REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR DISMISSAL OF THE DEFENDANT'S COUNTERCLAIM

CASE NO. I 3418/2013

In the matter between:

SIMON ERASMUS HILIFILWA **PLAINTIFF**

And

KERUB MWESHIXWA **DEFENDANT**

Neutral citation: *Hilifilwa v Mweshixwa (I 3418-2013) [2016] NAHCMD 166 (10 June 2016)*

CORAM: MASUKU J

Heard: 20 May 2016
Delivered: 10 June 2016

Summary: **RULES OF COURT –** Rule 26 (10), Rule 27 (3) and Rule 53 considered and applied.

Flynote: At the close of the case for the plaintiff, the plaintiff applied for an order dismissing the defendant's counterclaim on the basis that the latter had failed or neglected to file its proposed pre-trial order setting out the disputes and issues put up for trial. *Held that* – the duty to prepare and file the proposed pre-trial order falls on both parties and it is when the other party does not cooperate that the one party may prepare a one-sided proposed order and apply to the court to impose sanctions on the erring party.

Held that – the plaintiff did not itself set out what the issues and disputes are in the counterclaim and that it was therefore in equal guilt with the defendant in that regard. It was also noted that at no stage did the plaintiff apply to court for sanctions to be imposed by the court on the defendant for the alleged failure to comply.

Held that – where there is a counterclaim, there is no division of labour, resulting in the plaintiff having to prepare a pre-trial order in respect of the claim in convention and the defendant having to prepare one in respect of the claim in reconvention. Both parties have to participate and issue one pre-trial order in respect of the entire case, both the main claim and the counterclaim.

Held further that – both parties should, in terms of rule 27 (3), even at this stage prepare the pre-trial order in order to delineate the issues for determination in advance of the postponed trial.

Held that – an order dismissing a defence or claim is not easily granted and that good practice normally dictates that it should on notice to the other side so as to enable that side to also prepare and assist the court in making an appropriate order.

The plaintiff's application was dismissed and there was no order as to costs as both parties were found to have been in default regarding the filing of the pre-trial order in respect of the counterclaim.

ORDER

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1. The application for the dismissal of the defendant's counterclaim is dismissed.
2. The parties are ordered within 15 days of the delivery of this order, to file a joint proposed pre-trial order in relation to the counterclaim for the consideration and possible endorsement by the court.
3. The matter is postponed to 20 July 2016 at 15h15 for a pre-trial conference.
4. There is no order as to costs.

RULING ON APPLICATION FOR DISMISSAL OF THE DEFENDANT'S COUNTERCLAIM

MASUKU J,

[1] The question for determination in this Ruling is whether the defendant's counterclaim ought to be dismissed due his failure or neglect to file a pre-trial order in relation to same.

[2] In order to appreciate how the question for determination arises, it is necessary to briefly indulge in necessary detail relating to this matter. It amounts to this:

[3] The plaintiff sued the defendant for payment of an amount of N$ 56 000 and interest thereon at the usual rate. The basis of the claim. As alleged in the particulars of claim, is that the two contractants agreed in writing to the sale of a vehicle and in terms of which the plaintiff was the purchaser and the defendant, the seller. The price of the vehicle was N$ 66 000. Part of the essential terms of the agreement were that the plaintiff would take possession of the vehicle and use it as public transportation vehicle. In this regard, the plaintiff was to pay off the vehicle in a period of eight months from the date of signature, namely, 27 May 2012.

[4] On 24 February 2012, the plaintiff further avers, the defendant removed the said vehicle from his possession and had, at that time, failed to procure documents

necessary for the vehicle to operate lawfully in the public transportation arena. As a result, the plaintiff avers, he was required to pay fines in the amount of N$2000. His claim is for payment of N$56 000 being the amount allegedly advanced by the plaintiff to the defendant for purchasing the said vehicle and N$2000 in respect of the fines aforesaid.

[5] In response, the defendant, in addition to filing his plea, also file a counterclaim for payment of N$ 43 194 being in respect of damages allegedly incurred by the defendant as a result of the plaintiff breaching the contract referred to in para [3] above. In particular, it is alleged that the plaintiff failed, between 11 February and 17 February 2012 to deliver amounts collected from the transportation business to the defendant. It is further averred that the plaintiff, without the defendant's authorization drove the said vehicle to Oshikango outside the precincts of Windhoek where it was due to operate. As a result, the vehicle was involved in an accident and the plaintiff failed to effect repairs thereon. The defendant thus claims N$ 13 194 for the mileage to Oshikango being N$13 194 and N$ 30 000 being an amount the plaintiff claims he expended in restoring the vehicle to its pristine condition after the plaintiff had been involved in a collision as aforesaid.

