

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

CASE NO.: I 3683/2014

In the matter between:

MIGUEL MINGELI**PLAINTIFF**

And

OSHAKATI PREMIER ELECTRIC (PTY) LTD**DEFENDANT**

Neutral citation: *Mingeli v Oshakati Premier Electric (Pty) Ltd (I 3683/2014) [2015] NAHCMD 45 (6 March 2015)*

Coram: Masuku, Acting

Heard: 18 February 2015

Delivered: 6 March 2015

Flynote: The plaintiff sued the defendant for damages allegedly resulting from injuries suffered as a result of an electric wire or cable installed by the defendant. The plaintiff applied for the action to be transferred in terms of the Rules of Court from the main division Windhoek to Oshakati in the northern division. The defendant opposed

this application. The court reviewed the basis for transfer in terms of the Rules and defined the operative words 'reasonableness' and 'convenience' and postulated some of the factors that might influence the decision to transfer a case. The court held that the wishes of a party and the convenience of counsel do not play a meaningful part in a decision to transfer a case. The application was transferred to the northern division.

ORDER

The civil trial between the plaintiff and the defendant herein is hereby transferred from the main division in Windhoek to the northern division in terms of Practice Directive 47 (1) for continuation of all subsequent steps towards disposal of the trial.

There is no order as to costs.

RULING

MASUKU, AJ

- 1 The question for determination in this matter and which is the subject of the present ruling is the propriety of an order to transfer a trial from this court to the northern local division.
- 2 The facts giving rise to the present question are fairly common cause and they acuminate to this: The plaintiff, an adult male of Evululuko, Oshakati, sued the defendant company for a sum of N\$ 2, 450 000, interest thereon and costs of suit. The plaintiff alleges that he was, whilst at his home, burnt by an electric

cable or wire which was installed by the defendant. He alleges that the incident arose as a result of negligence on the part of the defendant and the amount claimed represents damages, which include past and future medical expenses and general damages for pain and suffering, disfigurement and discomfort. Needless to say, the defendant has opted to defend the claim.

3 The case was instituted under the present case number in the main division in Windhoek. By a written request dated 11 February, 2015, the defendant applied to this court for an order to transfer the case to the northern local division for further management and trial. The reasons advanced for the application for transfer include the following:

- (a) that the alleged delict complained of occurred in the north of Namibia, in Oshakati;
- (b) the plaintiff is resident in Oshakati;
- (c) the defendant conducts its business from Oshakati;
- (d) most, if not all the witnesses reside in the north;
- (e) the defendant is concerned about the ability of the plaintiff to travel and to accommodate himself and his witnesses in Windhoek should the trial proceed in Windhoek.

4. The plaintiff is opposed to the request and the following constitute the main bases for the opposition:

- (a) the plaintiff has a right to choose where he wants to prosecute the matter and has chosen the main division as the seat;
- (b) the defendant considers that the case will be speedily disposed of in the main division as previous proceedings in the north related to the case took inordinately long and remain unfinished;
- (c) the plaintiff is willing to travel to attend court sessions in Windhoek, indigent as he may well be;

(d) should the matter be transferred as applied for, the plaintiff, who is represented by the Legal Assistance Centre may no longer have legal representation, as his lawyers will be required to travel to the northern division to attend the proceedings and because the Legal Assistance Centre has no offices in the north, the costs of travelling to the north may well persuade the Centre to withdraw as the plaintiff's attorneys of record and this may deal the plaintiff's prospects of receiving justice a telling blow.

5. What is the relevant law applicable to transfer of cases from one division to another? Practice Directive 47¹ is the applicable law in this matter and it reads as follows:

- '(1) In respect of a civil proceeding a party may at any stage, on notice to all parties, apply to the managing judge or to a court for a matter to be transferred to a division where the matter may be more conveniently or more reasonably heard, other than the court where the matter commenced.
- (2) The party applying need not file an affidavit, but must in writing set out the reasons why the transfer is sought.'

6. In the instant matter, the defendant, which is the applicant for transfer, has made a written application and has stated the reasons why it requires the transfer. Furthermore, there is no gainsaying that the matter serving before court is a "proceeding" within the meaning ordinarily attached to the word. The Black's Law Dictionary defines a "proceeding" as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of a judgment; any procedural means of seeking redress from a tribunal or agency". The action instituted in this matter is, in my considered view a means of seeking redress before a tribunal and is also an act designed to finally result in the entry of a judgment, hence my conviction that this is proceeding as envisaged in the above provision.

¹ Promulgated by the JP on 16 April, 2014

7. It is worth mentioning as well that the Practice Directive allows such an application to be made at any time. This would suggest that in appropriate cases, such an application can even be launched at a very late stage of proceedings. I can only mention that generally speaking, the earlier the application is made, the better. In the instant case, it is worth noting that the action is at an infancy stage, so to speak and very little harm would, subject to the consideration of the submissions by the protagonists below, be occasioned by granting an application for the transfer.

