

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case No: HC-MD-CIV-ACT-OTH-2017/04189

In the matter between:

PETRUS SHOOVALEKA

PLAINTIFF

and

PRESIDENT OF THE REPUBLIC OF NAMIBIA

1ST DEFENDANT

PROSECUTOR GENERAL

2ND DEFENDANT

MINISTER OF SAFETY AND SECURITY

3RD DEFENDANT

INSPECTOR GENERAL NAMIBIAN POLICE

4TH DEFENDANT

ATTORNEY GENERAL

5TH DEFENDANT

PERMANENT SECRETARY JUDICIARY

6TH DEFENDANT

Neutral citation: *Shoovaleka v President of the Republic of Namibia* (HC-MD-CIV-ACT-OTH-2017/04189) [2021] NAHCMD 327 (9 July 2021)

Coram: Oosthuizen J

Heard: 30 April 2021

Delivered: 9 July 2021

ORDER

Having heard **Ms Unomwinjo Katjipuka-Sibolile**, counsel for the plaintiff and **Mr Ncube**, counsel for the second defendant -

IT IS ORDERED THAT:

[1] Second defendant's default to file her plea on 22 July 2020 is condoned and the bar imposed by Rule 54(3) is uplifted.

[2] Second defendant is allowed to file her plea to plaintiff's second amended particulars of claim and shall do so on or before **13 August 2021**.

[3] Plaintiff shall replicate to second defendant's plea on or before **31 August 2021**.

[4] Second defendant shall pay the costs of plaintiff occasioned by the condonation application. The costs shall be uncapped and Rule 32(11) shall not apply. The costs shall include the costs of one legal practitioner from 18 December 2020 to 31 August 2021.

[5] The parties shall discover on or before **10 September 2021**.

[6] The parties shall file their joint (or singular) case management report(s) on or before **22 September 2021**.

[7] A case management conference shall be conducted in the presence of the legal practitioners seized with the matter on **27 September 2021** at **11H30, SADC**.

[8] The parties are obliged to strictly comply with this order and no status reports are required. No process outside the provisions of this order shall be an excuse not to comply with the terms of this order.

JUDGMENT

OOSTHUIZEN J:

Background derived from the filings on e-justice.

[1] By way of a Notice of Motion dated 24 December 2020 the Prosecutor General of Namibia, the second defendant in Case No: 2017/4189 pray for leave of lifting of the bar (to plea) and condonation for late filing of her plea; costs of suit if the application is opposed; and further or alternative relief.

[2] This application for uplifting of the bar and condonation for the late filing of a plea came about in the following circumstances:

[2.1] Plaintiff filed a second amended particulars of claim during March 2020 with leave of the Court.

[2.2] On 12 May 2020 the Court ordered the defendants, including the second defendant, to file their pleas by 22 July 2020.

[2.3] On 27 July 2020 the parties entered into settlement negotiations with the intention of resolving plaintiff's claim on an amicable basis. The parties assured the Court that they are confident that an amicable solution in the present matter is possible and request that a case management conference scheduled for 10 August 2020 be postponed for a month to 14 September 2020.¹

[2.4] When the joint status report was filed, the defendant were already under automatic bar to plea by virtue of the provisions of Rule 54(3) of the Rules of Court.

[2.5] On account of the joint status report of 3 August 2020 the Court made an order on 10 August 2020 postponing the matter to 14 September 2020 for a status hearing and ordered that the settlement agreement be filed on or before 10 September 2020.

¹ Joint Status Report dated 3 August 2020.

[2.6] On 10 September 2020 the parties requested another postponement to 5 October 2020 to enable them to finalise settlement negotiations.

[2.7] According to the joint status report dated 30 September 2020, the settlement negotiations were at an advanced stage. They requested a final postponement to 26 October 2020 to finalise the settlement agreement. The parties conveyed to the court in the joint status report² that they have agreed that in the event they were unable to settle, the Court “will have to determine quantum.” In such an event they were in agreement that the matter be “set down for trial for purposes of determining quantum.”

[2.8] On 4 October 2020 and in the absence of the parties and based on the joint status report of 30 September 2020 the Court ordered the postponement of the case to 23 November 2020 for a status hearing and noted that the “managing judge found it appropriate to extend the time requested due to the nature of the issues to be considered and to grant adequate time for a settlement (if reached) to be drafted and signed.”

[2.9] On 18 November 2020 the parties file another joint status report saying that despite their best efforts they were unable to find an amicable settlement. They further stated that in line with their previous agreement, the parties request the matter to be set down for trial for the determination of quantum.

[2.10] The observation I need to note down here is that until this stage in all their joint status reports filed it was only quantum they needed to settle failing which the court will have to determine quantum. Any reasonable Court would have accepted that the parties are in agreement concerning the factual merits of plaintiff's claim. This Court certainly did.

