CASE NO.: P(1) 2149/2008

HIGH COURT OF NAMIBIA

In the matter between:

STANDARD BANK NAMIBIA LTD **APPLICANT/PLAINTIFF**

AND

ALEX MABUKU KAMWI **RESPONDENT/DEFENDANT**

CORAM: TOMMASI J

Heard on: 16 February 2010

Delivered on: 18 June 2012

JUDGEMENT

TOMMASI J: [1] The applicant/plaintiff brought an application against defendant/respondent for an order directing that: the Notice of Application filed and served of record on 30 September 2009 constitutes an irregular and improper step as

envisaged in rule 30 read with rules 29, 31, and 32 as well as the Consolidated Practice Directives. The respondent/defendant opposed this application. For the sake of convenience the parties would be referred to as in the main action.

[2] The defendant instituted a counterclaim in the sum of N$104 558.00 representing the wasted costs tendered by the plaintiff to Nationwide Detectives & Professional Practitioners and the defendant on 7 February 2008 and made an order of court on 11 March 2008 when the plaintiff withdrew a rule 45 application in a different matter (Case NO (P) I 2051/2007); and to the defendant when plaintiff withdrew its action against him in the same matter which was made an order of court on 6 June 2008. The invoice reflects charges for the defendant's perusal, preparation and drafting of pleadings and other documents; time spent on court appearances; and for the preparation of heads of argument (4 days).

[3] The plaintiff, on 28 November 2008 filed a plea to the counterclaim. The plaintiff admitted that it had undertaken to pay the defendant's wasted costs; having received the defendant's invoice on 9 June 2008; and having refused to pay the defendant. The plaintiff pleaded that it was rightly entitled to refuse to heed to the defendant's demand. I mention in passing that the plaintiff did not request for the costs to be taxed as it was entitled to do in terms of rule 42(1)(a). Furthermore it appears that the plaintiff's plea to the counterclaim raises an issue in law only. The defendant did not except to the plea

nor did he request further particulars to clarify why the plaintiff "*rightfully*" could refuse settling his invoice.

[4] No further pleadings were exchanged. A rule 37 conference was held and the minutes thereof were filed on 18 June 2009. On 5 September 2009 an application by the plaintiff for a trial date on the fixed civil or continuous civil roll in terms of Rule 39(2) read with the practice directive no 1 of 2001, was served on the defendant. The date on which the plaintiff was to apply for a trial date was 14 October 2009. The pleadings were therefore closed.

[5] On 9 September 2009 the defendant brought an application for default judgment. The plaintiff, on notice applied in terms of rule 30 to have the application for default judgment struck out and set aside as being an irregular and improper step. This application was opposed by the defendant. On 29 September 2009 the Court granted the plaintiff the relief it sought and ordered the defendant to pay the costs.

[6] The application before me arose when the defendant, on 30 September 2009, filed a "Notice of Application" in terms whereof he requested an order that the plaintiff pay him the amount claimed in his counterclaim together with "*monthly compounded interest at the rate of 20% p.a from 6 of June 2008*" and costs. (the latter did not form part of the defendant's prayers in the counterclaim). The plaintiff brought this application

in terms of Rule 30 to have this Notice of Application struck out and set aside. The defendant opposed this application.

[7] The grounds upon which the plaintiff relied were as follow:

(1) That pleadings have closed and the next step was to enroll the matter for trial as per the Rules of Court and the Consolidated Practice Directives and that the defendant was not entitled to set the matter down for judgment by way of application;

(2) that the defendant was not entitled to judgment insofar as the application purports to be an application or default judgment in terms of rule 31(2) (a) of the rules of Court and by doing so has taken an irregular and improper step in the proceedings;

(3) that the defendant was not entitled to judgment insofar as his application purports to be a judgment by confession as in envisaged in terms of rule 31(1) as the plaintiff's tender to pay the wasted costs pertains to legal costs only and does not amount to a confession in terms of rule 31(1). To claim judgment by confession would constitute an irregular and improper step in the proceedings.

(4) that the defendant was not entitled to judgment insofar as his application purports to be an application for summary judgment as his claim was instituted as a counterclaim and he accordingly was not entitled to apply for summary judgment and/or that the pleadings have closed and he cannot apply for summary judgment at this stage of the proceedings;

[8] The grounds which the defendant relied on were as follow:

1. That the application was brought in terms of Rule 6(11) and not in terms of rules 31 and 32 of the Rules of Court;

2. that it was not required to obtain a date at the registrar's meeting;

3. that the claim in reconvention and convention are normally disposed pari pasu is merely a matter of convenience and not peremptory nor instructive;

4. that in terms of Rule 42(1)(a) of the Rules of court, the costs provided for are "all costs" which are party and party costs which includes fees, expenses and charges and the wasted costs tendered by the plaintiff are "all costs"

5. That the defendant may request the Court for an order ordering the plaintiff to pay the costs despite the fact that the pleadings are closed;

[9] The defendant should indeed have clearly indicated that his application was brought in terms of Rule 6(11). This in turn left the plaintiff guessing as to the exact nature of the application. What is abundantly clear is that it was an application for judgment as per the defendant's counterclaim. The key question is whether the defendant was entitled to approach the Court by way of application for judgment on the counterclaim he instituted at this juncture. The plaintiff's essentially submitted that the rules do not make provision for the defendant to bring an application for judgment after close of pleadings unless it was to set the matter down for trial.

