"SPECIAL INTEREST"

CASE NO.: I 3026/2008

SUMMARY

THORSTEN HÜBNER **versus** GABY KRIEGER

DAMASEB, JP

11/11/2011

Punitive costs ordered for failure -

(1) To co-operate in generation of joint proposed pre-trial order and;

(2) To comply with a case management order.

REPUBLIC OF NAMIBIA

"SPECIAL INTEREST"

CASE NO. I 3026/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THORSTEN HÜBNER **PLAINTIFF**

and

GABY KRIEGER **DEFENDANT**

CORAM: DAMASEB, JP

Heard: 2 November 2011

Delivered: 11 November 2011

RULING

DAMASEB, JP: [1] This matter came before me on 2 November 2011 for pre-trial as envisaged in Rule 37 (11)(a) of the new case management rules. That rule

requires that prior to the trial of an action, the judge must hold a pre-trial conference at an agreed time set by the managing judge and the conference must be attended by the parties and their legal practitioners.[1] Its purpose is to narrow issues for trial by determining what legal or factual disputes remain in dispute. Before the pre-trial conference, the parties are required to meet towards that end and to prepare and submit to the managing judge a joint proposed pre-trial order which will be used by the managing judge to define the legal and factual disputes between the parties and in that way to avoid unnecessary delay at trial as the parties will be bound by the issues set out therein and will only be required to prove that which is in dispute and to call only those witnesses that are necessary to prove the issues in dispute.[2] At the pre-trial conference the managing judge also seeks to ensure that there are no unfinished interlocutory matters (such as belated amendments, un-answered requests for trial particulars and further and better discovery) that often prevent set down matters

[1]Rule 37 (11)(b)
[2]Rule 37 (14)

from proceeding to trial - as more often than not on the trial date - instead of hearing the evidence and finalizing the case - the court gets embroiled in wasteful applications for postponement and other interlocutory skirmishes. The salutary rationale behind the new case management *regime* is therefore to ensure that court time and resources are deployed productively.

[2] As this Court said[3], although in a different context, but in terms that bear resonance in the present case:

> "In my view, the proper management of the roll of the Court so as to afford as many litigants as possible the opportunity to have their matters heard by the court is an important consideration to be placed in the scale in the Court's exercise of the discretion whether or not to grant an indulgence. The time taken up by wasteful litigation which could more productively and equitably have been deployed to entertain other matters must, in my view, be an equally important consideration in determining whether or not to condone the failure to comply with the Rules of Court and orders of the Court. It is a notorious fact that the roll of the High Court is overcrowded. Many matters deserving of placement on the roll do not receive Court time

[3] *Haw Retailers CC T/A Ark Trading and Another v Tuyenikelao Nikanor T/A Natutungeni Pamwe Construction CC* (unreported) delivered on 4 October 2010 , at paragraphs 17 and 18.

> because[of that].Litigants and their legal advisors must therefore realize that it is important to take every measure reasonably possible and expedient to curtail the costs and length of litigation and to bring them to finality in a way that is least burdensome to the Court.
>
> …
>
> In the interest of litigants and the public as a whole – not just the particular ones before Court at any given time - the time has come for tighter Court control of litigation and stricter adherence to timetables and Court directions".

[3] After the initial case management conference, I made an order in the following terms based on the parties' joint report:

> "1. Without leave of Court first had and obtained, the parties may not:
>
> 1.1 join further parties;
> 1.2 bring interlocutory motions safe in respect of further particulars for trial;
> 1.3 introduce expert evidence.
>
> 2. Any party wishing further particulars for trial must request same on or
> before 30 September 2011 and answers to such requests must be provided no later than 10 (ten) Court days of such request.

3. The pre-trial conference in terms of Rule 37(11)(a) is scheduled for **2 November 2011** at **8h30** and the parties must comply with Rule 37(12)(b) and (c).

4. The trial dates are set for **16-18 November 2011**. [My underlining for emphasis]

[4] There was no proposed pre-trial order submitted to me as managing judge. At the pre-trial, Mr Vaatz for the plaintiff submitted from the Bar that a letter was directed to the defendant's legal practitioner of record, P F Koep & Co, on 18 October 2011 inviting them to propose dates for the holding of a parties' conference in order to generate such a report. The letter was ignored. That letter was handed up in Court and Mr Geier, for the defendant, saw it in Court for the first time. (His instructing counsel had obviously not warned him about it!). The instructing practitioner of record, who is required by the rules of Court to be present at a pre-trial hearing, was not present and could therefore not gainsay the allegation made by Mr Vaatz.

