REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: I 4113/2011

In the matter between:

NAMIBIA SECURITY SUPPLIES CC **PLAINTIFF / RESPONDENT**

And

TORSTEN SCHIDLOWSKI **DEFENDANT / APPLICANT**

Neutral citation: Namibia Security Supplies CC v Schidlowski (I 4113/2011) [2013] NAHCMD 282 (01 October 2014)

Coram: UEITELE, J

Heard: 21 November 2013

Delivered: 01 October 2014

Flynote: Practice – Filing of Plea- Application for condonation of failure to timeously file a plea - Requirements of - Rule of Court 55 – Requirements restated.

Summary: The plaintiff claimed from the defendant, the sum of N$96 203-65 for goods sold and delivered during the period 22 September 2010 to 17 June 2011. The summons was served on the defendant's wife, Leanie at the defendant's residential address on 12 January 2012, and on 25 January 2012, the defendant entered appearance to defend the claim.

Between the service of the summons on 25 January 2012 and March 2013 the plaintiff and the defendant engaged in attempts to reach a settlement of the plaintiff's claim to no avail. On 13 March 2013 the defendant's legal practitioner (Petherbridge Law Chambers) withdrew as legal practitioners of the defendant. On 12 April 2013 the defendant was personally served with a formal notice demanding the defendants' plea or answer to the plaintiff's claim within five days or face a notice of bar.

On 24 May 2013 the Registrar of this Court gave notice to the parties that the matter has been docket allocated to this court and that an initial case management conference is scheduled for 19 June 2013. On that date the defendant did not appear at the case management conference and the matter was postponed to 10 July 2013 for the plaintiff to make an application for default judgment. On 10 July 2013 when the matter was called it transpired that the application for default judgment was not served on the defendant as he was allegedly in South Africa. This court consequently postponed the matter to 31 July 2013 to enable the plaintiff to serve the default judgment application on the defendant. On 23 July 2013 MB De Klerk filed a notice of representation for the defendant and on 25 July 2013 the defendant's legal practitioner wrote to the plaintiff's legal practitioner requesting the application for default judgment to be withdrawn and he tendered wasted costs. But the plaintiff refused to uplift the bar; and on 30 July 2013 the defendant applied, on notice of motion, for the removal of the bar.

The defendant in his affidavit in support of this application explained his failure to timeously deliver his plea. Defendant asserts, in his affidavit, that he has a *bona fide* defence to plaintiff's claim on the basis that plaintiff's claim is defective. The main explanation given by the defendant as to why he failed to timeously file his plea is the fact that he was without legal representation from the date that he was served with a notice to plead.

Held that the tendency of the Court was to uplift a bar where (a) there was a reasonable explanation for the delay; (b) the application was bona fide and not made with the object of delaying the opponent in the satisfaction of his or her claim; (c) there did not appear to be a reckless or deliberate non-compliance with the rules of Court; (d) applicant's case was not patently unfounded; and (e) the opponent would not be so prejudiced that he could not be compensated by a suitable order as to costs.

Held further that condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility.

Held furthermore that the deficiencies in the defendant's affidavit have resulted in a situation where this court is unable to arrive at the conclusion that the defendant has discharged the onus that rests upon him. It follows that the defendants application for the uplifting of the bar in regard to this claim cannot succeed and is accordingly dismissed.

ORDER

(a) The defendant's application for upliftment of the bar is refused.

(b) The defendant must pay the plaintiff's cost.

(c) The matter is postponed to 29 October 2014 at 11H00 to hear the plaintiff's application for default judgment.

JUDGMENT

UEITELE, J

BACKGROUND

[1] By summons issued on 06 December 2011 (and amended on 16 April 2012), the plaintiff, Namibia Security Supplies CC (now the respondent in these proceedings, but I will refer to it as the plaintiff in this judgment), claimed from the defendant, Torsten Schidlowiski (now the applicant in these proceedings but, I will refer to him as the defendant in this judgment), the sum of N$96 203-65 upon a general account for goods sold and delivered during the period 22 September 2010 to 17 June 2011.

