REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No. I 244/2015

In the matter between:

EPIC TRANSPORT (PTY) LTD **APPLICANT/PLAINTIFF**

And

MLN JUNIOR TRUCKING CC **RESPONDENT/DEFENDANT**

Neutral citation: Epic Transport (Pty) Ltd v MLN Junior Trucking CC (I 244-2015) [2015] NAHCMD 198 (25 August 2015)

CORAM: MASUKU A.J.

Heard: 22 July 2015

Delivered: 25 August 2015

Flynote: RULES OF COURT – Rule 54 upliftment of bar; Rule 55 condonation for late filing. PRACTICE – Summary judgment.

Summary: Application of upliftment of bar for failure to file an affidavit resisting summary judgment –an affidavit is not a pleading and therefore an application to uplift the bar is not appropriate. The correct course to follow is to apply for condonation. Condonation for late filing considered – the twin requirements revisited. Failure to file

affidavit resisting summary judgment on time – respondent failed to make out a case for condonation to be granted – application for summary judgment granted.

ORDER

---

1. The application for condonation for late filing of the affidavit resisting summary judgment is dismissed with costs.
2. The application for summary judgment is granted as prayed.

JUDGMENT

MASUKU, AJ

[1] This is an application for summary judgment in which the plaintiff prays for payment of an amount of N$ 1,514,970.95, interest thereon and costs.

[2] The amount claimed arises from costs alleged by the plaintiff to have been incurred in respect of transport services it rendered to the defendant at the latter's instance and request. The agreement for the provision of the services in question, it is further alleged, was reduced to writing and both parties, it is further alleged, were represented by duly appointed representatives for execution of same.

[3] By combined summons dated 30 January 2015, the plaintiff sued the defendant claiming the amount captured above, alleging that the defendant breached the agreement by not complying with the material conditions thereof. This, it is averred, resulted in the defendant failing to pay its obligations to the plaintiff in relation to services rendered when same became due. The presentment of invoices to the

defendant in relation to the alleged indebtedness of the defendant to the plaintiff, it is alleged, did not spur the defendant to make good its indebtedness.

[4] In terms of the joint case plan, which was eventually made on order of this court, the plaintiff was, after a notice to defend was entered, to file its application for summary judgment and affidavit on 30 April 2015. The defendant, for its part, was to file its affidavit resisting summary judgment on or before 11 May 2015. I should mention that the parties also filed a report in terms of the provisions of rule 32 (10), indicating that attempts to amicably resolve the matter came to naught.

[5] Before dealing with the issue relating to the summary judgment application, there is one issue crying out for determination and it relates to an application filed by the defendant relating to its non-compliance with the court order relating to the filing of the affidavit resisting summary judgment. This application is vigorously opposed by the plaintiff. I shall presently consider the argument delivered by both parties on the sustainability or otherwise of this application.

Application for condonation

[6] From a reading of the papers filed of record, it is clear that on 22 April 2015, having heard the parties at a status hearing, the court, as presently constituted, issued an order endorsing the case plan proposed by the parties in terms of rule 23 of this court's rules. In terms of paragraph 1.1 thereof, the plaintiff was to file its application for summary judgment and accompanying affidavit on 30 April 2015. The defendant was to file its opposing affidavit on or before 11 May 2015. On 20 May 2015, the parties were to inform the court whether or not, after due consideration of the contents of the opposing affidavit, it was meet to grant the defendant leave to defend the action by consent. Time limits were also agreed by which the parties would file their respective sets of heads of argument i.e. in the event the summary judgment application was to proceed on an opposed basis.

[7] It is common cause that the defendant did not comply with the adopted case plan as it did not timeously file its affidavit resisting summary judgment. On 20 May 2015, at a status hearing, the court, by consent of the parties, issued an order for the defendant to file its application for the upliftment of bar on or before 3 June 2015. This was because it had fallen out of time within which its affidavit resisting summary judgment should have been filed in terms of the order of court. It is this application that is the subject matter of the ruling at this juncture.

