NOT IMPORTANT **CASE NO.: I 3026/2008**

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GABY KRIEGER **APPLICANT/DEFENDANT**

and

THORSTEN HÜBNER **RESPONDENT/PLAINTIFF**

CORAM: MANYARARA, A J

Heard on: 04 August 2009

Delivered on: 04 November 2009

JUDGMENT

MANYARARA, AJ: [1] The applicant (who I shall call *"the defendant")* is represented by Mr Geier and the respondent (who I shall call *"the plaintiff"*) is represented by Mr Vaatz and the present hearing relates only to the question of costs.

[2] The background to the matter is that the plaintiff instituted action against the defendant claiming payment of judgment debts obtained by the plaintiff against Net

Marketing CC, of which the defendant is a director, plus interest and costs of suit. A notice to defend was filed, following which the plaintiff applied for summary judgment. The application was removed from the roll on 31 October 2008 by agreement between the parties because the defendant tendered security. On 20 November 2008 the defendant filed a request for further particulars. On 24 November 2008 the plaintiff's legal practitioner addressed a letter to the defendant's legal practitioners in the following terms:

> *"The time period for making the Request for Further Particulars has expired and your request is out of time and we will therefore refuse replying thereto. This all the more so, because the questions you ask in your Request for Further Particulars are all within the personal knowledge of your client, she must know best when she became a member of the close corporation and, in any event, it is not relevant to the proceedings and she has after all been the wife of Mr Krieger and is operating the close corporation with him so she cannot claim to be "an innocent outsider."*

[2] Prior to delivering the above letter, the plaintiff's legal practitioner had on 24 November 2008 filed a notice of bar if the defendant failed to deliver his plea within 5 days of the notice. The notice was dated 20 November. However, on 1 December 2008 the defendant filed a Rule 30 application alleging that the plaintiff had taken an irregular step in the proceedings.

[3] On 3 December 2008 the plaintiff withdrew the notice of bar without tendering wasted costs. The withdrawal was accompanied by the plaintiff's legal practitioner's letter in the following terms:

"I refer to your application in terms of Rule 30 and would like to place on record that I dispute the interpretation you place on the rules, namely that the time periods only start running from the date on which leave to defend has been granted. As you state in your summary annexed to the application, the rules provide that once defence is accepted, the matter proceeds "as if no application for summary judgment has been made". If no application for summary judgment had been made in this matter, your Plea would have by now been overdue.

Nevertheless, it is hardly worthwhile to wait for your application to be heard at the end of January 2009 and then perhaps to wait even longer for a ruling of the court to be handed down, I have decided to withdraw the Notice of Bar and to reply to your Request for Further Particulars in order to encourage you to file a Plea as soon as possible."

[4] The plaintiff replied to the defendant's request for further particulars by a pleading filed simultaneously with the delivery of the above letter. Nothing happened until 16 December 2008 when the defendant's legal practitioners addressed the following letter to the plaintiff's legal practitioner:

"We thank you for your letter of 3 December 2008 and accept your withdrawal of the complained of Notice of Bar and the simultaneous filing of purported Further Particulars (in respect of which our client's rights are reserved).

We also take note of your interpretation of the rules, which we do not share.

Be that as it may we wish to take this opportunity to point out to you that neither your letter under reply, nor the 'Notice of Withdrawal of Notice of Bar', as delivered on 4 December 2008, does address the issue of wasted costs in respect of both the withdrawn Notice of Bar and the costs of the still pending Rule 30 application, the basis for which has now obviously fallen away, save for the costs issue.

Until such time therefore that these costs issues have been addressed/determined we hold instructions to proceed with the Rule 30 application on the issue of costs only in order to have the costs aspect thereof decided.

Kindly note that we are at present precluded from dealing with the Reply to our client's Request for Further Particulars, as delivered on 4 December 2008, by the provisions of Rule 30 as well as by the fact that the Rule 30 application launched on behalf of our client remains pending.

We shall deal with the aforesaid Reply at the appropriate time.

In the interim we would be pleased to learn what your stance on the abovementioned issues is and look forward to hearing from you."