[2]The summons was served on the defendant's wife, Leanie at the defendant's residential address on 12 January 2012, and on 25 January 2012, the defendant entered appearance to defend the claim. Between the service of the summons on 25 January 2012 and March 2013 the plaintiff and the defendant engaged in attempts to reach a settlement of the plaintiff's claim. The attempts resulted in the defendant making out post-dated cheques (for

the months of December 2012 to September 2013) in the amount N$ 8 690-83 per cheque. The cheque for the month of December 2012 was, on presentation for payment, dishonoured. The defendant when informed about the cheques which were dishonoured promised to make payment by electronically transferring the funds to the plaintiff. Nothing became of the promise to transfer the funds. When by March 2013 the plaintiff did not receive any payments the legal practitioners representing the plaintiff informally (by letter dated 12 March 2013) requested for the defendant to file his plea within five days from the date he received the letter. On 13 March 2013 the defendant's legal practitioner (Petherbridge Law Chambers) withdrew as legal practitioners of the defendant.

[3] On 12 April 2013 the defendant was personally served with a formal notice demanding the defendants' plea or other answer to the plaintiff's claim within five days or face a notice of bar. On 24 May 2013 the Registrar of this Court gave notice to the parties that the matter has been docket allocated to me and that an initial case management conference is scheduled for 19 June 2013. On that date the defendant did not appear at the case management conference and I postponed the matter to 10 July 2013 for the plaintiff to make an application for default judgment. On 10 July 2013 when the matter was called it transpired that the application for default judgment was not served on the defendant as he was allegedly in South Africa. I consequently postponed the matter to 31 July 2013 to enable the plaintiff to serve the default judgment application on the defendant. On 23 July 2013 MB De Klerk filed a notice of representation for the defendant and on 25 July 2013 the defendant's legal practitioner wrote to the plaintiff's legal practitioner requesting the application for default judgment to be withdrawn and he tendered wasted costs. But the plaintiff refused to uplift the bar; and on 30 July 2013 the defendant applied, on notice of motion, for the removal of the bar.

[4] Rule 55 of this Court's Rules provides as follows:

'Upliftment of bar, extension of time, relaxation or condonation

55 (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 a 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 of time 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.'

The forerunner of this rule is Rule 27, in which the phrase, *'on good cause shown'* occurred. In the matter of *Cairns' Executors v Gaarn*[1]*,* the Court was considering a condonation application in respect of appeal which was not enrolled within the time frames contemplated in the Rules of that Court (i.e. the Appeal Court). The applicant for condonation relied on a Court rule which read that: *'The Court may for sufficient cause shown, excuse the parties from compliance with any of the foregoing Rules'*. Innes, JA (as he then was) stated as follows:

'It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive, and which it is highly desirable not to abridge. All that can be said is that the applicant must show, in the words of COTTON, L.J. (*In re Manchester Economic Building Society*, 24 Ch.D. 488 at

[1] 1912 AD 181 at 186.

p. 498), 'something which entitles him to ask for the indulgence of the Court'. What that something is must be decided upon the circumstances of each particular application'.

[5] In the matter of *Smith, N.O v Brummer, N.O. and Another*[2], the Court stated that the tendency of the Court was to uplift a bar where (a) there was a reasonable explanation for the delay; (b) the application was bona fide and not made with the object of delaying the opponent in the satisfaction of his or her claim; (c) there did not appear to be a reckless or deliberate non-compliance with the rules of Court; (d) applicant's case was not patently unfounded; and (e) the opponent would not be so prejudiced that he could not be compensated by a suitable order as to costs.

[6] The requirement that an applicant's case must not patently be unfounded suggests that something must be put on record from which the Court can estimate the soundness of the applicant's case. In the matter of *Uitenhage Transitional Local Council v South African Revenue Service*[3] Heher, JA stated that:

> '…condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

[7] In the matter of *Silverthorne v Simon*[4], Salomon, JA said the following:

> 'Whenever therefore, there is any satisfactory explanation of the delay on the part of defendant, if the Court comes to the conclusion that defendant's application is *bona fide*,

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2 1954 (3) SA 352 (O) at 358.
3 2004 (1) SA 292 (SCA) at 297.
4 1907 T.S. at 123.

> that he is really anxious to contest the case and believes he has a good defence to the action, and if in these circumstances, the order can be made without any damage or injury to the plaintiff other than can be remedied by an order as to payment of costs, I think when these conditions are present in any application, the Court should as far as possible assist the defendant and allow him to file a plea in the action'.