[6] At the trial, the plaintiff called his witnesses and closed his case. When the defendant was due to open his case, the plaintiff's counsel, Ms. Shipopyeni, applied for an order dismissing the defendant's counterclaim on the basis that he had failed or neglected to comply with the provisions of rule 26 (10), which have the following rendering:

> 'Issues and disputes not set out in the pre-trial order will not be available to the parties at the trial, except with the leave of the managing judge or court granted on good cause shown.'

[7] As I understood Ms. Shipopyeni, the defendant failed to set out the issue and disputes for determination in relation to the counterclaim and further did not apply for leave to the court to have same available to him at the trial. For that reason, she argued, the defendant's counterclaim ought to be dismissed with costs.

[8] The defendant, for his part, urged the court to consider that he was previously legally represented and that as a lay man, he could not be expected, after the withdrawal of his legal practitioner, to have attended to the legal niceties required o litigants by the rules. He asked the court not to dismiss his counterclaim but to allow him to ventilate same during the proceedings.

[9] A perusal of the papers does indeed suggest that the defendant did not prepare a pre-trial order in relation to the counterclaim. All that appears is a pre-trial order in relation to the plaintiff's claim but no the claim in reconvention. As a result, the issues and questions for determination at the trial are not set out therein. He appears to have written a document entitled 'Notification' received by the registrar's office on 26 October 2015 in which he states that he had already submitted his response to the plaintiff's proposed pre-trial order.

[10] The question is whether the plaintiff is correct in submitting that because of the defendant's failure to comply, the court should proceed to dismiss the counterclaim. I must point out very early that the rule quoted by the plaintiff does not explicitly state that the failure to file a pre-trial order should result in the counterclaim being dismissed. All it says, is that the said party shall not have available to it the issues and disputes at the trial. Had the intention been to dismiss the claim for failure to file a pre-trial order as a sanction, I am confident that the rule-maker would have said in very clear and unambiguous terms.

[11] By way of comparison, the rule that does provide for the sanction of dismissing a plaintiff's claim or counterclaim for failure to comply with a court order is rule 53 and it provides as follows:

'If a party or his or her legal practitioner, if represented, without reasonable explanation fails to –

(a) attend a case planning conference, case management conference, a status hearing, an additional case management conference or pre-trial conference;

(b) participate in the creation of a case plan, a joint case management report or parties' proposed pre-trial order;
(c) comply with a case plan order, case management order, a status hearing order or the managing judge's pre-trial order;
(d) participate in good faith in a case planning, case management or pre-trial process;
(e) comply with a case plan order or any direction issued by the managing judge; or
(f) comply with any deadlines set by any order of court,

the managing judge may enter any order that is just and fair in the matter including any of the orders set out in subrule (2)'.

[12] Subrule (2), for its part, states the following:

'Without derogating from any power of the court under these rules the court may issue an order –

(a) refusing to allow the noncompliant party to support or oppose any claims or defences;
(b) striking out pleadings or part thereof, including any defence, exception or special plea;
(c) dismissing a claim or entering a final judgment; or
(d) directing the non-compliant party or his or her legal practitioner to pay the opposing party's costs caused by the non-compliance'.

[13] What is clear is that the court is given a panoply of alternative suitable orders to issue as a means of sanctioning a party that has failed 'without reasonable' explanation or excuse to comply with a court's order or direction. What is implicit in the foregoing rule is that the sanctions take place after the party has been afforded an opportunity to explain and show cause why they may not be so censured. There is good reason why this should be the case. It boils down to the principles of natural justice, which require that a man or woman should not be judged unheard. Put differently, no person should have an adverse order issued against him or her without him or her having been afforded an opportunity to address or deal with that proposed order or sanction.

[14] It must be pointed out that the refrain, in the sanctions enquiry, is for the court, at the end of the day, to issue an order that is in all the circumstances of the case just and fair. This means that there can be no one size-fits-all order. The court should, in fashioning an appropriate order in a case, have regard to all the pertinent factors and circumstances. Having done so, it will then be properly placed to issue a sanctions order, if called for, which meets the justice of the case.