[5] The plaintiff's legal practitioner replied to that letter on 17 December as follows:

"Thank you for your letter dated the 11th of December 2008. My proposal is that the question of wasted costs arising from the Notice of Bar and your Rule 30 application should be determined by the trial court. It does not make sense to have a separate interlocutory application merely to determine the costs on the Rule 30 application. Seeing that I have withdrawn the Notice of Bar and have furnished you with the Further Particulars, you are now in a position to plead and I hereby request you to file your Plea. Should your Plea not be filed at the latest by the 14th of January 2009, I will issue a new Notice of Bar. In my view there is no impediment at present for you to plead."

[6] On 19 January 2009 the plaintiff filed a notice of bar (the second notice of bar) if the defendant failed to deliver his plea within 5 days of the notice.

[7] The defendant's legal practitioners responded to the notice by letter dated 21 January 2009 as follows:

> *"We refer to your letter of 17 December 2008 and apologise for not having responded thereto sooner.*
>
> *We need to inform you however that your proposal in regard to the wasted costs arising through the withdrawal of the Notice of Bar served on 26 September 2008 and the resultant Rule 30 application is not acceptable.*
> *As in such circumstances the aforesaid Rule 30 application continues to be pending the situation remains that we are not in position to plead.*
>
> *Accordingly we need to inform you that we hold instructions to proceed with the presently pending Rule 30 application unless the issue of costs is resolved."*

[8] As it happened, the matter came up for hearing on 23 January 2009, on which date the Court issued the following order:

> "Having heard Adv Geier, Counsel for the Applicant/Defendant, and having read the *Notice of Application in terms of Rule 30(1) as read with Rule 30(2) and other documents filed of record:*
>
> *IT IS ORDERED*
>
> 1. *That by agreement between the parties, the issue of costs between the parties relating to the Rule 30(2) application is to be determined on a Tuesday as an interlocutory matter.*
> 2. *That the date be arranged with the Registrar for arguments and the Court is directing parties to file heads of argument."*

[9] Rule 30(1) of the Rules of Court provides that a party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside. An irregular step is defined as some act which advances the proceedings one stage nearer completion. See *Erasmus: Superior Court Practice B1-189 to B-190*, citing with approval *Market Dynamics (Pty) Ltd t/a Brian Ferres v Grogor* 1984 (1) SA 152 (WLD) at 153C.

In terms of Rule 30(2)(a), an application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if the applicant has not himself taken a further step in the cause with knowledge of the irregularity.

[10] Counsel are agreed that proof of prejudice is a prerequisite to the success of a Rule 30 Application and that the law is correctly stated by HOFF, J in *Gariseb v Bayeri* 2003 NR 118 (Hc) at 121 I as follows:

> *"The court has a discretion to overlook any irregularity in procedure which does not work any substantial prejudice."*

[11] The learned Judge cites with approval several cases on the point, among these, *Trans-African Insurance Co Ltd v Maluleko* 1956 (2) SA 273 (A) where SCHREINER JA said this at 278F-G:

"(T)echnical objections to less than perfect procedural steps should not be permitted in the absence of prejudice to interfere with the expeditious and, if possible, inexpensive decision of cases on the real merits."

[12] HOFF, J continues as follows:

"In the Minister of Prisons v Jongilanga case [1983 (3) SA 47 (E) the following appears at 57C-D:

"It is not only the prejudice which applicants will suffer if the application is refused which must be considered, but also the prejudice which respondent will suffer if the applicant's application were to succeed.""

[13] The defendant's submission is that the Rule 30 application should succeed because he has fully addressed the requirement of prejudice in the written heads of argument filed on his behalf as follows:

"28. It appears also with reference to the grave consequences which flow from the operation of Rule 26 of the Rules of High Court that the Applicant/Defendant herein does not merely raise a technical objection to a less than a perfect procedural step taken on the part of the Respondent/Defendant.

29. Quite clearly the Applicant/Defendant will suffer grave prejudice should the Respondent/Plaintiff be allowed to ride roughshod over the Rules of Court and the procedures set by the Rules of High Court and thereby achieve placing the Applicant/Defendant in bar and on the strength thereof obtain judgment by default while the first interlocutory application in terms of Rule 30 has not even been disposed of and while the prejudice caused by the complained of irregular steps as set out in

such application have not been addressed at least through a suitable costs order or tender.

