

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, WINDHOEK, MAIN DIVISION

RULING

CASE NO. I 926/2016

In the matter between:

CVW**APPLICANT / PLAINTIFF**

and

RVW**RESPONDENT / DEFENDANT****Neutral Citation:** *CVW v RVW* (I 926/2016) [2017] NAHCMD 234 (10 August 2017)**CORAM:** PRINSLOO J**Heard:** 21 July 2017**Delivered:** 10 August 2017**Reasons delivered:** 17 August 2017

Flynote: Matrimonial – Sanctions Hearing – Rule 53 and 54 of the High Court Rules – Condonation for non-compliance with Court Order – Opposed by other party – Condonation for non-compliance with court order dated 01/06/2017 is hereby granted.

Summary: Ms. Sauls-Deckenbrock, appearing on behalf of the defendant, moved the court to sanction the plaintiff in terms of rule 53 for her non-compliance with a court order. An application for condonation was filed on behalf of the plaintiff, asking the court to condone the non-compliance with the court order. It was the prayer on behalf of the defendant that the application for condonation be refused and that the claim of the plaintiff be struck.

Court Held: The court, in applying sanctions to an errant party, exercises a discretion and has at its disposal an array of alternatives in terms of punishing a party that is in default of a court order or direction. In exercising this discretion, the Court must consider what is just and fair in the matter.

Held further: I am satisfied that the reason for the delay in filling the expert report in accordance with the court order was sufficiently explained. It is clear from the annexed correspondence exchanged between the offices of the legal practitioner and that of Legal Aid, that substantial effort was made to resolve the issue of payment. I cannot find that there was any intentional delay on the part of the plaintiff.

Held further: I am of the opinion that given the circumstance of this case the proper order to be issued is to grant the condonation as prayed for, but to mulct the plaintiff with an appropriate cost order in terms of rule 53(2)(d) as a result of the non-compliance.

ORDER

1. Condonation for non-compliance with court order dated 01/06/2017 is hereby granted.
2. The costs of this hearing are awarded to the defendant.

3. The matter is postponed to 17 August 2017 at 15:00 for a status hearing.

RULING

PRINSLOO J:

Introduction

[1] On 10 August 2017, I delivered an order in this matter and indicated that the reasons therefore would be rendered in due course. Those reasons follow below:

Brief Background:

[2] The brief background of this matter is that a final order of divorce was issued on 15th of November 2016 whereby the bonds of marriage between the parties were dissolved.

[3] A settlement agreement was reached between the parties and the majority of the issues were addressed in the settlement agreement, however the issue of custody of the two minor children was an issue that the parties could not agree on.

[4] Subsequent to the date of the 15th of November 2016, three status hearings were held and the matter was set down for trial on 24-28 April 2017 and 08-12 May 2017 to deal with the issue of custody.

[5] On the trial date (28 April 2017) the parties requested that the matter be returned to the case management role to enable the plaintiff to secure an expert report pertaining to the custody of the minor children. The case was duly postponed to 01 June 2017 in order to consider the issue of joint expert report regarding custody.

[6] On 01 June 2017 the court made an order in the following terms:

- '1. The matter is postponed to 29 June 2017 at 15:00 for status hearing.
2. Plaintiff's Expert report to be delivered on or before 12 June 2017.
3. Expert reports to be exchanged on or before 14 June 2017.
4. Experts to meet on or before 19 June 2017 for drafting of joint expert report.
5. Joint expert report to be filed on or before 26 June 2017.'

[7] On 29 June 2017 the defendant filed a status report setting out that the plaintiff has not complied with paragraph (2) of the aforementioned order of court. The plaintiff did by then not file an application for extension of time¹ in order to secure relief for the non-compliance of the said court order.

[8] Ms. Sauls-Deckenbrock, appearing on behalf of the defendant, moved the court to sanction the plaintiff in terms of rule 53 for her non-compliance.

[9] The matter was hereafter postponed to 13/07/2017 for sanctions hearing. The affidavit on behalf of the plaintiff had to be filed on or before 10/07/2017.

[10] An application for condonation was filed on 11/07/2017 which read as follows:

'1. Please take note that application will be made on behalf of the plaintiff at the hearing of this matter for an order in the following terms:

- 1.1 Condoning the non-compliance with the court order issued on 1 June 2017.
- 1.2 Such further or alternative relief.'

