REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A 289/2012

In the matter between:

STANDIC BV **APPLICANT**

And

RENE J C W KESSELS **RESPONDENT**

Neutral citation: *Standic BV v Kessels (A 289-2012) [2015] NAHCMD 197 (24 August 2015)*

Coram: UEITELE, J

Heard: 9 October 2014

Delivered: 24 August 2015

Flynote: Practice - Applications and motions - Application for condonation for late filing of answering affidavit - In an application for the condonation of a late filing of an answering affidavit the court has a wide discretion which it will exercise in accordance

with the circumstances of each case. The tendency of the court is to grant such an application where - (a) the applicant has given a reasonable explanation of his delay; - (b) the application is *bona fide* and not made with the object of delaying the opposite party's claim; - (c) there has not been a reckless or intentional disregard of the Rules of Court; - (d) the applicant's action is clearly not ill-founded and (e) any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs. - Factor of prospect of success by itself never conclusive.

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Summary: The respondent filed an application to have a default judgment granted against it rescinded. The applicant opposed the application for condonation but failed to timeously file an opposing affidavit. Applicant accordingly applied for the condonation of the late filling of the opposing affidavit.

Held, that the courts normally were inclined to grant applications for removal of bar where: (a) a reasonable explanation for applicant's delay was forthcoming; (b) the application for condonation was *bona fide*; (c) it appeared that there had not been a reckless or intentional disregard of the Rules of Court; (d) the applicant's cause was not obviously without foundation; and (e) the other party was not prejudiced to an extent which could not be rectified by an appropriate order as to costs.

Held, further, that it has also been said that lack of diligence on the part of the applicant or his attorney, even if gross was not necessarily a bar to relief in condonation applications; on the other hand where the delay was longer and the lack of diligence was gross whether by the applicant or by his attorney the courts were entitled to take a more serious view of the matter.

Held further that the applicant has failed to explain why the notice to oppose the rescission application was filed late. The court did not find any acceptable explanation, (in the sense of being explanation being satisfactory) or reasonable explanation for the failure to timeously file the opposing affidavit. The court further found that apart from the

failure to explain all the above issues the supporting affidavit is silent on the prospects of success in opposing the rescission application.

ORDER

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1. The application to condone Standic BV's failure to timeously file its answering affidavit in the application to rescind the default judgment granted on 4 December 2013 against Mr. Kessels is hereby dismissed with costs.

2. The said costs will include the costs of one instructing and one instructed counsel.

3 The matter is postponed to **2 September 2015** at **8h30** for purposes of determining a date to hear the application to rescind the default judgment granted on 4 December 2013 against Mr Kessels.

JUDGMENT

UEITELE, J

Introduction

[1] This matter has its genesis in an application launched by Standic BV (I will in this judgment refer to it as Standic) in this court on 15 November 2012 in which application it sought an order declaring that, the judgment granted against Petroholland Holding (Pty) Ltd (as first respondent), Petroholland Oil Refining (Pty) Ltd (as second respondent) and Mr. JCW Kessels (as third respondent) jointly and severally, by the District Court of

Rotterdam (in the Netherlands) on 22 February 2012, is enforceable and executable against those parties in Namibia.

[2] Petroholland Holding (Pty) Ltd, Petroholland Oil Refining (Pty) Ltd and Mr. J C W Kessels (I will refer to these parties as the respondents in the main application) all entered a notice to oppose the application launched by Standic. That application was, after an exchange of pleadings, on 18 September 2013, postponed to 14 November 2013 for hearing. In the court order which postponed the matter to 14 November 2013 the court amongst others ordered that the parties must file their heads of arguments in accordance with the rules of court and the Practice Directives.

[3] On 14 November 2013 when the matter was called it transpired that the respondents in the main application had failed to file their heads of arguments, and also failed to apply for the condonation of their failure to file their heads of arguments. The court postponed the matter to 4 December 2013 for the respondents in the main application to provide reasons for the late filing of their heads of arguments and to enable them to file an application to condone their default. Petroholland Holding (Pty) Ltd and Petroholland Oil Refining (Pty) Ltd filed their explanation but Mr. Kessels did not file any affidavit explaining his default, he did appear in court nor did he instruct any legal practitioner to represent him and explain his default when the matter was called on 04 December 2013.