[10] The defendant argued that, since the plaintiff did not dispute that they had tendered to pay the wasted costs, he had every right to approach this Court by way of application for a speedy resolution of his counterclaim. He submitted that he is entitled, despite the fact that the rules do not make provision for it, to approach the Court by way of an interlocutory application to exercise its inherent jurisdiction to grant him judgment where the plaintiff had admitted that they were liable to pay his wasted costs irrespective of whether pleadings have closed.

[11] The defendant has conceded that the application was not brought in terms of Rule 31 and it clearly cannot be an application for default judgment. The defendant's

application has the distinct appearance of one for summary judgment despite his submission that he did not lodge the application in terms of rule 32. The defendant reasoned that he should be afforded the same opportunity as a plaintiff in convention and cited *Matyeka v Kaaber 1960 (4) SA 900 (T)* in support hereof. In the latter case it was held that although claims in convention and reconvention are normally dealt with *pari passu*, the Court has the inherent power to grant judgment by default on a counterclaim before the claim in convention is disposed of. In the cited matter the plaintiff failed to file a plea to the defendant's counterclaim. Hill J on page page 904 C-G states the following:

> *"In the light of the authorities referred to I have no doubt that although claims in convention and in reconvention are normally dealt with pari passu, the Court has the inherent power to grant judgment by default on a counterclaim before the claim in convention is disposed of and I think that where the circumstances of the case warrant it such procedural relief should be extended to the defendant. I may add that I am unable to find any compelling reason for restricting a judgment by default on claims in reconvention to cases where the conventional and reconventional claims are entirely unrelated as suggested in Smith, N.O v Brummer, N.O. and Another, supra at p. 362.*
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> *In principle the <u>defendant has the right to institute a separate action on his own claim and he would then be entitled to judgment by default without being delayed by any proceedings instituted by the plaintiff.</u> He should, therefore, not be penalised merely because, for the sake of convenience, he has joined his action with that of the plaintiff.*
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> *A case much in point is S.A. Fisheries and Cold Storage v Yankelowitz, 23 S.C. 667, 16 C.T.R. 1040. There the defendant in a suit pleaded to the declaration and filed a claim in reconvention. The defendant in reconvention not having filed his plea in time after demand was barred from pleading. It was held that the plaintiff in reconvention was entitled to judgment by default. In giving judgment DE VILLIERS, C.J., said:*
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>> *<u>'If the defendant in this case had instituted a separate action for the amount of the debt he would certainly have been entitled to take advantage of the Rule, and the case could have been set down by default. I do not think he should now be penalised, because, instead of instituting a separate action, he has brought his action by way of a claim in reconvention. I think he ought to have the same rights as if he had been the plaintiff in convention.'"</u> [my emphasis]*

[12] This Court has inherent power to regulate procedural matters before it and it has done so. The Court has interpreted and applied the rules in a spirit which would facilitate the work of the courts and enable litigants to resolve their differences in a speedy and inexpensive manner.[1] If it is accepted that the defendant may approach the Court to exercise its discretion to allow the defendant the same opportunity the plaintiff would ordinarily have, then it would follow logically that the Court would have to interpret rule 32 in such a manner that it could be availed to a defendant on his counterclaim. The defendant would have been required to bring this application within the same time frame as the plaintiff in a main action would have been required to do, which under these circumstances would have to be within 15 days after delivery of the plea or any other period condoned by the Court. The application by the defendant would require of the Court to the exercise its inherent discretion to interpret the rules to allow the defendant the indulgence of bringing an application for judgment at this stage of the proceedings. The defendant would be required to give an explanation as to why he brings this application after close of pleadings and almost a year after the plaintiff had filed its plea. This may afford the defendant an opportunity to resolve his matter in a speedy and inexpensive manner if successful, but the same cannot be said to be true for the plaintiff.

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[1] Maia v Total Namibia (Pty) Ltd 1991 (2) SA 188 (Nm) (1990 NR 216 (HC)); SOS KINDERDORF INTERNATIONAL v EFFIE LENTIN ARCHITECTS 1992 NR 390 (HC)

[13] It appears that the plaintiff had raised a defense in law i.e that the defendant was not legally entitled to the fees he claimed. The defendant naturally finds himself at pains to be put to the expense of a trial when there is an admission and a defense raised in law which could speedily be disposed of by way of argument. Under these circumstances the defendant would have achieved the same relief if he had approached the plaintiff to enroll the matter in terms of rule 33 and to have same set down for argument.

[14] The step by the defendant to bring an application for judgment is not provided for in the rules and the defendant is well aware of this. The plaintiff was at a loss to understand how the defendant could apply for judgment and no indication was given of the defendant's approach until he submitted this in argument.

