plaintiff is automatically barred for want of compliance. It is trite that once a party finds itself in a position of having failed to comply with either the rules, directions or court orders, it has a duty to apply for a condonation, which condonation must be sought at the first available opportunity.

[10] Respondent being the plaintiff had an obligation to prosecute her claim with vigour expected of a reasonable plaintiff. This court has, perhaps unnecessarily been

bending backwards in an attempt to accommodate plaintiff, however, lo and behold it seems that plaintiff spurned all the courts and defendant's generosity and indulgence.

[11] The rules of court are there for the smooth running of the judicial process as they help both the court, on one hand and other parties on the other in the attainment of justice. In this jurisdiction the principle in the case of ***Swanepoel v Marais & others 1992 NR 1 at 2J-3A*** is in point as it was stated:

'The Rules of court are an important element in the machinery of justice. Failure to observe such rules can lead not only to the inconvenience of immediate litigants and of the courts but also to the inconvenience of other litigants whose cases are delayed thereby. It is essential for the proper application of the law that the Rules of Court which have been designed for that purpose, be complied with. Practice and procedure in the Courts can be completely dislocated by non-compliance.'

[12] Rule 53(2)(c) gives the managing Judge power to exercise its judicial discretion in dismissing plaintiff's claim. But, before, it does so, the court is enjoined to examine the circumstance of both parties. Respondent is the prime mover of the litigation which is mounted against applicant. Applicant is, therefore, entitled to defend. Since, applicant has initiated these proceedings it is expected to pursue it to finality. All the affected respondents and the court expect a conclusion within a reasonable period. Respondent cannot sit on its laurels and expect other parties to languish in an endless expectation. This in my view is tantamount to torture and are the mind games which the courts cannot allow to play out in their courts.

[13] The explanation given by respondent is flimsy and lacks *bona fides*. In my considered view, it is designed to harass applicants and cannot be allowed to persist, for to do so is to render injustice to applicants much to their prejudice. As already pointed out non-compliance can be remedied by an application for condonation. In casu, application for condonation was filed on the date of the hearing, in fact a few hours before the hearing. In order to determine the genuineness of an application for condonation by respondent, it is unavoidable to look at its behaviour and conduct in

totality. For the past two years, this court has been indulging it in order for it to regularise its papers, but, this however, has come to naught.

[14] Respondent with the greatest respect has treated these proceedings with disdain and contempt. I therefore find that applicants have a good reason to complain and are entitled to the relief they seek as per the Notice of Motion filed of records.

[15] With regards to costs, costs normally follow the cause. Respondent's conduct attracts censure from the courts. Applicants were put into unnecessary expenses by respondent who seems to have mounted a court process when it either did not have sufficient proof to sustain its claim or out of malice. Applicants, are, therefore, entitled to recoup their expenses which have been occasioned by respondent. They need to be put back to their original positions. The only way to do so is to saddle respondent with costs at a higher scale in order to show the court's displeasure at litigants who abuse court process.

[16] It is for the above reasons that I find that applicants have made a good case against respondent and the following is the order of court:

1. Respondent/plaintiff's claim against applicants/defendants is dismissed in terms of Rule 53(2) (c) of the Rules of High Court;
2. Respondent/plaintiff shall pay the costs as between attorney and client scale and the said costs shall be taxed.

M Cheda
Judge

APPEARANCES

APPLICANT: Ms Kishi
of Dr. Weder, Kauta & Hoveka Inc, Ongwediva

RESPONDENTS: Ms Mainga
of Inonge Mainga Attorneys, Ongwediva