[2.11] The Court then, after hearing Ms Katjipuka for plaintiff and Mr Ncube for defendants postponed the case for another Status Hearing to 7 December 2020 for the parties to further partake in settlement negotiations and to file a joint report setting out the further issues to be determined.

² Joint Status Report dated 30 September 2020, paragraph 4.

[2.12] On 7 December 2020 Ms Katjipuka for plaintiff and Mr Ncube for defendants appeared again. Mr Ncube explained that the guidelines for determination of quantum were not finalised and that quantum were not finalised and that his clients need more time. The following excerpts from the transcription³ is quoted verbatim:

'Mr Ncube: Yes but we also could not agree on some of the aspects, hence I had send it to clients for them to peruse them, it is only this morning that my client advised me that she still needs more time to peruse.

Court: It is a 2017 matter.

Mr Ncube: My Lord I admit yes there were so many interlocutories in between.

Court: Yes.

Mr Ncube: And the major issue as we explained last time we were here, two weeks ago it is the aspect of quantum, that is the only aspect where we are failing to agree with the Plaintiff, and hence those guidelines for the Court to assist us with regard to quantum.

Court: And this is the matter where the Defendants did not plead to the amended Particulars of Claim, is that correct?

Mr Ncube: Yes we did not plea because we, technically we admit to most of those indiscretions, the only issue is quantum. And how to apportion the quantum (intervention).'

[2.13] The Court basically needed an agreed to written guideline (stated case) from the parties setting out (with or without prejudice and/or concessions to substantial rights and the law, but for determination of the quantum by the court only) the facts and allegations they agree upon and the evidence to be tendered or required during the trial for purposes of quantum only.

[2.14] What the Court (and the plaintiff) was confronted with is the Notice of Motion dated 24 December 2020 for the upliftment of the automatic bar to plea and for

³ Transcript of proceedings on 7 December 2020, page 3 thereof, lines 6 to 23.

condoning the filing of a late pleading by second defendant and the seeking of a cost order against plaintiff, should he oppose.

[2.15] Plaintiff elected to oppose the application of second defendant for lifting the bar and condonation to file a plea late. So much is clear from the joint status report filed by the parties on 27 January 2021.

[2.16] On 1 February 2021 the Court ordered the timeliness for filing the answering/opposing affidavit and the replying affidavit and postpone the matter to 1 March 2021.

[2.17] On 1 March 2021 the Court ordered the timeliness for filing heads of argument and set the matter down for hearing of arguments on 30 April 2021.

[2.18] Second defendant failed to index as she was obliged to do in terms of Rule 131(6) and(7) resulting in severe inconvenience in considering and writing this reasons.

Contextual setting

[3] Plaintiff came to Court during 2017 with a claim for damages in order to vindicate rights he said was abused by the defendants.

[4] These rights are constitutionally entrenched but are not alien to the common law. In a nutshell they are: not to be unlawfully deprived of personal liberty; not to be subjected to arbitrary detention; and to be tried within a reasonable time. The aforementioned rights are also known to the common law. Article 12(1)(b) of the Namibian Constitution however added a sanction or remedy for not being put on trial within a reasonable time i.e. "failing which the accused shall be released".⁴

[5] It seems that the current view of the second defendant is that in order to be released the person complaining of the infringement is obliged to set the law in motion to obtain his release.

⁴ Compare *Malama-Kean v Magistrate, District of Oshakati, and Another* 2002 NR 413 SC, and *State v Myburgh* 2008 (2) NR 592.

[6] Moreover, it is submitted that if an accused (represented or unrepresented) did not apply for his release in terms of Article 12(1)(b) during his incarceration, he (or she) is precluded from a constitutional claim for damages in terms of article 25(4) of the Constitution.

[7] It is further submitted by the second defendant that a delictual claim for general damages would not lie if the complaint is one that invoke constitutional infringements, because of the constitutional remedy (or remedies) provided for.

[8] In *casu*, it seems to be argued that the plaintiff has never applied for his release in terms of article 12(1)(b) and therefore should not be availed relief in terms of the common law or article 25(4) of the Constitution.

[9] Plaintiff has filed a second amended particulars of claim during March 2020. The second amended particulars of claim came about subsequent to an earlier ruling of this Court wherein exceptions taken to an earlier amended particulars of claim succeeded.⁵

[10] Plaintiff seek vindication for the failure of the justice system at his expense, resulting in him spending 10 years, 5 months and 29 days in prison only to be acquitted and discharged in respect of all charges against him, following a trial that only started 7 years after he was first taken into custody and which took over 3 years to conclude.⁶

The Application

[11] Second defendant tendered explanations for her belated decision to apply for the upliftment of the automatic bar to plea and to apply for condonation to file her plea late.