[5] During the pre-trial hearing it became clear to me that the defendant (and his instructing counsel) had chosen to stall the speedy finalization of the matter. It was conceded on the defendant's behalf by instructed counsel, Mr Geier, that the defendant's side had not provided:

(i) further particulars for trial purposes although asked for, even as the Court sat on 2 November 2011.
(ii) further and better discovery although asked for, even as the Court sat on 2 November 2011.

In both respects, the defendant was in breach of the case management order which I have quoted above.

[6] The plaintiff's claim is fairly uncomplicated: He seeks damages from the defendant on the ground that the defendant was a member of a close corporation (*Net Marketing CC*) on the date when the judgment obtained by the plaintiff against the Close Corporation was, upon execution, returned *nulla bona* – and that on that date,

to the defendant's knowledge, there was a vacancy in the office of accounting officer of the close corporation. Section 63(h) of the Close Corporations Act[4] provides:

> "**Joint liability for debts of corporation**
>
> (63) Notwithstanding anything to the contrary contained in any provision of this Act, the following persons shall in the following circumstances together with a corporation be jointly and severally liable for the specified debts of the corporation;
>
> (h) Where the office of accounting officer of the corporation is vacant for a period of six months, any person who at any time during that period was a member and aware of the vacancy, and who at the expiration of that period is still a member, shall be so liable for every debt of the corporation incurred during such existence of the vacancy and for every such debt thereafter incurred while the vacancy continues and he still is a member."

[7] The request for trial particulars and the further discovery requested are both aimed at establishing the defendant's membership of Net Marketing CC and the incumbency of the office of accounting officer during the relevant period. The defendant is assiduously

[4] Act No. 26 of 1988 (as amended)

avoiding having to deal with these matters and does so in the vaguest terms imaginable: The answers to the request for further particulars since filed, and the discovery made, demonstrate that reluctance.

[8] As the plaintiff's claim stands at the moment and having regard to the plea filed of record to date, the only issues properly requiring adjudication are whether, on the date of the execution against Net Marketing CC, the defendant was aware of the vacancy in the position of accounting officer of the subject close corporation; and whether she was a member of the corporation. The dispute falls within a very narrow factual and legal compass, yet the trial just would not get off the ground because, during the pre-trial conference, Mr Geier submitted that the defendant intends to amend her plea and thus "substantially re-opening the pleadings." This raises the question, of course, why such a substantial amendment should be made so late in the day, considering that the trial dates are less than 10 court days away? It appears to me that the basis of the defence will change completely. If it

does, the defendant will no doubt explain why valuable time was wasted in pursuing a defence which ultimately would be abandoned!

[9] At all events, it became obvious, in view of the defendant's non-compliance with the case management order, the intended amendments, and the tactics deployed by the defendant to stall finalisation of the matter, that the trial dates of 16-18 November 2011 were no longer feasible. Court time and resources will therefore go to waste!

[10] That the defendant had resolved to frustrate the matter proceeding to trial on 16-18 November 2011 is a moot point. This fast-becoming-routine practice of rendering case management nugatory has to be stemmed in the tracks before it becomes a malignant cancer in our new litigation ethos underpinned by case management. I intimated to Mr Geier that I was satisfied that the conduct of the defendant called for a punitive costs order and did not get much by way of protest from him

in that regard. I accordingly make the following order:

1. The case shall not proceed to trial on 16-18 November 2011.

2. The defendant shall be liable for the plaintiff's wasted costs, occasioned by the refusal to co-operate in the creation of a proposed case management report for the pre-trial conference held on 2 November 2011; all of the plaintiff's necessary and reasonable costs in respect of the request for trial particulars and request for further and better discovery; the plaintiff's costs occasioned by the attendance of the pre-trial conference of 2 November 2011; and the plaintiff's reasonable wasted costs for trial-preparation for 16-18 November 2011 - in all respects on the scale as between attorney and own client.

3. Should the plaintiff prepare and have taxed his bill of costs arising from this order within 30 days of this order and present same to the defendant within that period, the defendant shall be obliged to pay same within 5 days of it being so presented and shall not be entitled to pursue her defence to the plaintiff’s claim until the taxed bill is fully paid. The plaintiff shall be entitled, if the taxed bill remains unpaid for a period of 5 days after being presented, to approach court to have the defendant’s defence to his claim dismissed and to seek an order in terms of his claim filed of record.

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DAMASEB, JP

ON BEHALF OF THE PLAINTIFF: **Mr A Vaatz**

Of: **Andreas Vaatz & Partners**

ON BEHALF OF THE DEFENDANT: **Mr H Geier**

Instructed By: **Koep & Partners**