[15] It is the task of this Court to determine whether the application by the defendant constitutes an irregular step and whether by taking this step the other party would be prejudiced[2]. The rules do not make provision for an application for judgment after close of pleadings stage. The step, whether it is an application in terms of rule 6(11), remains one seeking judgment of the defendant's claim. It does not comply with the rules and is

[2] Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd 2010 (2) NR 703 (HC); China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC 2007 (2) NR 675 (HC); Gariseb v Bayerl 2003 NR 118 (HC)

therefore irregular. The Court however has the discretion to allow the defendant to proceed with the application if there is no prejudice.

[16] The application brought by the defendant, if allowed to proceed, may not finally dispose of the dispute between the parties in which case the defendant would have a further opportunity to proceed with the matter to trial. The procedure would not afford the plaintiff an opportunity to request for the dismissal of the defendant's counterclaim. The plaintiff, at this stage of the proceedings is guaranteed that the matter would be finally disposed of during trial. The plaintiff is equally entitled to a have his main claim and the counterclaim resolved speedily and inexpensively. Not only will the defendant be advantaged by having a further opportunity to proceed to trial in the event that his application is unsuccessful, but his conduct would rob the plaintiff of its right to have both the claim and the counterclaim finally disposed of. This would clearly prejudice the plaintiff who has reached the stage in the proceedings where it can legitimately expect final adjudication on its claim and the counterclaim. The defendant would have been placed in a better position if he had agreed with the plaintiff to approach the court in terms of rule 33 (1) which would have offered the parties an opportunity to set the matter down as a special case for adjudication.

[17] The plaintiff prayed for a cost order on an attorney and client basis. Counsel for plaintiff argued that the defendant had abused the process of court and that his conduct was vexatious. She submitted that the defendant had brought a previous application for

default judgment which was set aside and approached the Court for a second time with a similar approach and that he failed to take cognizance of or abide by the judgment of this Court. She further argued that the defendant, despite a Supreme Court decision that a lay litigant should draw a bill of costs and cannot claim professional earnings in a Bill of Cost but only but only disbursements, persists in claiming costs.

[18] At first glance it may appear that the defendant shows a total disregard for the rules but his actions should be viewed in the light of the facts of the case. The plaintiff had instituted proceedings against the defendant which compelled the defendant to oppose it and had withdrawn same for reasons best known to the plaintiff. The plaintiff had admitted that it had tendered the wasted cost of the defendant and that it had refused to pay the defendant. The plaintiff essentially admitted being indebted to the defendant but averred that it was "*rightfully*" entitled to refuse to pay the invoice of the defendant. The plaintiff itself was entitled to request that the invoice be taxed as this is provided for by the rules but opted to refuse payment. The plaintiff now argues that the defendant should have his invoice taxed whereas they had tendered to pay the wasted costs.

[19] Counsel for the plaintiff furthermore misread the Supreme Court judgment handed down in *Nationwide Detectives and Professional Practitioners cc v Standard Bank Of Namibia Ltd 2008 (1) NR 290 (**SC**).* This Court in *Nationwide Detectives & Professional Practitioners cc v Standard Bank Of Namibia Ltd 2007 (2) NR 592 (**HC**)*

was requested by the applicant (represented by the defendant herein) to grant a cost order as the respondent (the plaintiff herein) had failed to tender costs in an action it had withdrawn. The Court, using its discretionary powers made a specific cost order therein. The appellant appealed against the order made. The appeal was dismissed on the ground that the appellant failed to obtain leave to appeal. The Supreme Court has therefore not expressed itself on the issue of costs payable to a person who litigates in person.

[20] I am not called upon to determine what the outcome would be in this matter. I do not hold the view that the defendant is barred from approaching this Court to adjudicate the terms and conditions of the agreement entered into between the parties and to interpret the meaning of "*costs*" as it is contained in the orders of court. The plaintiff, having essentially raised a defense in law only, could equally have limited the cost of a trial herein if the issue whether they are legally liable to pay the cost of the defendant had been enrolled as a special case for the adjudication of the Court.

[21] It is however correct that the defendant brought this application after an application for default judgment was set aside. The defendant's conduct herein was however misconstrued. The defendant essentially pursued a judicial decision without being put to the expense of a trial. The plaintiff had admitted that it had tendered wasted costs for having unjustly compelled the defendant to defend litigation. This however does not detract from the fact that the defendant had brought an application of

this nature shortly before obtaining a trial date and one that no provision is made for in the rules of court. He was also fully aware that no such rule existed and used rule 6(11) seeking judgment and the Court's assistance to interpret the rules in an unprecedented manner without as much as notifying the plaintiff that he would do so. The defendant under these circumstances cannot avoid attracting a cost order.

[22] In the result the following order is made:

1. The rule 30 application of the applicant is upheld with costs.

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Tommasi J

ON BEHALF OF THE APPLICANT/PLAINTIFF	Adv. Maasdorp
Instructed by:	Andreas Vaatz & Partners
ON BEHALF OF THE RESPONDENT / DEFENDANT	In Person