8. It would therefore seem to me that the defendant has fully complied with the procedural requirements set out in Practice Directive 47 above. Furthermore, the reasons for seeking the transfer were not conveyed in an affidavit but in a written notice and to which notice the plaintiff, as he is entitled to, responded in writing. I have set out the essence of the reasons why a transfer is sought. The only question, falling for determination, at this juncture, is whether the defendant's reasons as advanced in the said notice meet the requirements for transfer set out in the Practice Directive quoted above.

9. I am of the considered view that the main reasons which should persuade the court and inform a decision to transfer a case are two, namely "convenience" or "reasonableness" as captured in the relevant provision of the Practice Directive quoted above. In either case, it would seem to me, the court must make a value judgment, based on the entire conspectus of the case. Claassen² defines "convenience" as "not limited to expediency, efficacy and desirability, but includes fairness, justice and reasonableness." It therefore seems to me that the above epithets should be taken into account in determining the question whether the requirement of convenience have been met.

10. The same learned author, on the other hand defines 'reasonableness' as meaning, 'considering the matter as a reasonable man normally would and deciding as a reasonable man normally would decide. As will be recalled, a 'reasonable man' is

² Dictionary of Words and Phrases, Vol 1, Butterworths, 2003 at C-136

regarded as a person 'of ordinary intelligence, knowledge and prudence.'³ Parker J, in *Trustco Insurance v Deeds Registries Regulation Board*⁴ adopted the meaning escribed to reasonable in *In re a Solicitor*,⁵ namely:

'The word 'reasonable' has in law the prima facie meaning of reasonableness in regard to those circumstances of which the actor called upon to act reasonably I adopt that interpretation as applicable in this case.'

11. It would appear to me, regard had to the definitions given to the two operative words above, that there are similarities in the meaning to the two words i.e. convenience and reasonableness. I say so because in defining convenience, the learned author makes reference to reasonableness as a consideration, leading to the conclusion that the two are related and are not necessarily mutually exclusive concepts.

12. In sum therefore, it would seem to me that issues that the court may take into account in deciding to transfer a matter, and which may simultaneously answer to both reasonableness and convenience include, but are not limited to the following factors:

- (a) the place where the cause of action arose;
- (b) the place where the respective parties reside;
- (c) the distance to the court from the respective parties' places of residence and in cases where there is an unequal bargaining power, the distance from the place of abode of the less privileged of the parties;
- (d) the place where the witnesses by and large reside;
- (e) the place where execution of the judgment will more conveniently take place; and
- (f) meeting the objectives of the rules such as speedy, efficient and cost effective resolution of disputes; and
- (g) where appropriate, the health and physical condition of main protagonists.

In this regard, it would appear to me that the wishes and preferences of the parties carry a trifling weight, if any.

³ Cilliers *ibid* at R-10

⁴ 2010(2) NR 565 at 579 par 31.

⁵ [1945] 1 A11 ER 445 (CA) at 4464 per Scott LJ.

13. In the instant case, the reasons for the transfer relate to the cause of action arising in the north and that both parties reside in the north (the defendant carrying on its business in that location). Furthermore, it is contended that the witnesses, at least the majority of them to testify on the factual matters, will in all probability come from the north. I digress, for purposes of argument and envisage a situation where the trial takes place in this court and a previously unforeseen need appears, during the course of leading evidence, for the conduct of an inspection *in loco*. Would it not be convenient and reasonable to hold the trial up north where the event occurred? To order the parties and the court to travel what is common cause is a long distance to the north for that purpose, would in my view be unreasonable and inconvenient to the parties and to the court in terms of time and expense, to mention but a few issues.

14. As one reads the plaintiff's opposition to the application for transfer, two major points emerge which should be placed in the balance. First, the plaintiff complains about the efficiency of the court's division in the north and reasons that the matter took an inordinately long time and remains unconcluded in that court up to now and hence the preference to initiate the proceedings in this division. The second one is that if the matter is transferred to the north, his legal representatives will in all probability withdraw as attorneys of record as they will not have the means to travel up north to attend management and pre-trial conferences related to this matter. Should the latter event eventuate, it was argued, the plaintiff, who is represented by the Legal Assistance Centre, would be bereft of legal representation and may well fail to ever have his day in court, resulting in grave injustice, given the injuries he allegedly suffered as a result of the defendant's alleged negligence.

15. Weighty as these considerations may appear to be at first blush, sight must not be lost of the overriding considerations in such cases. It is the twin concepts of convenience and reasonableness properly considered and weighed in the circumstances of any matter under consideration. This duet of considerations must not be viewed in an isolated manner and only in reference to a single party or that party's

parochial interests. The considerations must, in my considered view be applied in reference to the case as a whole; considering both parties' interests, the interests of the court and of the witnesses, in tandem with the dictates of fairness and justice. This may even include what would otherwise be regarded as peripheral interests of persons who reside in the locality where the incident arose who are not intimately involved in the matter but have a contiguous interest such as relatives, friends or even neighbours in following the proceedings and seeing the wheels of justice grinding in front of their very eyes.