[4] The court on that day (4 December 2013), in consequence of Mr. Kessels' default granted a default judgment against him. On 11 March 2014 Mr. Kessels launched an application to have the default judgment granted against him rescinded, the hearing of the application to rescind the default judgment was set down for 28 March 2014. By 28 March 2014 Standic had not opposed the rescission application. On 28 March 2014 the hearing of the rescission application was postponed to 17 April 2014 as an unopposed application. In the meantime and on 2 April 2014 Standic filed a notice to oppose the rescission application.

[5] As I have indicated above by 17 April 2014 the rescission application became opposed. On that day (i.e. 17 April 2014) the court made the following order:

> '1 The matter is postponed to 02 July 2014 at 08h30 for a status hearing;
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> 2 The respondents [i.e. Standic BV] must file their answering affidavit on or before 24 April 2014;
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> 3 That if the applicant intends to reply it must file its replying affidavit on or before 08 May 2014.'

Standic, however, only filed its answering affidavit on 13 May 2014. When Standic realized that it had filed its affidavit out of time it, on 19 May 2014, launched an application seeking the court to condone its failure to timeously file the answering affidavit. The applicant opposed the application and the court heard arguments in respect of the condonation application on 9 October 2014. It is that condonation application that I am now considering.

Applicable Legal Principles

[6] Before I venture to set out the legal principles applicable to the subject matter of this application namely condonation for failure to comply with a court order or rule of court I digress and point out that, the application for the rescission of the default judgment granted on 4 December 2013 was launched on 11 March 2014. At that time the Rules[1] now governing the conduct of proceedings in this court had not yet become operative. I am therefore of the view that Rule 32(9) and (10) is not applicable to that

[1]Promulgated in the Government *Gazette* Number 5392 of 16 April 2014 under Government Notice No. 4 of 2014.

application. I will consider the application for condonation under the Rules[2] applicable at the time.

[7] Rule 27 of the repealed Rules of the High Court provides as follows:

> '27 (1) In the absence of agreement between the parties, the court may upon application on notice and *on good cause shown*, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.
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> (2) Any such extension may be ordered although the application therefor is not made until such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.
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> (3) *The court may, on good cause shown, condone any noncompliance with these rules*.' (Italicized and underlined for emphasis.)

[8] In the matter of *Smith NO v Brummer NO and Another*[3] it was said that the courts normally are inclined to grant applications for condoning none compliance with the rules of court or an order of court where:

> ‘(a) a reasonable explanation for applicant's delay is forthcoming;
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> (b) the application for condonation (or removal of bar) is *bona fide*;
>
> (c) it appears that there has not been a reckless or intentional disregard of the Rules of Court;

[2]Promulgated in the Government *Gazette* of 10 October 1990 under Government Notice No. 59 of 1990.
[3] 1954 (3) SA 352 (O) at 358.

(d) the applicant's cause is not obviously without foundation; and

(e) the other party is not prejudiced to an extent which cannot be rectified by an appropriate order as to costs.

[9] In the matter of *Telecom Namibia Limited v Mitchell Nangolo & 34 Others* Damaseb JP identified the following as principles guiding applications for condonation:

'1 It is not a mere formality and will not be had for the asking.[4] The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.[5]

2 There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.[6]

3 It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.[7]

4 The degree of delay is a relevant consideration;[8]

5 The entire period during which the delay had occurred and continued must be fully explained;[9]

6 There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented.[10] (Legal practitioners are expected to familiarize themselves with the rules of court).[11]

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[4] *Beukes and Another v Swabou and Others* [2010] NASC 14 (5 November 2010), para 12.

[5] *Father Gert Dominic Petrus v Roman Catholic Archdiocese* , SA 32/2009, delivered on 09 June 2011, para 9.

