



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX-TEMPORE JUDGMENT

Case no: I 341/2008

In the matter between:

DIRK JACOBUS LOUBSER**APPLICANT/PLAINTIFF**

and

DE BEERS MARINE NAMIBIA (PTY) LTD**RESPONDENT/DEFENDANT**

Neutral citation: *Loubser v De Beers Marine Namibia (Pty) Ltd* (I 341/2008) [2012]
NAHCMD 68 (30 October 2012)

Coram: GEIER J**Heard:** 30 October 2012**Delivered:** 30 October 2012

Flynote: Practice - Judgments and orders – Case Management Order made in terms of Rule 37(16)(iii) – Rescission of such order applied for in terms of Rule 44 (1)(a) of the Rules of High Court –

Practice - Judgments and orders – Imposition of sanctions in terms of Rule 37(16) (i) to (iv) of the Rules of High Court – Three requirements set by Rule before sanctions should be imposed – firstly there must be one of the non-compliances – failures - listed in Rule 37(16) (a) to (e) – secondly such non-compliance or failure must be without lawful excuse – thirdly - and only after the determination of the

lawfulness of the excuse - it would be incumbent to determine whether or not - in view of the particular non-compliance - it would also be just to order the dismissal of an action or a defence in terms of sub-rule (iii) or to rather impose any of the other sanctions as contemplated in sub-rules (i), (ii) or (iv)

In casu – no evidence before the Court - at the time of the granting of the order dismissing plaintiff's claim in terms of sub-rule (iii) - with reference to which the lawfulness or not of the non-compliance in question and the appropriateness of any sanction could have been determined – accordingly it was thus not competent for the court to have dismissed the action in terms of the rule 37(16)(iii) at that stage – rescission therefore granted

Summary: Due to the failure of the plaintiff's legal practitioners to appear at court in compliance with a status hearing notice issued by the court the court on 22 November 2011 ordered the dismissal of the plaintiff's action in terms of Rule 37(16)(iii) - Plaintiff subsequently applying for the rescission and setting aside of that order.

Held: Application fell to be decided with reference to the requirements set by Rule 37(16) of the Rules of High Court.

Held : Three requirements set by the Rule before sanctions should be imposed – firstly there must be one of the non-compliances – failures - listed in Rule 37(16) (a) to (e) – secondly such non-compliance or failure must be without lawful excuse – thirdly - and only after the determination of the lawfulness of the excuse - it would be incumbent to determine whether or not - in view of the particular non-compliance - it would also be just to order the dismissal of an action or a defence in terms of sub-rule (iii) or to rather impose any of the other sanctions as contemplated in sub-rules (i), (ii) or (iv);

Held : As there was no evidence before the Court, at the time, with reference to which the lawfulness or not of the non-compliance in question and the appropriateness of any sanction could have been determined - it was not competent for the court to have dismissed the action in terms of the rule 37(16)(iii) at that stage.

Held : Matter thus handled in a procedurally deficient manner

Held: Rescission thus falling within the ambit of Rule 44(1)(a) of the Rules of High Court as the order of 22 November 2011 was in such circumstances 'erroneously granted' and was therefore liable to be rescinded and set aside. Application accordingly granted.

ORDER

1. The order granted by the above Honourable Court against the applicant in favour of the respondent in case number I 341/2008 on 22 November 2008 is hereby rescinded and set aside.
2. No order as to costs.

JUDGMENT

GEIER J:

[1] This matter relates to the dismissal of the plaintiff's action in terms of Rule 37(16) (iii) of the Rules of High Court which was apparently caused by the failure of the plaintiff's legal practitioners to appear at a status hearing called by the Managing Judge for the 22nd of November 2011.

[2] Unfortunately the record, which would show, what actually transpired on that date, has not been made available.

[3] The answering affidavits filed in opposition to this application, (to have this order directing the dismissal of the plaintiff's action rescinded and set aside), inexplicitly also do not shed any greater light on the matter - after all the respondent's legal practitioners were in court on the day in question and they could, therefore, have been expected to provide greater detail on what transpired at the hearing.

[4] Also the papers exchanged between the parties unfortunately only focus on - what I wish to call - 'a finger-pointing exercise' between the various legal practitioners involved in this matter, which exercise¹ lost sight of the cardinal issue which requires to be decided, namely the determination of what was before the Court at the actual time that the order was granted².