30. Save for a short delay occasioned by the agreed postponement the Respondent/Plaintiff on the other hand will suffer no substantial prejudice whatsoever should its second Notice of Bar be struck out as an irregular step or proceeding.

31. Ultimately the adjudication of the Respondent/Plaintiff's claim is delayed through the Respondent/Plaintiff's own refusal to address the issue of costs flowing from the withdrawal of the first ill-conceived Notice of Bar, which necessitated the bringing of the first Rule 30 application herein and his failure to tender the resultant costs.

32. Accordingly it is respectfully submitted on behalf of Applicant/Defendant that also this pre-condition for the relief sought has been met."

[14] The plaintiff disagrees and filed an opposing affidavit the relevant portions of which averred as follows:

"3.3 The pleadings show that the Defendant then, instead of pleading on receipt of the Notice of Bar, filed its first application in terms of Rule 30 on the 1st of December 2008. I thought that there was no merit in that application, I felt it hardly worthwhile to oppose and argue that

application ***as that would only cause further extreme delays*** *as one would then first have to await the judgment in response to the interlocutory application before one could continue with the pleadings and it is on that basis that I decided on the 3rd of December 2008 to withdraw the Notice of Bar and because of my view that the Application in terms of Rule 30 was not justified, I did not tender any costs. I at the same time, on the 4th of December 2008, I filed the Plaintiff's Reply to Defendant's Request for Further Particulars and hoped that that would*

enable the Defendant to file its Plea still in December 2008. My letter addressed to Koep & Partners dated the 3rd of December 2008 (Annexure RTD5) I advised the Defendant's attorneys that I did not agree, that they could validly bring an application in terms of Rule 30 or that my first Notice of Bar was an irregular proceeding. I also sated precisely why I decided to withdraw the Notice of Bar and to reply to the Request for Further Particulars in order to expedite the pleadings.

3.5 When the Defendant did not file a plea by the 19th of January 2009 (25 days after the Further Particulars were replied to) I filed a second Notice of Bar, as I was entitled to in terms of Rule 26. I submit that I was fully justified to file such a notice and that more than enough time has passed for the Applicant (Defendant) to file her plea in this matter. To come now with a new application in terms of Rule 30 is merely a gimic to delay pleadings even further. I hope that the court will not allow such tactics as there is no prejudice to the Applicant caused by the fact that the question of costs in respect of the first application must still be determined by the court. I thus submit that both applications in terms of Rule 30 were inappropriate in these proceedings and that this application should be dismissed and the Applicant (Defendant) be ordered to pay the costs."

[15] The relevant portion of the letter referred to elaborated the expression "to expedite the pleadings' as follows:

"……it is hardly worthwhile to wait for your application to be heard at the end of January 2009 and then perhaps to wait even longer for a ruling of the court to be handed down, I have decided to withdraw the Notice of Bar and to reply to your

Request for Further Particulars in order to encourage you to file a Plea as soon as possible."

[16] In my view, the opposing affidavit and the heads of argument filed on the plaintiff's behalf have actually admitted the defendant's point, be it inadvertently. It will be noted that neither the plaintiff's letter nor his submission deal with Rule 30 or explain how the step the plaintiff has invited the defendant to take cannot be said to be an act "which advances the proceedings one stage nearer completion" as stated in *Market Dynamics, supra,* precisely because no such explanation is tenable. To my mind, the stance adopted by the plaintiff is precisely the mischief at which Rule 30 is directed and does little if anything to answer the defendant's accusation that the plaintiff's intention is simply to "ride rough shod" over the Rules of Court.

[17] Accordingly, I take the view that the defendant has made out an irrefutable case for allowing the application and there will be an order in terms of paragraphs 1, 2 and 3 of Rule 30(1) as read with Rule 30(2) of the Rules of Court. Costs will follow the event.

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MANYARARA, AJ.

ON BEHALF OF THE APPLICANT/DEFENDANT **Adv. H. Geier**

Instructed by: **Koep & Partners**

ON BEHALF OF THE RESPONDENT/PLAINTIFF **Mr A. Vaatz**

Instructed by: **Andreas Vaatz & Partners**