REPORTABLE

SUMMARY

CASE NO.: (P) A 105/2006

VAN ZYL & ANOTHER V SMIT & ANOTHER

VAN NIEKERK, J

21 May 2007

PRACTICE

Application for condonation for late filing of heads of argument – opposed motion – Practice Direction No. 2/2006 requires applicants to file heads of argument 15 clear court days before date of hearing – *in casu* heads filed two clear court days before date of hearing – applicant for condonation must show good or sufficient cause for non-compliance – applicant must satisfactorily explain delay in manner sufficiently full to enable Court to understand how it really came about – applicants' explanation found to fall far short of this requirement – other relevant factors bearing on application are respondents' attitude, nature of case, purpose of Practice Direction, convenience of Court and avoidance of unnecessary delays in administration of justice.

Purpose and effect of Practice Direction No. 2/2006 discussed.

Respondents not opposing application for condonation – although inconvenienced, respondents desirous to have main application heard –no specific reasons advanced nor particulars of prejudice placed before Court – respondents' attitude, while not irrelevant, by no means an overriding consideration – no indication *in casu* that applicants employing tactic to delay hearing of matter.

Condonation refused - main application struck – applicants ordered to pay costs of the day.

CASE NO.: (P) A I 105/2006

IN THE HIGH COURT OF COURT OF NAMIBIA

In the matter between:

JOHAN VAN ZYL **1ST APPLICANT**
NAMIBIA CASH LOAN CC **2ND APPLICANT**

and

DANIËL PETRUS SMIT **1ST RESPONDENT**
LOUIS PETRUS FOURIE **2ND RESPONDENT**

CORAM: VAN NIEKERK, J

Heard: 21 May 2007
Delivered: 21 May 2007

REASONS

VAN NIEKERK, J:

[1] This is an application ("the main application") to enforce a settlement previously made an order of this Court. It is opposed by the two respondents. When the matter was called, I heard Mr *Strydom* on behalf of applicants and Mr *Corbett* on behalf of respondents on the issue of applicants' application for condonation for the late filing of

their heads of argument. Thereafter I made an order dismissing the application for condonation. I also struck the main application from the roll and ordered the applicants to pay the costs of the day. The reasons for these orders follow.

[2] The filing of heads of argument in this particular case is regulated by the Judge-President's Practice Direction No. 2/2006 (“the Practice Direction”) which became effective on 18 September 2006. Although not applicable in this case because they came into operation on 8 May 2007, the Consolidated Practice Directions subsequently issued by the Judge-President incorporates the Practice Direction almost word for word.

[3] In terms of paragraph 2 of the Practice Direction, the applicants were required to file their heads of argument not later than 15 clear court days before the date of hearing. Excluding the 8 Saturdays and Sundays, as well as the 3 public holidays during this period, the applicants should therefore have filed their heads of argument by no later than 24 April 2007. Applicants however filed their heads at 14h15 on 15 May 2007, a mere two court days before the date of hearing.

[4] As required by the Practice Direction, applicants also filed an application for condonation for failure to file their heads on time. This was done on 16 May 2007. The application is supported by an affidavit deposed to by the applicants' instructing counsel, Mr Gous. He states in the affidavit that the heads of argument were supposed to have been filed by no later than Friday, 27 April 2007. He states that on Monday, 23 April 2007, he instructed his secretary to prepare counsel for applicants' brief for delivery that same day. Then, acting on the secretary's assurance and his own belief that the brief had been delivered to counsel, he went about his usual business for the rest of that week, also attending to matters out of town. The next week he was on leave. He returned to his office on Monday, 7 May 2007, when he for the first time made enquiries with counsel whether there was any further preparatory work to be done in the matter. Counsel then informed him that he never received the brief and that no heads of argument were filed. Mr Gous then relates what steps were taken to locate the brief, which had mysteriously disappeared. Enquiries with the firm's messengers revealed nothing. Then, on 9 May, the clients' file was forwarded to counsel, who agreed to prepare the heads after hours while he was engaged in another matter. On the evening of 10 May counsel informed Mr Gous that no copy of the founding papers was in the brief. The next day a copy was made from a copy of the papers on the Court file. Counsel attended to the heads over the

week-end and thereafter, until the heads were eventually filed on 15 May.

[5] Whether the rule is laid down by the rules of court or practice direction, it is trite that in an application of this kind the applicant must show good or sufficient cause for the failure to comply with the rule. The applicant must show "something which the Court considers sufficient to justify it in granting indulgence" (*Rose & another v Alpha Secretaries Ltd* 1947 (4) SA 511 (A) 517). If there was a delay in complying with the rule, the applicant for condonation must satisfactorily explain the delay in a manner sufficiently full to enable the Court to understand how it really came about (*Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) 353A).