[6] *Beukes and Another v Swabou and Others* [2010] NASC 14(5 November 2010), para 13.

[7] *Ondjava Construction CC v HAW Retailers* 2010 (1) NR 286(SC) at 288B, para 5.

[8] *Pitersen-Diergaardt v Fischer* 2008(1) NR 307C-D(HC).

[9] *Unitrans Fuel and Chemical (Pty) Ltd v Gove –Co carriers CC* 2010 (5) SA 340, para 28.

[10] *Salojee and Another NNO v Minister of Community Development* 1965 (2) SA 135(A) at 141B*; Moraliswani v Mamili* 1989(4) SA 1 (AD) at p.10; *Maia v Total Namibia (Pty) Ltd* 1998 NR 303 (HC) at 304; *Ark Trading v Meredien Financial Services Namibia (Pty) Ltd* 1999 NR 230 at 238D-I.

[11] *Swanepoel, supra* at 3C; *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432(SC) at 445, para

7 The applicant for condonation must demonstrate good prospects of success on the merits. But where the non-compliance with the rules of Court is flagrant and gross, prospects of success are not decisive.[12]

8 The applicant's prospect of success is in general an important though not a decisive consideration. In the case of *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*[13], Hoexter JA pointed out at 789I-J that the factor of prospects of success on appeal in an application for condonation for the late notice of appeal can never, standing alone, be conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with the rules, should be considered.

9 If there are no prospects of success, there is no point in granting condonation.'[14]

In the matter of *Silverthorne v Simon*[15] it has also been said that lack of diligence on the part of the applicant or his attorney, even if gross is not necessarily a bar to relief in condonation applications.

[10] Based on the authorities that I have cited in the preceding paragraphs, I must, in order to consider whether I must grant the condonation sought, apart from the prospects of success, be satisfied that the applicant (Standic in this instance) has offered an acceptable and reasonable explanation for the delay and that it has given a full, detailed and accurate explanation for the entire period of the delay, including the timing of the application for condonation.

Evidence adduced in support of and against the application

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[12] *Swanepoel, supra* at 5A-C; Vaatz: *In re Schweiger v Gamikub (Pty) Ltd* 2006 (Pty) Ltd 2006 (1) NR 161 (HC), para; *Father Gert Dominic Petrus v Roman Catholic Diocese,* case No. SA 32/2009, delivered on 9 June 2011, page 5 at paragraph 10.

[13] 1985 (4) SA 773 (A).

[14] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

[15] 1907 TS 123, also see See *Gordon and Another v Robinson* 1957 (2) SA 549 (SR). The case *Stolly's Motors Ltd v Orient Candle Company Ltd* 1949 (4) SA 805 (C).

[11] The supporting affidavit to the application for condonation was deposed to by one, Henner Diekmann, who was the legal practitioner of record for the respondent at the time when the condonation was sought. According to Diekmann, unbeknown to him and his office the hearing of the matter 'eventuated' on Wednesday 17 April 2014. He asserts that he was not aware that the matter had been set down for hearing on 17 April 2014. He furthermore asserts that his office did not, to the best of his knowledge, receive any notification that the application for the rescission of the default judgment was set down for hearing on 17 April 2014. He proceeds to state that the first time his office became aware of the fact that *'a hearing in this matter eventuated an (sic) 17 April 2014…'* was on 7 May 2014 when his secretary collected the court order of 17 April 2014. He states that at that stage he was not in Namibia but in South Africa and his secretary e-mailed the court order of 17 April 2014 to Standic's counsel in Cape Town.

[12] Mr. Diekmann states that when his office received a copy of the court order dated 17 April 2014, on 7 May 2014 the date (i.e. the 24 April 2014) by which Standic had to file its answering affidavit had already passed. He states that he accordingly gave immediate instructions for Standic's counsel to prepare an answering affidavit. The answering affidavit was prepared and he signed it on his return from South Africa on 13 May 2014. The answering affidavit was, however, only filed at court on 19 May 2014.

