REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 174/2013

In the matter between:

THE MINISTER OF DEFENCE **APPLICANT/DEFENDANT**

and

A & R PROPERTIES & SOLAR SUPPLY CC **RESPONDENT/PLAINTIFF**

Neutral citation: *The Minister of Defence v A & R Properties & Supply CC* (I 174/2013) [2014] NAHCMD 133 (14 April 2014)

Coram: HOFF J

Heard: **01 April 2014**
Delivered: **14 April 2014**

Summary: Applications for rescission of default judgment, removal of bar, leave to defend an application, and extention of time for the filing of pleadings have one common denominator namely the failure by a litigant to act timeously in terms of the rules and who seeks the indulgence of the court to allow such a litigant to proceed with his or her action or defence – A court may condone non-compliance where 'good cause' has been shown – Rule 27 gives a court a wide discretion which must, in principle, be exercised with regard to the merits of the matter seen as a whole.

Good cause comprises, firstly, of the giving of a reasonable explanation of the non-compliance, sufficiently full, to enable the court to understand how the non-compliance came about and to assess the conduct and motives of a litigant, and secondly, disclosing a *bona fide* defence, under oath, valid in law, which is sufficiently full, to persuade a court that what such litigant alleges, if proved at the trial, will constitute a defence.

ORDER

The application for the condonation of applicant's failure to deliver a plea to the respondent's particulars of claim and for the upliftment of the bar that operates against the delivery of its plea is dismissed with costs, occasioned by the employment of one instructing and one instructed counsel.

JUDGMENT

HOFF J:

[1] This is an application for the condonation of applicant's failure to deliver a plea to the respondent's particulars of claim and for the removal of the bar operating against the applicant who is the defendant in the main action. The bar came into operation as a result of applicant's failure to deliver its plea after it was put on terms to do so. This application is opposed.

[2] On 20 September 2011 the applicant and respondent entered into a contract in terms of which the respondent undertook to erect two prefabricated barracks and other related works at Rooikop Military Base against payment of a specific sum of money.

[3] Subsequently on 11 November 2011 the agreement was terminated by the applicant. On 19 February 2013 the respondent issued a combined summons in which the respondent claimed damages for breach of contract by the applicant.

[4] On 27 April 2012 (prior to the issuance of the summons) the legal practitioners of the respondent directed a letter to the principal agent (appointed in terms of contract) in which his attention was drawn to the provisions of clause 26.1 of the agreement which provides that in the event of a dispute between the parties the principal agent shall determine the dispute by way of a written decision given to the parties which decision shall be final and binding on the parties and where the contractor or the employer within 14 days of receipt of such decision, by written notice, disputes the decision, the dispute shall be referred to an adjudicator agreed to by the parties. In this letter the principal agent's decision was demanded in respect of the termination of the contract by the applicant, within a period of 14 days.

[5] The principal agent was also informed that should he not provide his written decision within 14 days the respondent would seek the appointment of an adjudicator in terms of the provisions of the agreement.

[6] On 15 May 2012 (with reference to the letter dated 27 April 2012) the applicant informed the respondent that the said letter had been referred to the Attorney-General for a legal opinion, stating further that applicant was within its rights to terminate the agreement and was prepared to face any legal action the respondent may contemplate. The applicant stated that it would revert back to the legal practitioners of the respondent once the Office of the Attorney-General had formally advised it on the matter.

[7] On 23 August 2012 the applicant informed the respondent's legal practitioners that it has received the legal opinion from the Attorney-General and had decided to instruct the Government Attorney to handle the matter on its behalf. The respondent was further informed that should he wish to pursue the matter further he should deal with the Office of the Government Attorney.