[8] The application is predicated on the founding affidavit of the defendant's sole member, Mr. Titus Nakuumba. In this affidavit, the defendant alleged that its failure to file the affidavit resisting summary judgment was not wilful or intentional. The main gravamen of the failure to comply with the order of court, is attributed to the allegation that the defendant, in order to defend the claim against it properly, had rely upon a lot of documentation, including invoices from a company called Rossing Uranium with which it conducted business. These documents, it was further alleged, covered an extended period of time. Mr. Nakuumba then deposed that he had since been able to obtain the said documentation from the said Rossing Uranium and it is after that, that the defendant could properly be placed in a position to file its affidavit resisting summary judgment.

[9] There are a number of issues raised by the plaintiff in opposition to this application. Some of them are procedural in nature, whereas some are matters of substantive law. I will begin with the procedural ones. First, it is common cause that the defendant did not, as is customary, file a notice of motion to accompany the affidavit in which it sought condonation. The plaintiff contends that there is no proper application before court and that for that reason, the application for condonation, premised as it is on defective papers must be dismissed with costs.

[10] Rule 65 (1) provides the following:

> ‘Every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief and every application initiating new proceedings not forming part of an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification purposes.’

[11] It is clear that the tenor of the provision is mandatory and this can be deduced from the use of the word ‘must’, occurring in the first line of the provision. What cannot, however be doubted is that the application in this matter is not a new one, which can be properly regarded as initiating fresh proceedings. It is interlocutory in nature. For that reason, the provisions relating to the requirements of the registrar’s stamp and identification do not apply.

[12] It is clear that the defendant did not comply with the provisions of this rule. Notices of motion, it must be said, are required by the rules of court not for idle, decorative or pedantic reasons. They play an important part in proceedings for they should stipulate in clear and unambiguous terms the nature, extent and scope of the order or relief sought. Properly crafted, they enable the opposing party and the court, amongst other things, to determine, by looking closely at the affidavit, whether the relief sought is fully explained and grounded in the affidavit filed in support thereof. For that reason, failure to comply with this rule by not filing a notice of motion or filing a defective one, is a serious matter, for it hampers the court and the opposite party from fully comprehending the full impact of the relief sought, and may, when properly filed, conduce or contribute to settling the matter without further ado, if the relief sought, which should appear in the notice of motion, is clearly spelt out.

[13] The question to be answered in the instant matter is whether this is a proper case to refuse the application for the reason that the affidavit is not accompanied by a notice of motion? Without appearing to trivialize the importance of the notice of motion in this matter, I am of the view that given the nature of this matter and its antecedents, including the fact that the relief sought on the application was a matter that was based

on a common understanding between the parties, coupled with the fact that there is no demonstrable prejudice suffered by the plaintiff in this case, it would be extremely harsh to deny the applicant relief for failure to file a notice of motion.

[14] Furthermore, it must be recalled that the rules were made for the court and not the court for the rules. For that reason, the court should be able to condone infractions that do not work substantial injustice or prejudice to the parties. I also note that the plaintiff claims a substantial amount of money from the defendant and to close the door of the defendant for the reason that there is no proper notice of motion, particularly in the circumstances I have described above, would be harsh in the extreme. I say so, considering the summary and final nature that the relief sought may occasion to a defendant. For the above reasons, but without being seen to encourage parties not to comply fully with the provisions of the rules, I am of the view that this is a proper case in which to condone the non-filing of the notice of motion. This, I must specifically point out, is not a precedent. Under different circumstances, the court may well and properly insist on the full and proper compliance with the rules of court.

[15] The next complaint, which is a matter of substantive law, is whether the defendant, has in its application made out a proper case for the grant of the indulgence it craves. In this regard, the plaintiff contends that the defendant has dismally failed to present a reasonable explanation for its delay. Furthermore, it is the plaintiff's case that no *bona fide* defence to the claim is borne out in the application for condonation. Are the plaintiff's contentions sustainable in the entire circumstances of the case?