[6] In my view the applicant's explanation falls far short of this requirement. Mr Gous furnishes no explanation for the fact that he wrongly calculated the deadline for the heads of argument to be 27 April 2007. Even if he did not realize this at the time of making the affidavit, between him and counsel appearing, they should have realized this subsequently when preparing for this application and at least have filed an affidavit explaining this error. In any event, if they had properly read Mr *Corbett's* heads of argument already filed on 2 May 2007, they would have been alerted to the fact that the heads

were supposed to have been filed no later than 24 April 2007 and not 27 April 2007.

[7] Quite apart from this, even if it may be case that Mr Gous on 23 April 2007 *bona fide* was under the impression that the due date was 27 April 2007, I am of the view that, *prima facie,* he left it to a very late stage to instruct counsel to draft heads in such a lengthy application as this which consists of 585 pages. Although it is not impossible for counsel to have completed the heads in such a short time, one would expect instructing counsel to have made special arrangements to ensure that counsel briefed is duly informed of the very short time available and to ensure that counsel was able and willing to accept such instructions at such short notice. One expects that this much would then have been stated in the affidavit, which it is not. If counsel had been aware that he had to draft the heads by 27 April 2007, one expects an explanation why he did not call for the brief when he realized that it had not been delivered. However, not a word is said about any of this in the affidavit. Apart from this, instructing counsel did not make any enquiry whatsoever from 23 April 2007 to 7 May 2007 to follow up whether what may, in the circumstances, be called urgent heads of argument, were indeed filed. It was his responsibility to have seen to a matter like this.

[8] To compound matters, counsel was apparently later on 9 May 2007 briefed without a copy of the founding papers. The explanation regarding this issue is obscure. Mr Gous states in paragraph 13 of his affidavit that when he and counsel went through, what I might call the second brief, to look for the founding papers together "it became apparent that the original founding papers were enclosed in the brief due to the voluminous nature thereof". In order to make a copy of the founding papers for instructing counsel, a copy of the papers was obtained from the court file and copied for counsel. Why the original papers were not on the court file where they belong, but in the brief, is not explained. Why counsel could not draw heads from the original papers he had in his brief or make a copy for him from the originals, is also not explained. I fail to understand what bearing the voluminous nature of the papers had on the matter. Is counsel supposed to be properly briefed only in cases where papers are not voluminous?

[9] The incompleteness and inadequacy of the applicants' explanation, coupled with the extent of the delay, renders it difficult, if not impossible, to find that good cause has been shown for granting the indulgence sought. However, in this case there are other factors which I should also consider in the exercise of my discretion. Amongst them are the respondents' attitude, the nature of the case, the

purpose of the Practice Directive, the convenience of the Court and the avoidance of unnecessary delays in the administration of justice.

[10] In his heads of argument, filed before applicants delivered their heads and their application for condonation, Mr *Corbett* took the stance that the main application should be struck with costs, because applicants were in breach. At the hearing, although Mr *Corbett* was not complimentary in his description of the merits of the application for condonation and emphasized the inconvenience caused by the very late delivery of the heads of argument, he held instructions not to oppose it as the respondents were desirous of having the main application heard. No specific reasons were advanced, nor were particulars placed before me of any prejudice to be suffered should the matter not be heard. However, it was acknowledged on behalf of respondents that it was for the Court to decide whether to grant condonation.

[11] At this stage it becomes necessary to look at the Practice Direction in more detail. Paragraph 4 thereof reads:

> "4. If a practitioner fails to file Heads of Argument in time, a proper Application to condone such failure should timeously be filed with the judge or judges as the case may be. Ordinarily, if the Heads of

> Argument of both parties, or anyone of them, are not filed within the time set out in paragraph 2 of this Direction, the Application will **not** be heard. If condonation is granted, the Application shall be postponed to a date previously arranged with the Registrar or to another date when opposed applications are heard. When no Heads of Argument have been filed in the time provided therefore and no application for condonation has been made, the presiding judge may in his/her discretion strike the Application from the Roll with or without an appropriate costs order, or hear the Application and adjudicate upon it without all the Heads of Argument and make such costs order as is deemed appropriate in the circumstances."

[12] It is clear that the Practice Direction contemplates that the usual practice is that, where an application for condonation is filed, the main application will not be heard. If condonation is granted, the main application must ordinarily be postponed. Although the Practice Direction does not expressly deal with the course to be followed when condonation is refused, there is in my view no reason why, ordinarily, the main application should not be struck or postponed with an appropriate costs order. Therefore, whether condonation is granted or not, ordinarily the main application will not be heard. The inference to be drawn, in my view, is that the fact that, ordinarily, there will be a delay in hearing the matter, has already been taken into account in the Practice Direction.