[8] The combined summons was subsequently served upon the applicant, care of the Government Attorney on 19 February 2013. On 4 April 2013 the Government Attorney filed a notice of intention to defend the action on behalf of the applicant. On 8 May 2013 the respondent served a notice of bar on the applicant in which the applicant was required to deliver its plea within a period of five days, failing which it would be *ipso facto* barred. In spite of this notice the applicant failed to file its plea. The respondent thereafter on 22 August 2013 delivered an application for default judgment which was enrolled for hearing on 6 September 2013.

[9] On 4 September 2013 the applicant delivered an interlocutory application in which the following relief was sought:

'1. Condoning applicant's non-compliance with the rules of this Honourable Court relating to notice and service of this application and in other respects as may be necessary.

2. Condoning applicant's delay in delivering his plea.

3. Removing the bar operating against the applicant in delivering his plea, extending the time within which applicant is required to deliver his plea, in terms of Rule 27 of the Rules of this Honourable Court.

In the alternative to the above:

4. arresting the proceedings in the main application and staying such proceedings until the domestic remedies of Adjudication and Arbitration have been exhausted or the application for lifting the bar has been determined.'

[10] The hearing of this application was eventually set down on 1 April 2014. This court may, in terms of the provisions of rule 27(3), on good cause shown, condone any non-compliance with its rules.

[11] The main issue for decision in this application is whether the application for condonation for the applicant's non-compliance with the rules of court as well as the application for the removal of the bar (to enable it to enter a plea) should be granted.

[12] Rule 27(3) gives this court a wide discretion which must be exercised with due regard to two principal requirements. The first is that the applicant should file an affidavit satisfactorily explaining the non-compliance with the rules, and secondly, the applicant should satisfy the court that he has a *bona fide* defence.

[13] In *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 216H-217B the following was said (quotation from headnote):

'Applications for rescission of default judgment, removal of bar, leave to defend an application, and extention of time for the filing of pleadings must be seen as *species* of the same *genus*. In all these cases there is a failure by a litigant to act timeously in terms of the Rules and who seeks the indulgence of the Court so as to allow him to proceed with his action or defence. According to Rule 27(1) of the Uniform Rules of Court 'good cause' must be shown and this gives the Court a wide discretion which must, in principle, also be exercised with regard to the merits of the matter seen as a whole. This approach applies to all the applications concerned, but what does differ is the *quantum* of the assurance required to the effect that there is indeed a defence, which may vary from case to case. The graver the consequences which have already resulted from the omission, the more difficult it will be to obtain the indulgence. There may also be an interdependence of the reasons for and the extent of the omission, on the one hand, and the 'merits', on the other.'

[14] It was also stated (at 217A) that an application is bound to fail where there is no defence since it would then serve no purpose to continue with the application.
Du Plooy was referred to with approval by this Court in *Solomon v De Klerk* 2009 (1) NR 78.

[15] Regarding the nature and extent of the explanation required Schreiner JA in *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A stated that it 'is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives'.

and continued as follows at 353G:

'The *onus* lay upon the defendant to prove good cause and in my view the bare allegation of forgetfulness made by Nathan Ozen was of little value in discharging that *onus*. An allegation that is too bald may for that reason carry little weight.'
(See also *General Accident Insurance Co South Africa Ltd v Zampelli* 1988 (4) SA 407 (CPD) at 410H-J).

[16] The explanation for the failure to deliver its plea is contained in paragraph 5 of its founding affidavit which reads as follows:

'Mr Charles Chanda a Zambian national left Government service at the end of his contract in early April 2013 and the file was re-assigned to Mr Steven Nkiwane who joined the office in March 2013, but due to some administrative lapses at the Office of the Government Attorney the file did not cross his desk until about 22 August 2013.'

[17] Mr Nkiwane (in his heads of argument) conceded that the delay was a 'long one' and submitted that it is not 'outside the range of experience in legal practice for lapses of that nature to occur'.