[5] In my view this application is to be determined mainly on a much narrower compass, namely with reference to the requirements set by Rule 37(16), which are as follows:

“(16) Without lawful excuse, if a party or his or her counsel –

(a) fails to attend ... a status hearing ... ;

the managing judge may enter such orders as are just, including, but not limited to the following –

- (i) an order refusing to allow the non-compliant party to support or oppose designated claims or defences, or prohibiting that party from introducing designated issues in evidence;
- (ii) an order striking out pleadings or part thereof, including any defence, exception or special plea;
- (iii) an order dismissing a claim or entering a final judgment; or

¹ Although relevant to a common law rescission

² Relevant to a Rule 44(1) rescission

- (iv) an order requiring a non-compliant part or his or her counsel to pay the opposing party's costs caused by the non-compliance." (*my underlining*)

[3] Three key elements emerge from this rule :

- a) in order to fall within the ambit of Rule 37(16) a party or its legal practitioner firstly has to commit any one of the failures listed in Rule 37(16)(a) to (e)³;
- b) secondly, and if such failure is without lawful excuse – (this pre-supposes a determination of the issue of the lawfulness of the excuse);
- c) then, thirdly, the Managing Judge may also dismiss a claim (*or defence*) if this would be just.

[4] Reverting to the facts - there is nothing before this court which indicates that Swanepoel J had any information before him on the 22nd of November which indicated that the plaintiff's legal practitioners had failed to appear at the status hearing either with- or without lawful excuse. It follows that in the absence of any such information no determination on the second leg of the enquiry could have been made.

[5] It is also clear from the further provisions of the said rule that only once an inquiry into the reasons for the non-appearance or non-compliance would have been made - and such non-appearance would have been found to have been without lawful excuse - would the third leg of the inquiry kick in, namely it would only then – as a next step - have to be determined whether or not - in view of the particular non-compliance - it would also be just to order the dismissal of an action or a defence or to rather impose any of the other sanctions as contemplated in sub-rules (i), (ii) or (iv).

³ The failure to attend at a status hearing is provided for in sub-rule 37(16)(a)

[6] In my view, one of the courses which could have been followed by the Managing Judge on 22 November 2011 - in order to establish the reasons for the plaintiff's legal practitioners' non-compliance with the Case Management Notices issued on 4 November 2011 - was to direct the plaintiff's legal practitioners to either appear before the Court to explain themselves or to direct them to file affidavits on or before a set date, explaining their non-compliance and non - appearance - as in this instance - and to show cause why any of the sanctions contemplated by Rules 37(16) (i) to (iv) should not be applied. The matter could then have been postponed to a further date for a hearing on this issue during which - and this goes almost without saying - both parties would be entitled to be heard. Only after such hearing would the Court, in my view, have been in a position to properly and fairly determine which of the sanctions listed should be imposed, if any.

[7] I am not trying here to suggest, with reference to this particular example, that this would be the only fair and rule-compliant manner in which a Managing Judge could determine the imposition of sanctions in terms of the rule. After all, this would be a matter for the Managing Judge to determine in his or her discretion in each particular case with reference to the needs and rights of the parties and the given circumstances.

[8] As however, in my view, this matter was handled in a procedurally deficient manner and as there was no evidence before the Court, at the time, with reference to which the lawfulness or not of the non-compliance in question and the appropriateness of any sanction could have been determined - it was not competent for the court to have dismissed the action in terms of the rule 37(16)(iii) at that stage.

[9] For these reasons I consider this to be the type of case that falls within the ambit of Rule 44(1)(a) of the Rules of High Court in the sense that I find that the order of 22 November 2011 was 'erroneously granted'⁴ and is therefore liable to be rescinded and set aside.

⁴ In the sense that there was an irregularity in the proceedings or if the Court, at the time the order was made, was unaware of facts which, if known to it, would have precluded the granting of the order (see *Nyingwa v Moolman NO 1993 (2) SA 508 (Tk)* at 510G). – See also for instance : *Promedia*

[10] Accordingly I grant the order sought in Prayer 1 of the Notice of Motion.

[11] For the reasons explained I decline to make an order as to costs.

H GEIER
Judge

APPEARANCES

APPLICANT:

JJ Botha SC (with him L Viljoen)
Instructed by Dr Weder, Kauta & Hoveka Inc.,
Windhoek.

RESPONDENT:

G Dicks
Instructed by GF Köpplinger Legal Practitioners,
Windhoek