[13] Mr. Kessels opposes Standic's application for the condonation of the late filling of the answering affidavit. Mr. Pfeiffer who was the legal practitioner of record for Kessels deposed to the opposing affidavit in opposition to the application for condonation. He denies the accuracy of Mr. Diekmann's assertions. His denial is based on the following. He states in his opposing affidavit that the hearing of the rescission application was initially set down for Friday 28 March 2014. The hearing of the application was then postponed to 17 April 2014. He states that although the application for rescission was unopposed at that time the court order of 28 March 2014 postponing the matter to 17

April 2014 was also directed to Diekmann and Associates. His (Mr. Pfeiffer's) office received that order on 31 Mach 2014.

[14] Mr. Pfeiffer proceeds to state that on 2 April 2014 he received a telephone call from the secretary of Mr. Diekmann a certain Sharen Jansen van Rensburg who having seen the Court Order of 28 March 2014 enquired about the status of the application and also enquired whether or not Standic could still file an a notice of intention to oppose the rescission application. Mr. Pfeiffer further states that he advised Ms. van Rensburg that if Standic files a notice to oppose the rescission application, the hearing of the rescission application will not proceed on 17 April 2014 because affidavits will have to be exchanged. Shortly after the conversation with Ms. van Rensburg she send an email to Mr. Pfeiffer in which e-mail she confirms the conversation, a copy of the email (dated 2 April 2017) was attached to Mr. Pfeiffer's affidavit and it amongst others reads as follows:.

> 'Dear Sir
>
> We herewith confirm the telephonic discussion between your goodself and Advocate T A Barnard earlier today, to the effect that we shall file our notice off opposition to day in respect in respect of the of the application for rescission of judgment dated 11 March 2014.
>
> We confirm that the matter will accordingly not proceed on 17 April 2014 and will proceed on a defended basis…'

[15] Mr. Diekmann did not respond to these averments by Mr. Pfeiffer, but he (Diekmann), without any explanation left it to Ms. van Rensburg to depose to the replying affidavit. Ms. van Rensburg states as follows: *'I depose to this affidavit with the approval and consent of Mr. Diekmann.'* In the replying affidavit Ms. van Rensburg states that Mr. Diekmann's statement that he or his office was not aware of the set down of the matter

on 17 April 2014 was a misinterpretation of what she conveyed to him. Mr. Diekmann does not depose to a confirmatory affidavit to support this opinion of Ms. Van Rensburg.

Discussion and application of the legal principles to the facts

[16] It is common cause that there was no appearance at court by Diekmann and Associates on behalf of Standic on 17 April 2014 when the matter was postponed to 2 July 2014 for a status hearing and when the court had granted the deadlines to the parties for filing their answering/opposing and replying affidavits. Mr. Diekmann in his affidavit (in support of the condonation application) alleges that he or his office was not aware that the matter was set down for hearing on 17 April 2014. Ms. van Rensburg on the other hand states that when she was aware of the hearing scheduled for 17 April 2014 but that when she discussed the matter with Mr. Pfeiffer she '*believed that the matter would be removed from the roll and that it would not be necessary for any party to appear on behalf of Standic on 17 April 2014.'*

[17] My reading of the email of 2 April 2014 is that the discussion with regards to the hearing of the application which was postponed to 17 April 2014 was between Advocate Barnard (the instructed counsel for Standic in this matter) and Mr. Pfeifer. Ms. van Rensburg's explanation accordingly leaves more questions unanswered than it gives explanations. The approach adopted (i.e. the fact the replying affidavit is deposed to by a person other than the person who deposed to the supporting by Standic) leaves me perplexed, particularly in the light of the fact that the replying affidavit draws opinions as regards the state of mind of the person who deposed to the supporting affidavit and also in view of the fact that the replying affidavit in some respects contradicts the supporting affidavit (e.g. Mr. Diekmann asserts that the secretary has only collected the court order of 28 March 2014 from court 21 days later i.e. on 7 May 2014. On the other hand, the secretary states in her affidavit that the court order of 28 March 2014 was faxed to Mr. Diekmann's office on 2 April 2014). I must say, I find it highly improbable that a court order will be faxed to a legal practitioner's office and that fact is not brought to that legal

