

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2017/03567

In the matter between:

MANGA NAWA-MUKENA

APPLICANT

and

MULTICHOICE NAMIBIA (PTY) LTD

FIRST RESPONDENT

NAMFLEX PENSION PRESERVATION FUND

SECOND RESPONDENT

NAMFLEX PROVIDENT PRESERVATION FUND

THIRD RESPONDENT

NAMFLEX RETIREMENT ANNUITY FUND

FOURTH RESPONDENT

Neutral citation: *Nawa-Mukena v Multichoice Namibia (Pty) Ltd* (HC-MD-CIV-ACT-DEL-2017/03567) [2020] NAHCMD 12 (21 January 2020)

Coram: RAKOW AJ

Heard: 13 November 2019

Delivered: 21 January 2020

Flynote: Practice – Stay of proceedings – Discretion of court – Discretion sparingly exercised on strong grounds, with great caution and in exceptional

circumstances – Application to be considered in a dispensation where overriding objectives of judicial case management are applicable – High requirement standard to be met in order for court to grant stay of proceeding – Applicant failing to meet requirements.

Summary: Applicant brought a stay of proceedings application with the hope of staying the civil matter and finalizing a criminal matter which was based on the same nature and scope with regard to the causes of action relied upon in the civil matter, i.e. both cases were directly connected and integrated with each other as they are premised on the same set of facts.

Applicant's application was based on the premise that her right to remain silent, the right to be presumed innocent until proven guilty as well as the right not to give self-incriminating evidence will be compromised in circumstances where the complainant in the criminal trial can use the evidence in a civil trial in order to achieve that which it in other circumstances would not achieve, namely a possible conviction in the criminal trial. Applicant's grounds were further based on the premise that should she elect not to give evidence at the civil trial in order to avail herself of her constitutional rights concerned, her silence may lead to judgment given against her and which may lead to her financial demise.

First respondent was of the view that the applicant's application is based on alleged possible prejudice which the applicant may suffer, which the applicant failed to establish. First respondent was further of the view that the applicant has a choice of how to conduct the civil proceedings, keeping in mind that the applicant chose to plead and file witness statement even though there was no State compulsion to do so.

First respondent further submitted that as a result of the applicant's choices made on how to conduct the civil proceedings, her right to remain silent has become illusory. This view was on the premise that, on the papers, the applicant has already disclosed essentials of her defence when she filed a plea in the civil proceedings and filed a witness statement as well.

Held – an application for stay of proceedings cannot be granted merely by request. Various considerations need to be made, especially in this dispensation where the overriding objectives in terms of rule 1(3) of the High Court is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable.

Held – This court therefore cannot grant a stay of proceedings merely due to the fact that the applicant has to make a difficult decision on how to conduct the criminal and civil proceeding.

ORDER

- a) Application for stay of proceedings under case number HC-MD-CIV-ACT-DEL-2017/03567 is refused.
- b) Costs awarded to the first respondent (plaintiff) against the applicant (defendant), to include costs of one instructing and one instructed counsel.
- c) Matter is postponed to 4 February 2020 for a status hearing. Parties to file a joint case status report on or before 31 January 2020.

JUDGMENT

RAKOW AJ:

[1] The applicant brought an application for stay of proceedings on the following grounds:

“Ordering and directing the pending civil action under case number HC-MD-CIV-ACT-DEL-2017/03567 be stayed until such time as the hearing of the applicant/ 1st defendant’s criminal trial under case number 16806/2017 set down for trial in the High Court (Main Division) is finalized.”

[2] The first respondent opposed to the application as intended by the applicant and the matter was set down for determination. For the purposes of this judgment, I will commence with the submissions made by the applicant and proceed to the submissions by the first respondent.

Applicant's submissions

[3] Counsel for the applicant submitted that primarily and it is common cause that the criminal case, as well as the civil case, are similar both in nature and scope with regard to the causes of action relied upon in both, i.e. both cases are directly connected and integrated with each other as they are premised on the same set of facts.

[4] Counsel further referred to the proposed pre-trial order¹ where the applicant indicated that she intends to call her husband, Mr. Joseph Mukena, and a certain Mr. Celestino Gabriel. Counsel further submitted that due to the fact that both these persons are also co-accused persons in the criminal case, the applicant was unable to secure witness statements from them simply because they felt compromised to present such statements in light of the upcoming criminal trial. On this score, counsel submitted that the applicant elected to have them called by way of a subpoena. It is on this premise wherein the applicant decided to approach this court for the relief as indicated in para 1 above.

[5] Counsel further referred to Article 12 (1) (d) and 12 (1) (f) wherein they provide as follows:

“(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them...”

and

“(f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall

¹ Which is one-sided in that the respondents did not sign it to indicate an agreement thereto.

admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof.”