[12] I cautioned myself not to make binding determinations concerning the legal submissions made by second defendant in attempting to make out a case that she

⁵ *Shoovaleka v Minister of Safety and Security* (HC-MD-CIV-ACT-OTH-2017/04189) [2019] 438 (28 October 2019).

⁶ Paragraph 1 of plaintiff's notes for argument, dated 22 April 2021.

will have good prospects in her defence once pleaded and allowed to proceed to trial.

[13] My caution is founded on the real possibility that this Court eventually shall be required during a trial to pronounce on the legal submissions once pleaded.

[14] Rule 56 of the Rules of the High Court requires good cause to be established by the second defendant.

[15] Good cause will lie if the Court find that a reasonable *bona fide* explanation for the delay/remiss was tendered and that a *bona fide* defence was advanced. Rule 56(1) (h) requires me to take into account the interests of the administration of justice.

[16] *Namib Plains*⁷ reiterates the need to consider the importance of the case; respondent's interest in the finality of the judgment and the avoidance of unnecessary delay in the administration of justice.

[17] Second defendant's explanation that she did not know of the earlier exceptions in this case which were upheld, is astounding and alarming. She was the interested party instrumental in the bringing of the exceptions and her office instructed eminent senior counsel. The case law now relied on by second defendant was in existence before she was required to file her plea on 22 July 2020. *Mahupelo*⁸ was delivered in the High Court on 6 May 2020. *Mahupelo* in the Supreme Court, referring the issue of constitutional damages back to the High Court, was delivered on 28 February 2019 (SA 7-2017). The excuse tendered by second defendant concerning her ignorance of the applicable case law in view of her constitutional obligations and involvement as a party in the current case, is revealing. This Court, as a consequence, was inconvenienced and the due administration of justice was as a result suspended, effectively, for more than a year. The Court however accept the notion advanced that settlement negotiations are without prejudice.

⁷ *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & Others* 2011(2) NR 469 (SC) paragraph 19.

⁸ *Mahupelo v Ministry of Safety and Security* (I 56/2014) [2020] NAHCMD 143 (6 May 2020).

[18] Despite the above however and in view of second defendant's withdrawal from settlement negotiations on the quantum without binding guidelines or a stated case, this Court is left in a vacuum without any plea being allowed to the second defendant. After all the second defendant advanced that a *bona fide* defence exists and she should be allowed to plea same. She has an interest in the matter and a constitutional right to prosecute her defence.

[19] I want to make it abundantly clear that although the Government Attorney represents the second, third and fourth defendants against whom relief is claimed, it is only the second defendant requesting upliftment of the bar and condonation to enter a plea late. The assumption by the Government Attorney when titling their Heads of Argument as "Defendants' Heads of Argument", is erroneous. Third and fourth defendants are still barred.

[20] In the interest of the administration of justice and in order to reach finality in this matter and without allowing any further exceptions to be brought, I shall uplift the bar and condone late filing of second defendant's plea.

[21] Second defendant came to Court seeking an indulgence. Second defendant pursued settlement of the quantum from 27 July 2020 after she was already barred to plea in terms of Rule 54(3). Second defendant pursued settlement on the quantum on an alleged erroneous and uninformed belief of what the law was, which is not reasonable. Second defendant failed to index as she was obliged to do. Second defendant is censured with an uncapped costs order.

[22] In the premises, taking into account the intricate nature of the matter and the preparation the parties had to invest in an attempt to settle the matter on the quantum; the apparent consensus they must have had on the factual merits of the matter and the need to expedite the proceedings, the following orders are made -

[22.1] Second defendant's default to file her plea on 22 July 2020 is condoned and the bar imposed by Rule 54(3) is uplifted.

[22.2] Second defendant is allowed to file her plea to plaintiff's second amended particulars of claim and shall do so on or before **13 August 2021**.

[22.3] Plaintiff shall replicate to second defendant's plea on or before **31 August 2021**.

[22.4] Second defendant shall pay the costs of plaintiff occasioned by the condonation application. The costs shall be uncapped and Rule 32(11) shall not apply. The costs shall include the costs of one legal practitioner from 18 December 2020 to 31 August 2021.

[22.5] The parties shall discover on or before **10 September 2021**.

[22.6] The parties shall file their joint (or singular) case management report(s) on or before **22 September 2021**.

[22.7] A case management conference shall be conducted in the presence of the legal practitioners seized with the matter on **27 September 2021** at **11H30, SADC**.

[22.8] The parties are obliged to strictly comply with this order and no status reports are required. No process outside the provisions of this order shall be an excuse not to comply with the terms of this order.

G H Oosthuizen
Judge

APPEARANCES:

PLAINTIFF(S): Ms Unomwinjo Katjipuka-Sibolile
Nixon Marcus Public Law Office

DEFENDANT(S): Mr Ncube
Government Attorney