practitioner's attention. No explanation is given as to why Mr. Diekmann who I am informed, approved and consented, (and I presume read Ms. van Rensburg's affidavit) to Ms. van Rensburg deposing to the replying affidavit failed to depose to a confirmatory affidavit. The allegations by Ms. van Rensburg that Mr. Diekmann misinterpreted what she communicated to him are speculative and inadmissible. I am tempted to conclude that the approach was adopted to mislead the court or to hide the truth from the court.

[18] Neither Mr. Diekmann nor Ms. van Rensburg explains in their affidavits whether they attempted to establish what happened in court on the 17th April 2014. Neither Mr. Diekmann nor Ms. van Rensburg explains why for a period of more than one month (i.e. between 2 April 2014 and 7 May 2014) no answering affidavit was drafted and filed. The do not tell the court as to when they received the application for the rescission of judgment. Even in the absence of a court order the time limits within which a party has to file its answering affidavit are set out in the rules of court. It is accepted that the instructed counsel knew already on 2 April 2014 that Standic will oppose the rescission application but no explanation is given as to why any affidavit was not filed within the timeframe contemplated in the rules.

[19] I repeat what has been said in so many decisions of this court that condonation is not there for the asking. The party seeking condonation **must** give a full, detailed and accurate explanation for the delay. There is no explanation why the notice to oppose was filed late. There is no explanation as to the nature of the practice of Diekmann & Associates (e.g. whether or not it is a one person practice so that when that partner is not available nobody else from that practice can attend to the business of the practice). Mr. Diekmann furthermore fails to explain to this court why it took his office six days to file the answering/opposing affidavit after it was deposed to and signed and another six days to file the application for condonation. Apart from the failure to explain all the issues that I have stated above Mr. Diekmann's affidavit is silent on the prospects of success in opposing the rescission application. Not a single sentence is said in that regard.

[20] I do not find any acceptable explanation, in the contemporaneous conduct of Mr. Diekmann and the conduct of Ms. van Rensburg, offered in support of the application for condonation now before me, (in the sense of the explanation being satisfactory) or reasonable explanation for the failure to timeously apply for the condonation when it became clear that the filing of the opposing affidavit was out of time. The law as I have stated above is settled that the application for condonation must be brought as soon as the delay has become apparent and to the extent it was not so brought, there must be an acceptable, full and accurate explanation for the delay in the bringing of the application for condonation. The application is singularly and demonstrably lacking in that regard too.

[21] I have indicated that no single sentence is uttered in the affidavit of Mr. Diekmann as regards the prospects of success in the opposition of the rescission application. Even if it were to be found that there are reasonable prospects of success, this is the sort of case where in view of the gross failure to properly explain the delay in filling the opposing affidavit and the lateness of the condonation application, the prospects of success (which in any event have not been set out) must not to be decisive.

[22] The issues of costs is within the discretion of the court and the general rule is that costs follow the course nothing has been placed before me to persuade me to depart from that general rule. I therefore make the following order:

1 The application to condone Standic BV‘s failure to timeously file its answering affidavit in the application to rescind the default judgment granted on 4 December 2013 against Mr. Kessels is hereby dismissed with costs.
2 The said costs will include the costs of one instructing and one instructed counsel.

3 The matter is postponed to 2 September 2015 at 8h30 for purposes of determining a date to hear the application to rescind the default judgment grant on 4 December 2013 against Mr. Kessels.

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Judge

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APPEARANCES:

FOR THE APPLICANT:	MS B DE JAGGER INSTRUCTED BY BEHRENS & PFEIFFER
FOR THE RESPONDENT:	MR. T BARNARD INSTRUCTED BY LORENTZANGULA INC.