[6] Counsel further cited s 15 of the Civil Proceedings Act 25 of 1965 wherein it provides that:

“It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings.”

[7] Counsel submitted that the above essentially means that any evidence given by the applicant may be used against her in any other court hearing, including any criminal trial, this also applying to both her husband and Mr. Antonio. Therefore, counsel submitted, the civil trial and its possible enquiry are directly related and relevant to the enquiry to be undertaken in the criminal trial.

[8] With the above in mind, counsel submitted that the applicant’s right to remain silent, the right to be presumed innocent until proven guilty as well as the right not to give self-incriminating evidence will be compromised in circumstances where the complainant in the criminal trial can use the evidence in a civil trial in order to achieve that which it in other circumstances would not achieve, namely a possible conviction in the criminal trial. Counsel further submitted that it goes without saying that the applicant is further confronted with the possible prejudice that should she elect not to give evidence at the civil trial in order to avail herself of her constitutional rights concerned, her silence may lead to judgment given against her and which may lead to her financial demise.

[9] Counsel further illustrates the following that if the civil matter is allowed to continue while the criminal matter is not yet finalized, the plaintiff would obtain the following benefits:

a) Should the applicant elect to invoke her right to remain silent, then the plaintiff may gain an unfair advantage which may afford it a judgment which under other circumstances, it might not have secured;

b) Alternatively, would afford the plaintiff evidence which will assist the State in securing a verdict against the applicant with the potential remedy set out in s 300 of the Criminal Procedure Act 51 of 1977, thereby both securing a criminal conviction as well as a civil judgment.

[10] Counsel submitted that the abovementioned is untenable in light of the express constitutional provisions guarding against an unfair trial, whether through the employment of either a criminal or civil procedure. To that end, counsel submitted, the violator of the rights in question is afforded an unfair advantage over the applicant, which would render the provisions of Article 12 nugatory.

[12] Counsel was of the view that by compelling the applicant to give evidence at this juncture and prior to her giving evidence in defence at the criminal trial would directly and indirectly infringe these rights and render both her criminal and civil trial unfair.

[13] Counsel further submitted that by granting the stay of the civil trial until the criminal trial has been finalized (or at least until such time as the applicant has given evidence in defence of the charges), would safeguard these constitutional rights and would dispense with the need to exercise judicial discretion whether to allow or disallow any such evidence given prior to the criminal trial.

[14] Counsel further submitted that the plaintiff would not be prejudiced by such an arrangement as the effect of the relief would only amount to a stay of the action and nothing more. Counsel further formed the view that such prejudice would also be alleviated by the fact that in all probability, the criminal trial may commence sometime early next year, although no date has of yet been fixed for the criminal matter to be heard.

First Respondent's submissions

[15] Counsel for the first respondent formed the view that the applicant's application is based on alleged possible prejudice which the applicant may suffer, however, the applicant failed to establish such prejudice clearly.

[16] Counsel was of the view that the applicant has a choice of how to conduct the civil proceedings and further highlighted that the applicant chose to plead and file witness statement even though there was no State compulsion to do so. Counsel highlighted that the applicant chose to call Mr. Mukena and Mr. Antonio by way of subpoena to testify in the civil proceedings.

[17] Counsel was also of the view that this court could assist that applicant by ameliorating the State compulsion which may be brought about in respect of Mr. Mukena and Mr. Antonio, should subpoenas be issued against them. Counsel pointed out that the applicant chose not to ask this form of relief and simply wants to have the entire civil proceeding stayed while having no basis to do so.

[18] Counsel further submitted that as a result of the applicant's choices made on how to conduct the civil proceedings, her right to remain silent has become illusory. Counsel formed this view on the premise that, on the papers, the applicant has already disclosed essentials of her defence when she filed a plea in the civil proceedings and filed a witness statement as well.

[19] Counsel concedes that although the applicant has a hard choice to make, to extend the court's intervention to cases where an applicant for stay of proceedings has a "hard choice" to make, would bring the right to remain silent into disrepute. Therefore, counsel concluded that that applicant failed to make out a case for the relief sought and prayed that the application be dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

Applicable law

[20] It is common cause that an application for stay of proceedings must be granted with great caution, considering the consequences thereto. Smith J in the matter of *Randell v Cape Law Society*² summarised the legal principles governing applications for leave to stay as follows:

[25] The applicable legal principles in my view can then be summarised as follows:

² 2012 (3) SA 207 (ECG).