[11] On 13/07/2017, Ms. Boesak acting on behalf of the plaintiff requested a postponement to reply to the opposing affidavit filed on behalf of the defendant. The matter was then duly postponed to 21/07/2017 for argument in the application for condonation.

¹ Rule 55(1) of Rules of the High Court.

[12] In the affidavit filed by Ms. Nambinga, the delays and non-compliance were explained as follows:

12.1 It would appear from the affidavit filed by Ms. Nambinga on behalf of the plaintiff that the issue of the delay was that of acting on the instructions of the Directorate of Legal Aid (hereinafter referred to as Legal Aid). Legal aid was approached in order to secure the funding for an expert to compile a report regarding the best interest of the minor children.

12.2 Legal Aid confirmed that they will effect payment in respect of such an expert and an expert was hereafter secured. The terms of the expert was relayed to the Directorate of Legal Aid and same was accepted.

12.3 According to Ms. Nambinga, the invoices of the expert was submitted to Legal Aid and same was followed up on weekly basis but Legal Aid did not honor the terms as per their undertaking and at the time of the affidavit the invoices remained unpaid.

[13] An array of correspondence was attached to the affidavit in support thereof².

[14] It was argued on behalf of the plaintiff that there was no willful/deliberate conduct to frustrate proceedings and that the plaintiff was at all material times reliant on the financial assistance of Legal Aid. At the time of the argument, only half of the amount was apparently paid by Legal Aid. It would however appear that the amount due and payable to the expert was settled by the defendant after he took a loan.

[15] In opposing the application for condonation, it was argued that the plaintiff failed to show good cause for non-compliance. It is also averred that the plaintiff failed to place all the relevant factors before court regarding the expert report and failed to address the manner in detail in which steps were taken to request payment from Legal Aid.

² Supporting affidavit by Ms. Nambinga, pages C1-24.

[16] The court had the opportunity to hear oral argument in this regard supplemented with extensive reference to case law.

[17] It was the prayer on behalf of the defendant that the application for condonation be refused and that the claim of the plaintiff be struck.

The relevant Law

[18] In view of the plaintiff's non-compliance with the court order, the defendant has applied to this court to impose sanctions on the plaintiff in terms of the provisions of rule 53(1)(f) read with rule 53(2)(b) i.e. in particular, the defendant prayed that the court should strike the plaintiff's claim in the circumstances.

[19] Rule 53 (1) reads as follows:

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

(a) . . .

(f) comply with 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 order set out in sub-rule (2)'.

[20] Sub-rule (2), on the other hand, provides the following:

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

(a)

(b) Striking out pleadings or part thereof, including any defence, exception or special plea;

[21] The court, in applying sanctions to an errant party, exercises a discretion and has at its disposal an array of alternatives in terms of punishing a party that is in default of a

court order or direction. In exercising this discretion, the Court must consider what is just and fair in the matter³.

[22] It does not appear to be a one size fits all approach that can be followed. Each matter must be dealt with on its own merits. The court must also consider the nature of the non-compliance; its extent; its effect on the further conduct on 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.

[23] Applications for condonation in terms of rule 55 apply in instances where a party has for reasons to be canvassed and found to be satisfactory to the court, been unable to comply with time limits prescribed by the rules or an order of court. The said provision entitled “Upliftment of bar, extension of time, relaxation or condonation”, reads as follows:

‘(1) The court or the managing judge may, on application on notice to every party and on good cause shown, make an order extending or shortening a time prescribed by these rules or by an order of court for doing an act or taking any step in connection with proceedings of any nature whatsoever, on such terms as the court or managing judge considers suitable or appropriate.

(2) An extension may be ordered although the application is made before the expiry of the time prescribed or fixed and the managing judge ordering the extension may make any order he or she considers suitable or appropriate as to the recalling, varying or cancelling of the consequences of default, whether such consequences flow from the terms of any order or from these rules.’

[24] The words “good cause” as per Rule 55(1) was discussed in the matter of *Leweis v Sampoio*⁴ where the Supreme Court per Strydom CJ stated that:

³ *Donatus v Muhamederahimvo & Others; Donatus v Ministry of Health and Social Services (I2304/2013; I1573/2013) [2016] NAHCMD 49 (2 March 2016)*

⁴ 2000 NR 186 (SC).