[8] 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. What is therefore left for me to enquire is, whether the defendant has satisfactorily explained the delay on his side, whether his application is made *bona fide* and not put up merely for the purpose of delaying satisfaction of the plaintiff's claim..

[9]The defendant in his affidavit in support of this application explained his failure to timeously deliver his plea. I summarise the reasons advanced as follows: He states that during 2011, he instructed Petherbridge Law Chambers to defend the action. He was unhappy with the services of Petherbridge Law Chambers, because he did not receive regular feedback on the status of the matter and that he was not kept abreast of the developments of his case. That the failure to keep him informed of the progress of his case resulted in tension between him and his legal practitioner (Ms Petherbridge of Petherbridge Law Chambers) when he enquired as to the progress of the matter. That as a result of the tension between him and his legal practitioner he terminated her mandate to

act on his behalf on 06 March 2012. That Petherbridge Law Chambers withdrew as his legal practitioner of record only after she was placed on terms to file a plea on 12 March 2013 (That was one year after her mandate was already terminated). That he had no knowledge about the procedures to be followed and what was required of him and that as soon as he was served, on 12 April 2013, with a notice bar he attended to obtain new legal representation but to no avail. He stated that he initially approached the offices of LorentzAngula after he received the notice of bar but they were unable to assist him and he only secured legal representation in July 2013.

[10]Defendant asserts, in his affidavit, that he has a *bona fide* defence to plaintiff's claim on the basis that plaintiff's claim is defective in the following regard:

(a) Plaintiff sues defendant in his personally capacity and alleges that it, during the period 22 September 2010 to 17 June 2011, delivered goods to defendant.

(b) Defendant denies that he is personally liable and alleges that plaintiff in fact contracted with a corporate entity and not with him in his personal capacity. He further argues that the plaintiff is pursuing him as a surety without first having sued the principle debtor.

(c) There is no close corporation of which he is a member or aware of that is called Hotwire Protect Alarms and Security CC with a company registration number CC/2006/0383. The close corporation with the aforementioned CC number (CC/2006/03838) is called Hotwire Automative Technology CC, which is a different entity to the entity described in the applicant for credit.

[11]In the affidavit deposed to by Mr Putzler on behalf of the plaintiff, in its opposition of the upliftment of the bar, the plaintiff puts in doubt the defendant's *bona fide* desire to defend

the action against him. The doubt raised by the plaintiff is based on the following facts: During August 2012 plaintiff's debt collector, informed the plaintiff and its legal practitioner that the defendant has admitted his indebtedness and agreed to sign an acknowledgment of debt. During September 2012 the plaintiff's debt collector forwarded the acknowledgment of debt to the defendant for his signature. On receipt of the written acknowledgement of debt the defendant enquired whether the acknowledgment of debt could be signed on behalf of a business, but he did not indicate which business. Defendant however indicated that he has every intention to settle the debt as agreed.

[12]During October 2012 defendant provided the plaintiff's debt collector with certain post-dated cheques in the amount of N$8 690 - 83 per cheque, dated the 15th of each month, for the months of January 2013 to September 2013, excluding March 2013, as per the payment schedule agreed upon. Defendant did however not sign the acknowledgment of debt. The bearer of the aforesaid post-dated cheques was Pro-Techt Alarms Systems CC. It is only March 2013 when the post-dated cheques were dishonoured on presentation for payment that the plaintiff put the defendant on terms to file his plea.

[13]The defendant in his affidavit however admits that he made certain payments to reduce the debt under the mistaken belief that he in his personal capacity was indebted to the plaintiff, but on receipt of legal advice he believes that he, in his personal capacity is not indebted to the plaintiff.

[14] In this matter the main explanation given by the defendant as to why he failed to timeously file his plea is the fact that he was without legal representation from the date that he was served with a notice to plead. I echo the words of Heher, JA, in the matter of *Uitenhage Transitional Local Council v South African Revenue Service*[5] when he said that one would have hoped that the many admonitions concerning what is required of an

5 *Supra* at 3.

applicant in a condonation applications would be trite knowledge among practitioners who are entrusted with the preparations of condonation applications to this Court: I have, quoted above the statement that 'condonation is not to be had merely for the asking; ***a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility***.'