[13] In paragraphs 1, 2 and 3 of the Registrar's explanatory note to the Practice Direction dated 7 April 2007, it is explained that the purpose of the Practice Direction is to complement the new system recently introduced by the Judge-President in which the aim is to overhaul the enrolment of cases; to manage the court roll effectively and fairly for the benefit of practitioners, judges and the public; and to afford judges hearing opposed motions more time to know what the arguments are that will be presented and to prepare themselves properly for the hearing and the consideration of oral argument. Judges in this jurisdiction work under great pressure and cannot waste their valuable time doing unnecessary preparation for applications that may not be heard because one of the parties does not follow the rules. Recognizing this, the Practice Direction lays down that the matter will normally not be heard, thereby freeing the judge from having to intensively prepare for the hearing and allowing him or her to concentrate on other work. In the instant case the applicants' heads of argument, consisting of 31 pages, were filed two court days before the date of hearing and the application for condonation one day later. Not only the respondents, but the Court as well, was greatly inconvenienced by this late delivery. The fact of the matter is that, even though the Practice Direction contemplates that the matter will ordinarily not be heard, the Court still has to prepare sufficiently to be

able to consider whether to exercise its discretion to hear the matter, should circumstances require this. Not knowing until very late whether applicants would be filing heads and an application for condonation and then having to deal with these documents and the implications of their delivery at the last minute, put respondents and the Court in an intolerable position.

[14] In considering the need not to undermine the purpose of the Practice Direction I agree, with respect, with the following statement by GIBSON, J in *Johnston v Indigo Sky Gems (Pty) Ltd* 1997 NR 239 (HC) 241E-F:

> "The crux of the matter is that there appears to have been a flagrant breach of the Rules of Court. Given that course of conduct, my attitude is that the Court can only ignore such attitude at its peril and to its own prejudice in the running and administration of the Court's business. Thus my view is that such failure cannot be overlooked in the circumstances of this case because to do so would be to encourage laxity in the preparation of Court pleadings. The orderly arrangement of Court proceedings as presently known, will be a thing of the past. If rules are only to be followed when a legal practitioner sees fit to do so, then the Rules may as well be torn up."

[15] The Practice Direction does bear in mind that an unscrupulous party may manipulate the situation to create a delay in the hearing of the application and allows that the presiding judge may nevertheless hear the matter (see paragraph 4 of the Practice Direction and paragraphs 4.5 – 4.7 of the Registrar's explanatory note). However, there is no indication *in casu* that such circumstances are present.

[16] While bearing in mind the following statement in *Saloojee & another NNO v Minister of Community Development* 1965 (2) SA 135 (A) 138D: "It is for the applicant to satisfy this Court that there is sufficient cause for excusing him from compliance, and the fact that the respondent has no objection, although not irrelevant, is by no means an overriding consideration", the Court, in reaching its decision in this application, took due note of the respondents' attitude and of the fact that it is they, and not the applicants, who set the main application down. I accept that the respondents are for some reason desirous to have the matter finalized and that remissness on the part of applicants is delaying the fulfillment of that desire. In eventually declining to grant condonation and while this is not the only consideration, I had regard to the fact that there is nothing before me to allow me to reach the conclusion that the applicants were abusing the situation or employing any tactic to delay the hearing of the matter.

[17] In further considering the factor of respondents' attitude, the nature of the application is also relevant. The applicants seek delivery of certain electronic equipment, safes and furniture; access to remove certain items of furniture; rendition of an account and debatement thereof; payment of certain amounts of money; and delivery of certain accounting records. A delay in the matter would appear to adversely affect the applicants, rather than the respondents. On the other hand, the allegation that respondents are in breach of a previous order of this Court is *prima facie* serious and if correct, such a breach should not be allowed to continue unduly lest the authority of the Court is undermined. However, by declining to grant condonation and striking the application, which may be re-enrolled as soon as in the next term, it seems to me that two purposes are served: firstly, the preservation of the authority of the Court in requiring that its rules be followed and, secondly, the avoidance of an undue delay in hearing the main application and, if necessary, the enforcement of the previous Court order. By awarding costs against the applicants any inconvenience and prejudice caused to the respondents may be assuaged.

[18] Counsel for applicants submitted that the failure to file the heads of argument timeously is not the fault of the applicants, but of the legal practitioners involved and that applicants should not be punished

where their lawyers are to blame. However this submission is not fully borne out by the affidavit. Mr Gous states in paragraph 20: “In conclusion I respectfully submit that the late filing is not due to any delay and/or fault on part of the applicants and insofar as there may be procrastination concerning the legal practitioners, I respectfully pray the Court’s indulgence.” This is no clear allegation that the legal practitioners are to be blamed or that there was procrastination on their part. The allegation as formulated, coupled with the inadequate explanation in the rest of the affidavit, requires of the Court to read between the lines and to speculate as to the actual cause for the delay. In these circumstances I am not inclined to grant the indulgence sought on this basis.

[19] Having considered all the various other relevant factors, they did not weigh sufficiently with me in favour of granting condonation where the explanation for the applicants’ failure is as inadequate as I have set out above. I therefore made the orders mentioned at the beginning of this judgment.

VAN NIEKERK, J

APPEARANCE FOR PARTIES:

FOR APPLICANTS: Adv J A N Strydom

Instructed by: Theunissen, Louw & Partners

FOR RESPONDENTS: Adv A W Corbett

Instructed by: Chris Brandt Attorneys