'Although the Courts have studiously refrained from attempting an exhaustive definition of the words 'good cause' they have laid down what an applicant should do to comply with such requirement. In this regard it was stated that an applicant:

- (a) must give a reasonable explanation for his default;
- (b) the application must be made bona fide; and
- (c) applicant must show that he has a bona fide defence to the plaintiff's claim.'

[25] Having considered the founding affidavit by Ms. Nambinga as well as all the annexures attached thereto, I am satisfied that the reason for the delay in filling the expert report in accordance with the court order was sufficiently explained. It is clear from the annexed correspondence exchanged between the offices of the legal practitioner and that of Legal Aid, that substantial effort was made to resolve the issue of payment. I cannot find that there was any intentional delay on the part of the plaintiff. I am thus satisfied that the application is bona fide.

[26] The final issue to consider is the issue of bona fide defence. In the matter of *Namibia Security Supplies CC v Schidlowski*⁵ Ueitele J said the following:

'In view of our current Constitutional dispensation which guarantees every person the right to have his or her dispute determined by an independent and competent Court or Tribunal I endorse the views expressed in the cases I have quoted above. I am therefore of the opinion that the present Rule, i.e. Rule 55 (1) and (2), should, be interpreted to say, that it requires a defendant who is in default *to say on oath that he has a good defence*, and requires him further to set out sufficient information to enable the Court to come to the conclusion that the defence is *bona fide* and not put up merely for the purpose of delaying satisfaction of the plaintiff's claim. The defendant does not, as a rule of law, necessarily have to make out a *prima facie* defence in his affidavit. (My underlining)

[27] The application before court is not the ordinary run of the mill matter as the main dispute relates to the custody of two minor children, who are aged 7 and 12 respectively. It is trite that a child's best interests are paramount in every matter concerning the child.

⁵ An unreported judgment of this court Case No (I 4113/2011) [2013] NAHCMD 282 (delivered on 01 October 2014).

In determining what was in the best interest of minor children in considering the issue of custody, the court did so as their upper guardian. The latitude afforded by the South African courts in this regard was endorsed by this court⁶.

[28] Generally, courts are reluctant to close the doors of court to a litigant purely for reasons relating to non-compliance with court proceedings. I believe this is more so in disputes concerning children. That in these cases the child's best interest should not be held at ransom for the sake of legal niceties⁷.

[29] By striking the claim of the plaintiff as prayed for on behalf of the defendant, would effectively close the door of the court to the plaintiff, who is the mother of the minor children.

[30] The reason why the matter was returned to judicial case management was specifically to obtain expert reports to assist the court in reaching a just and fair decision with regards to the custody of the minor children.

[31] The report in question is indeed now available and it is my considered view that the interest of the children can best be determined if the court has all the relevant factors pertaining to them and their parents at its disposal. It is only then that the court will be in a position to determine what is in the best interest of the minor children and the matter pertaining the minor children can be properly ventilated as to what would be in their best interest in so far as who should be awarded primary care. This can however only be done if the plaintiff and defendant are allowed to present their case to court.

⁶ *JM AND ANOTHER v SM 2016 (1) NR 27 (HC)*.

⁷ *Mava Majikija v Nothemba Pamela Mxo and Another (Unreported) Case number 1596/2015 (ECLD)*

Cost

[32] I am of the opinion that given the circumstance of this case the proper order to be issued is to grant the condonation as prayed for, but to mulct the plaintiff with an appropriate cost order in terms of rule 53(2)(d) as a result of the non-compliance.

[33] As it was the plaintiff who sought an indulgence from this court and the opposition thereto was not unreasonable. This order for costs will therefore extend to the costs necessarily incurred as a result of this hearing.

[34] Having regard to the foregoing, I make the following order:

1. Condonation for non-compliance with court order dated 01/06/2017 is hereby granted.
2. The costs of this hearing are awarded to the defendant.
3. The matter is postponed to 17 August 2017 at 15:00 for a status hearing.

JS Prinsloo
Judge

APPEARANCES:

For the Plaintiff:

Of:

Ms. S. Nambinga

AngulaCo Inc, Windhoek

For the Defendant:

Of:

Ms. D. Sauls

Sauls Jacobs & Co, Windhoek