16. Whereas one may have understandable sympathy for the feelings of a plaintiff regarding where he would wish or prefer to have his matter heard and determined, sympathy alone is never a sufficient ingredient. Regarding the first issue, i.e. the delay in dealing with the case before the northern division in the past, whatever problems may have afflicted the machinery of the court in this case in the past, judicial case management has to a very large extent cured or at the least ameliorated the ills of the previous dispensation in the handling of cases, where inordinate delays characterized judicial proceedings. This was put to counsel for the plaintiff and it elicited no meaningful response save acknowledgement that the demons of the past delays had for the most part been exorcised. The more structured and court-controlled pace of litigation, introduced by judicial case management, with the aim and the purpose of facilitating the resolution of real the issues in dispute justly, speedily, efficiently and cost-effectively⁶ is practiced, not only in this division but in the north as well and there are no reasons why the court in the north can be regarded as less efficient in dealing with this matter, considering that that court is subject to the same Rules of practice.

17. Regarding the second reason advanced, namely the fact that the plaintiff's counsel would be required to travel up north for conducting the case and would probably withdraw if the case is transferred, I have serious difficulty. It would appear that the priority of interests in this case are mixed up. The convenience of counsel, although important, should not have an overriding sway over the decision where a

⁶ Rule I (3) of the Rules of Court, 2013

matter is ultimately heard. The argument advanced in this regard bears all the hallmarks of placing the convenience of counsel above that of the client, the court, the other side and the general interests of justice. This should not be.

18. In the present circumstances, arrangements can and should be made for correspondents in the north to be engaged to attend to the pre-trial procedures on the plaintiff's behalf, which exercise should also enable him to personally go to court to follow the pre-trial proceedings. Once the matter nears trial, only then could the plaintiff's counsel be required to travel for the precognition of witnesses and matters incidental to the actual trial.

19. In the reasons for opposing the order sought, it has been submitted on behalf of the plaintiff that though "indigent, the plaintiff is willing to travel to and from the north in dealing with this matter and will in any event have to travel whether it is to the courts in the north or to the courts in Windhoek." This in my view is totally beside the point. The plaintiff's willingness is one issue but it does not answer at all to the key requirements of convenience and reasonableness envisaged in the relevant provision. It would certainly be harsh in the extreme, inconvenient and unreasonable in the circumstances, to order the trial to proceed in this court where all the other factors point to the northern division being the most suitable, reasonable and convenient forum in the circumstances for the reasons stated earlier.

20. I wish to comment favourably on the undertakings made by the defendant in its application to assist the plaintiff in so far as is practicable should the court be inclined to transfer the case to the north. It has undertaken not to exploit the effects of the transfer in its favour and to the plaintiff's detriment. For example, it has undertaken to allow a relaxation of the rules appertaining to service and has offered to attend to indexing and paginating the file if so requested. All these undertakings are welcome in the light of the plaintiff's impecunious state demonstrated in the papers opposing the transfer. The defendant's gestures are to be applauded and it will be expected comply and be held to its undertakings reduced to writing. I may well add that the reasons for seeking transfer

by the defendant commend themselves to me and are not borne out of an intention to oppress and disable the plaintiff from effectively pursuing his case. The opposite appears to be the case.

21. On a minor point of procedure, it appears that the plaintiff's counsel in this matter wrote the reasons for opposition as though same were contained in an affidavit and went on to make submissions thereon in the first person. This should not be so. In this regard and to illustrate the point, on the second page at, AD PARAGRAPH 1-2, (there being no numbering of paragraphs or pages to the grounds for opposition), the following is stated by the plaintiff's legal representatives in relation to the plaintiff and his reluctance to agree to the transfer, "Whether his fears are justified I am of the opinion that I am responsible to follow the instructions of my client and to satisfy him that the matter will be finalized this time."

22. First, this is not an affidavit but it is supposed to be a document stating the reasons for opposing the application. More importantly, counsel, though bearing a duty to follow their clients' reasonable and lawful instructions, owe an even heavier duty to the court as an officer and should advise clients accordingly, not only in line with clients' wishes and expectations but in regard to what the law provides and requires of them, which may not necessarily coincide with what their clients wishes or prefers.

23. In the premises, I am of the view that the application for the transfer of the trial to the northern division is meritorious and ought to be granted. I accordingly grant the following Order:

23.1 The civil trial between the plaintiff and the defendant herein is hereby transferred from the main division in Windhoek to the northern division in terms of Practice Directive 47 (1) for continuation of all subsequent steps towards disposal of the trial.

23.2 There is no order as to costs.

TS Masuku, AJ

APPEARANCES

PLAINTIFF:

Ms Van Wyk

Instructed by Legal Assistance Centre

RESPONDENT/PLAINTIFF:

J. Gaya

Instructed by Mueller Legal Practitioners