[18] However no explanation is advanced in the founding affidavit as to the meaning and content of these 'administrative lapses' and who was responsible for these 'lapses'. This explanation is not 'sufficiently full' to enable this court to understand the reason for the delay. It is a bare allegation which, in my view, cannot be afforded any weight. It was stated in *Zampelli* (supra) that condonation is not a mere formality.

[19] After the notice of bar was filed upon the Government Attorney a period of more than 4 months lapsed before this application was launched. This is indeed a considerable delay for which there is no acceptable explanation. In *Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another* 1992 (4) SA 852 (AD) at 859E-F the following was said regarding non-compliance with the rules of court:

'This Court has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are; this applies even where the blame lies solely with the attorney (see, for example, *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799D-H).'

[20] Regarding its defence, the applicant stated the following in paragraph 8 of its founding affidavit:

'From the above, it is clear that:
Defendant (applicant herein) has always wanted to defend this action.
He has a solid *bona fide* defence to the action.
Is not at all to blame for delivering his plea on good time, particularly as:
He was at all times labouring under the impression that the alternative dispute resolution mechanism was being resorted to and/or was not aware of the terms to plead on which he had been put.'

[21] In *Flugel v Swart* 1979 (4) SA 494 (ECD) at 497F Kannemeyer J stated the following in respect of good cause:

'. . . an applicant must give a reasonable explanation under oath for his failure to comply with the Rule of Court in question and he must also, in his affidavit, disclose a *bona fide* defence which need not be set out in any great detail. It is sufficient if it is set out shortly. In *Ford v Groenewald* 1977 (4) SA 244 (T) NEDSTADT J reviewed the authorities and held that the principles applicable as to what a defendant had to show in order successfully resist an application for summary judgment are also applicable in an application of this nature. With this approach I am in respectful agreement. In this regard he referred to the judgment of COLMAN J in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T), from which it appears that a defendant, in order to establish that he has a *bona fide* defence, must (a) swear to a defence, valid in law, in a manner which is not inherently and seriously unconvincing (at 228C), and (b) place before the Court a statement of the material facts which is sufficiently full to persuade that what he alleges, if proved at trial, will constitute a defence to plaintiff's claim (at 228D-E) and that (c) if the defence is set out in a manner which in the circumstances of the case is bald, vague or sketchy this will be a relevant consideration in deciding whether the defence is a *bona fide* one.'

[22] In *Markides and Another Levendale* 1954 (4) SA 181 (SR) 183-184 it was held that a defendant should set out in his *affidavit what the facts are* on which he relies for his defence, so that the court can form some opinion of the merits of his defence. (See also *Du Plooy* (supra) at p 217H-218A).
(Emphasis provided).

[23] In the applicant's founding affidavit (par 6) reference was made to a letter (dated 22 August 2013) in which consent of the removal of the bar operating against the applicant was requested and in which it was indicated that respondent's legal representatives had indicated a conditional willingness to do so. That letter did not disclose any *bona fide* defence.

[24] The only reference to a *bona fide* defence in applicant's affidavit is contained in par 8 mentioned hereinbefore. In this paragraph the applicant merely stated that it has a 'solid *bona fide* defence' to the action without stating, firstly, the nature of such defence and secondly, the material facts which are relied upon for such a defence which are 'sufficiently full' to persuade this court that what is alleged, if proved at the trial, will constitute a defence to respondent's claim.

[25] I am of the view that the applicant has failed to discharge its onus to show 'good cause' as required by rule 27(3) and the application should accordingly fail.

[26] In the result the following order is made:

> The application for the condonation of applicant's failure to deliver a plea to the respondent's particulars of claim and for the upliftment of the bar that operates against the delivery of its plea is dismissed with costs, occasioned by the employment of one instructing and one instructed counsel.

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E P B HOFF

Judge

APPEARANCES

APPLICANT/DEFENDANT:	S Nkiwane Of Government Attorneys, Windhoek
RESPONDENT/PLAINTIFF:	A Denk Instructed by Sisa Namandje & Co. Inc. Windhoek