- (a) Our courts have a discretion to suspend civil proceedings where there are criminal proceedings pending in respect of the same issues.
- (b) Each case must be decided in the light of the particular circumstances and the competing interests in the case.
- (c) In exercising its discretion the court will have regard to, inter alia, the following factors:
 - (i) The extent to which the person's right to a fair trial might be implicated if the civil proceedings are allowed to proceed prior to the criminal proceedings.
 - (ii) The interests of the plaintiff in dealing expeditiously with litigation or any particular aspect thereof.
 - (iii) The potential prejudice to the plaintiff if the proceedings are delayed.
 - (iv) The interests of persons not involved in the litigation.
 - (v) The interests of the public in the pending civil and criminal litigation.
- (d) The court must be satisfied that there is a danger that the accused might be prejudiced in the conduct of his defence in the criminal matter if the civil case is allowed to proceed before the finalisation of the criminal case against him.'

[21] Further, in *Prosecutor-General and others v Mwananyambe and 19 other cases*,³ the court made the following observations:

“[23] The legal principles which are at play when the court is considering whether or not it should exercise its discretion to order stay of civil proceedings have been referred to in the matter of *Randell v Cape Law Society supra*. No doubt, a court has jurisdiction to stay civil proceedings where there are criminal proceedings pending on the same issue. It has further been held that 'the court has a judicial discretion, which must be sparingly exercised on strong grounds, with great caution and in exceptional circumstances'.

[24] It would appear to me that in most cases, applications for stay of proceedings are made in respect of civil proceedings where both criminal as well as civil proceedings are based on the same facts. In such cases, the main purpose for the stay of civil proceedings is to protect the integrity of the criminal justice system and to avoid any prejudice against the accused.”

[22] In *Mouton v Gaoseb*,⁴ the court said the following:

³ 2017 (1) NR 215 (HC).

⁴ [2015] NAHCMD 257 (I 425/2011; 28 October 2015).

“It thus becomes clear that applications for stay of proceedings are not granted lightly and merely for the asking. It would seem that exceptional circumstances must be proved to be extant before the court may resort to this measure. I would think this is because once legal proceedings are initiated, it is expected that they will be dealt with speedily and brought to finality because tied in them are rights and interests of parties, which it is in the public interest to bring to finality without undue delay. Applications for stay have the innate consequence of holding the decisions and the rights and interests of the parties in abeyance. It is for that reason that these applications are granted sparingly. It would appear to me, in line with the overriding principles of judicial case management, the bar for meeting the requirements for stay of proceedings is even higher as the application impacts on the completion of the case, time expended on the application itself (not to mention the time to be waited during the time when the stay operates if successful) and obviously, the issue of costs.’

Conclusion

[23] With the above, it is clear that an application for stay of proceedings cannot be granted merely because it is requested. Various considerations need to be exercised, especially in our current court dispensation where the overriding objectives in terms of rule 1(3) of the High Court is, to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable.

[24] It is common cause that the combined summons in this matter were issued on the 28th of September 2017, ageing this matter to approximately 27 months and one week, fifteen months over the prescribed High Court’s disposal benchmark wherein cases should not remain on the managing judge’s roll for more than twelve months. Therefore, the relief sought by the applicant would further take this matter beyond the prescribed limitation as set in High Court’s disposal benchmark and policies, defeating the purpose of judicial case management. It is also of important to note that the applicant, only at this advanced stage of the proceedings, approaches the court with a request to stay proceedings; this was never raised during the case planning stage nor the case management stage.

[25] Considering further the fact that the criminal matter has yet to be allocated a date for hearing, granting a stay of proceedings in the civil will cause unprecedented

delays on a matter that is primarily ripe for trial. Furthermore, keeping the determining factors as stated in *Rendell (supra)* in mind, this court does not see the prejudice as alluded to by the applicant, considering the fact that the applicant has already pleaded and filed a witness statement to that effect. In essence, the filing of the two discloses a defence in response to the plaintiff's claim.

[26] The court was further not approached to ameliorate any State compulsion that exists but for a stay of the civil proceedings, which in itself is a drastic measure. This court is not inclined to grant a stay of proceedings merely due to the fact that the applicant has to make a difficult decision on how to conduct the criminal and civil proceeding. I share the same sentiments as expressed by Masuku, J in *Mouton v Gaoseb (supra)* that the bar to meet the requirements for stay of proceedings is high as the application impacts on a number of factors, being the delay to be experienced on the matter wherein the application is sought and costs pertaining thereto, especially considering the overriding principles of judicial case management.

[27] In the result, I make the following order:

- a) Application for stay of proceedings under case number HC-MD-CIV-ACT-DEL-2017/03567 is refused.
- b) Costs awarded to the Respondent (Plaintiff) against the Applicant (Defendant), to include Costs of one instructing and one instructed council.
- c) Matter is postponed to 4/2/2020 for a status hearing. Parties to file a joint case status report on or before 31/1/2020.

E RAKOW
Acting Judge

APPEARANCES:

APPLICANT:

J A N STRYDOM

Instructed by De Klerk, Horn & Coetzee Inc.

FIRST RESPONDENT:

B De JAGER

Instructed by Francois Erasmus & Partners