[15] I have from the affidavits filed in the application for the lifting of the bar established that the defendant terminated the mandate of Petherbridge legal practitioners as far back as 12 March 2012. He approached LorentzAngula to take over the matter during March 2012. In a letter (dated 13 March 2012) written by LorentzAngula Incorporated the latter legal practitioners amongst others state the following to Petherbridge Law Chambers:

> 'Kindly file your notices of withdrawal and notify us when we can come and collect the files in all of Mr Thorsten Schidlowiski matters to enable us to come on record.
>
> Should you fail to do so on or before noon 16th March 2012 we shall have no other option but to file our Notice of Representation and attach the letter of termination.'

[16] The defendant's affidavit consists of a number of generalized causes without any attempt to relate them to the time-frame of its default or to enlighten the Court as to the materiality and effectiveness of any steps he has taken to secure the services of a legal practitioner (for a period of over eighteen months) if one is to take into consideration that he terminated Petherbridge Law Chambers mandate on 06 March 2012 by that time he was already served with summons). The defendant's failure to disclose all the material facts border on misleading the court or consciously withholding information from the court. The defendant does not for example disclose where he obtained the legal advice that he is not personally liable for the debt nor does he disclose to Court when he obtained that advice.

As regards the defenses raised by the defendant he submits that there is no Close Corporation with the name Hotwire Protect Alarms and Security CC with a company registration number CC/2006/0383, but he does not explain to the Court why he signed the '*Application for Credit'* and bound himself as surety and co-principal debtor for a non-existing close corporation which amongst others reads as follows:

> 'I THE UNDERSIGNED TORSTEN SCHIDLOWISKI IN MY CAPACITY AS ……..OF THE CUSTOMER AND IN MY PERSONAL CAPACITY:
>
> **1** HEREBY WARRANT THAT I AM DULY AUTHORISED BY THE CUSTOMER TO MAKE THIS APPLICATION ON ITS BEHALF AND THAT THE ABOVE INFORMATION IS TRUE AND CORRECT;
>
> **2** DO HEREBY ON BEHALF OF THE CUSTOMER ACCEPT AND AGREE TO THE TERMS AND CONDITIONS OF CONTRACT SET OUT IN THE FOREGOING PAGES, WHICH TERMS AND CONDITIONS I ACKNOWLEDGE HAVING READ AND UNDERSTOOD HERE.
>
> **3** DO HEREBY ACKNOWLEDGE AND AGREE THAT BY MY SIGNATURE HERETO I BIND MYSELF, IN ACCORDANCE WITH THE TERMS AND CONDITIONS OVERLEAF, CO-PRINCIPAL DEBTOR IN *SOLIDUM* WITH THE CUSTOMER IN FAVOUR OF THE COMPANY FOR DUE PAYMENT OF THE CUSTOMER OF ALL AMOUNTS WHICH MAY AT ANY TIME HEREAFTER BECOME PAYABLE BY THE CUSTOMER TO THE CREDITOR.'

[17] The deficiencies in the defendant's affidavit have resulted in a situation where I am unable to arrive at the conclusion that:

(a) the defendant has reasonably explained his delay in filing a plea;

(b) the defendant's application is *bona fide* and not made with the object to delay the plaintiff in the satisfaction of its claim;

(c) the defendant was not reckless or deliberate with the non-compliance with the rules of Court; and

(d) the defendant's case is not patently unfounded.

[18] It follows that the defendants application for the uplifting of the bar in regard to this claim cannot succeed and is accordingly dismissed. In this matter I have not been referred to any facts or circumstances which will persuade me to depart from the general rule that costs must follow the cause. In the result I make the following order:

1 The defendant's application for upliftment of the bar is refused.

2 The defendant must pay the plaintiff's cost.

3 The matter is postponed to 29 October 2014 at 11H00 to hear the plaintiff's application for default judgment.

SFI Ueitele
Judge

APPEARANCES:

PLAINTIFF:	B DE JAGER Instructed by Van der Merwe–Greeff Andima Inc
DEFENDANT:	A SMALL Instructed by M B De Klerk & Associates