[15] In dealing with the provisions of the above subrules, the court stated the following in *Benedicta Donatus v Dr. A. Muhamederahimo and Three Others:*[1]

> 'It is clear from the foregoing that the court, in applying sanctions to an errant party, exercises a discretion and has at its disposal a panoply of alternatives in terms of punishing a party that is in default of a court order or direction. In this regard, it would seem to me that the court should enter an order that is just, appropriate and fair in all the circumstances. In this regard, it would seem to me that the court has to consider the case at hand; its nuances; the nature of the non-compliance; its extent; its effect on the further conduct on (*sic)* the proceedings; the attitude or behavior of the party or its legal representative, to mention some of the considerations, and thereafter make a value judgment that will at the end meet the justice of the case'.

I endorse these remarks as appropriate even in the instant case.

[16] One issue that sticks out like a sore thumb, is that the defendant was not at any stage called upon to deal with the alleged non-compliance. He is a self-actor at this stage, his legal practitioner having withdrawn. It appears unjust and unfair, in the circumstances, at the trial, to call for the dismissal of the defendant's counterclaim in circumstances where he has been given no notice to comply and has importantly not been notified, in his disadvantaged position of the non-compliance and afforded a reasonable opportunity at the appropriate time, to comply.

[17] I have considered the file and the documents in it, particularly the case management file. It does not appear to me that the defendant was specifically informed

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[1] (I 2304/2013; I 1573/2013) [2016] NAHCMD 49 (2 March 2016) at p.14 para [32].

that he was to file a pre-trial order in regard to his case in particular. The rules, it seems, envisage a situation where both parties should sit down, prepare and ultimately file joint case plan or joint pre-order, as the case may be, This document should as far as possible, capture the issues and disputes of both parties i.e. in convention and in reconvention. It is when the other party refuses to partake in that joint exercise that a party may then file its own proposed order for the court's consideration and approval.

[18] It goes without saying in that event that an explanation would naturally accompany the one-sided proposed order as to why the other side has not participated. If it has done so out of intransigence or other haughty motive, it is then appropriate for the court, having afforded such party an opportunity to respond, to then issue an appropriate sanction in terms of rule 53 (1) (b) above. It appears to me to be highly improper, unjust, unfair and at odds with the notions of rules of natural justice, for a party, aware of the other's non-compliance alleged, to navigate through the different rungs of the conduct of litigation, maintain a deafening silence and then at trial, without notice, to importune the court to dismiss the other party's claim for not filing of a pre-trial order.

[19] This is particularly odious in the circumstances for the reason that where a party is legally represented and the other is not, the legal representative should lead the way and assist the self-actor to appreciate what is require at every turn for the smooth and proper conduct of that case. In the instant case, there is no suggestion that the defendant was unwilling to participate in the preparation of the pre-trial order such that the plaintiff's legal representative was entitled to prepare a one-sided proposed order without the input of the defendant, and more particularly, one that did not take into account the full range of the issues in contention, namely the claim and the counter-claim.

[20] Where there is a claim and a counter-claim as is the position in this case, these should not be treated as two different claims that are unrelated in terms of complying with the rules. In this regard, rule 26 (6) provides the following:

> 'The parties' proposed pre-trial order referred to in subrule (4) must cover the following –

(a) all issues of fact to be resolved during the trial;
(b) all issues of law to be resolved during the trial;
(c) all relevant facts not in dispute in the form of a statement of agreed facts;
(d) * . . .'

The foregoing reinforces my view stated above that all the issues, including those in convention and in reconvention should be included in the pre-trial order, It should not be dealt with in a truncated fashion as that may be costly and time-consuming for the parties, where they have to deal with setting out all the relevant issues in instalments.

[21] It, would, in view of the foregoing, be improper for the plaintiff to prepare its own pre-trial order in relation to the matter where it is the *dominis litis.* The plaintiff should proceed and even set out what the issues and disputes it raises are in respect of the counter-claim. A reading of the file suggests that the plaintiff's legal representative adopted this erroneous position and folded her arms. Placed in proper perspective, I would be of the view that both parties have not, in the instant case, complied with the order regarding the proposed pre-trial order pertaining to the counter-claim and for emphasis, this includes the party that is now up in arms pointing an accusing finger at its opponent. In my book, they are *in pari delicto* (in equal guilt).

[22] Both parties have waded in the blood ensuing from the blood-letting caused by the non-compliance with the rules of court. The plaintiff should not, in the circumstances, be allowed to point a whitewashed accusing finger, attempting as it appears, to conceal the blood-stained hand that participated in the fracture and non-compliance, by claiming to be 'holier than thou' in the present circumstances.

[23] Because both parties are in equal guilt in this case, I am of the view that the court is entitled, in the circumstances, to fashion an order that will be fair to both parties and more importantly, one that will ensure that all the issues and disputes in contention are fully dealt with for a proper disposal of the case on its proper merits without, as applied for by the plaintiff, dismissing the defendant's counterclaim.

[24] I should mention on a cautionary note, that the decision to dismiss a party's defence or claim, as the case may be is not one that the court may take lightly. I say so for the reason that it effectively closes the door of the court in final fashion on the face of the defendant or the plaintiff, as the case may well be. In this regard, this court, in the *Benedicta Donatus* matter, (s*upra*), expressed itself in this regard in the following terms:[2]

'I should however, mention that the order for the striking of a defence is very serious as it has the potential, if granted, to show the errant party, what in footballing parlance, is akin to a red card. This card effectively excludes that party from further participation in the trial. For that reason, the dictates of justice and fairness would in my view require that this application should not be made orally or only in the heads of argument. Good practice, propriety and fairness would suggest that it must on account of if its gravity be on notice, preferably on application, and to which the defaulting party may have an opportunity to deal with it. Furthermore, it will always assist the court, before issuing such a drastic order, to have had the benefit of argument by both parties where they still have their hands on the plough so to speak.'

[25] I endorse these remarks as applicable in the present case and note that the defendant had no notice whatsoever regarding the moving of such an application which has debilitative consequences on the defendant's counterclaim.

[26] Rule 27 (3), which I intend to apply in the circumstances of this case, provides the following:

'In order to expedite the determination of the real issues between the parties, the managing judge may, for good cause, at any status hearing, case management conference, pre-trial or at the trial –

(a) relax or vary time limits set by these rules, a practice direction, a case plan order or pre-trial order;
(b) condone technical irregularities where these do not prejudice the other party or the administration of justice;

[2] At para [36].

(c) allow or order amendments to the pleadings to be filed so that only the real issues between the parties and not mere technicalities are determined at the trial; or
(d) on application transfer the case from one division to another.'

[27] It would appear that the above subrule is flexible and allows the court to manage a case or trial in a manner that conduces to dealing with the real issues and at times with minimal formality. Critical to mention is that the court is allowed at any stage, including even during trial, to expedite the determination of the real issues, avoiding technical issues in the process; to relax or vary time limits and to condone technical irregularities where no prejudice enures to the other party, and to allow amendments where appropriate. It is important to note that it is only in respect of applications for transfer of the case that the rules order an application to be made, which means that the provisions of rule 65 applies to that application. The converse is that in relation to the other issues, the court is at large to adopt a flexible, cost effective and less formal approach as long as what is sought to be done is to properly and fully ventilate the real issues between the parties. That should, in my view, be the guiding light.

[28] I am of the view that what the plaintiff was seeking to do was to adopt a highly fastidious approach that was destined, if granted, to non-suit the defendant on the basis of what is a common mistake on both parties and which would in the process result in avoiding dealing with the real issues that the defendant raised in its counterclaim. That hardly appears to be the proper course to adopt if justice is to be seen to be done in this matter, considering as well that the defendant, who is unlettered in law, is representing himself. He is, in that regard, entitled to some assistance from the court and the other side in a bid to ensure that justice, with a humane face is done.

[29] In view of the fact that both parties are in equal guilt in the resultant order, I am of the view that it would be unconscionable for the court to issue an order for costs and this is so, in my view, notwithstanding the defendant's success in this application and to which I must record, he had no contribution. The court was called upon to do justice in the face of an onslaught from the plaintiff's legal practitioner.

[30] In the premises, I am of the considered view that the following order would meet the justice of the case:

1. The application for the dismissal of the defendant's counterclaim is dismissed.
2. The parties are ordered within 15 days of the delivery of this order, to file a joint proposed pre-trial order in relation to the counterclaim for the consideration and possible endorsement by the court.
3. The matter is postponed to 20 July 2016 at 15h15 for a pre-trial conference.
4. There is no order as to costs.

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T.S. Masuku

Judge

APPEARANCES

PLAINTIFF:	Shipopyeni
	Shipopyeni & Associates
DEFENDANT:	K. Mweshixwa
	The Defendant In Person