[16] One of the leading cases in this jurisdiction on applications for condonation was delivered with devastating force and clarity by O'Regan A.J.A. in *Petrus v Roman Catholic Archdiocese,*[1] the learned Supreme Court Judge made the following remarks:

'It is trite that a litigant seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. Moreover, it is also clear that a litigant

[1]2011 (20 NR 637 (SC).

should launch a condonation application without delay. In a recent judgment of this court, *Beaukes and Another v SWABOU and Others [2010] NASC 14 (5 November 2010)*, the principles governing condonation were once again set out. Langa AJA noted that “an application for condonation is not a mere formality” (at para 12). The affidavit accompanying the condonation application must set out a “full, detailed and accurate” (at para 13) explanation for the failure to comply with the rules. In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant’s prospects of success on the merits, save in cases of “flagrant” non-compliance with the rules which demonstrate a “glaring and inexplicable” disregard for the processes of the court (*Beukes,* at para 20).’

[17] It is the plaintiff’s case that the defendant has dismally failed in its affidavit, to make allegations necessary to be allowed the condonation it seeks. The defendant, on the other hand, argues that it is not required to apply for condonation in the circumstances. It contends that its application is under rule 55 and it is for the upliftment of bar. Consequently, it contends that the requirements for success in applications for condonation are not applicable to the instant case and that for that reason, the plaintiff’s contentions are misplaced by seeking apples as it were, among oranges. Is the defendant correct?

[18] The starting point is to consider the provisions of rule 54 (3) which make reference to barring. It provides that, ‘Where a party fails to deliver a pleading within the time stated in the case plan order or within any extended time allowed by the managing judge, that party is in default of filing such pleading and is by that very fact barred’.

[19] What has to be determined at this stage, is whether an affidavit resisting summary judgment is a pleading and for that reason whether it is amenable to the provision relating to barring. Our rules of court, unfortunately do not give a definition of pleadings. From reading the provisions of rule 45, however, the nature and purpose of pleadings is disclosed, without defining what a pleading is. It is clear that pleadings must be delivered (rule 45 (2)); registered by the registrar – rule 45 (4); and must set out

clearly and concisely the material facts on which a claim or defence is predicated – rule 45 (5).

[20] The learned authors Herbstein and Van Winsen[2] say a pleading in civil cases is used 'to denote a document in which a party to proceedings in a court of first instance is required by law to formulate in writing his case or part of his case in preparation for the hearing . . . In South Africa the term "pleading" is used in a more restricted sense and does not include documents such as petitions, notices of motion, affidavits, simple summonses, provisional sentence summonses or writs of arrest.' At page 559, the learned authors posit that among its other functions, a pleading serves as a record of the respective parties' claims, counterclaims, admissions and defences which may be relevant in any other future litigation between the parties.

[21] I am of the considered view, regard being had to the foregoing, that the definitions given above apply also to the import to be given to pleadings in this jurisdiction. The advent of judicial case management has not, in my considered opinion, changed the nature and character of pleadings. It is clear from what the authors say above that affidavits are not pleadings. For that reason, it would appear to me that failure to file an affidavit resisting summary judgment is not subject to barring as it is not a pleading. Rather, it would appear to me, other provisions in the rules apply to cases where a party is in default of filing an affidavit relating to summary judgment. On this score, I entirely agree with the plaintiff's counsel that the provisions of rule 54 (3) do not apply to the instant matter.

[22] In its application, the defendant claims to be applying for an upliftment of bar, which as I have said, is inapplicable in the instant matter. In the heads of argument, the defendant's counsel appears to argue that the defendant seeks an order extending the time within which the defendant ought to have filed the said affidavit in terms of the same rule. In paragraph 2 of the affidavit, the defendant states that it ought to have filed its affidavit on or before 11 May 2015 but did not do so because it had to obtain certain

[2] The Civil Practice of the High Courts of South Africa, 5th edition, Vol I, page 558.

documents from Ross Uranium. It does not say until when then it wishes the extension of time to run. My reading of the application in its entirety, supports the argument that this was an application for extension of time as alleged.

[23] I am of the view that where a party seeks an extension of time, it should state when it was ordered to file and also state the length of the extension sought, preferably a date by which it would have made good on the court order. This is conspicuously missing in the instant case. It is also possible, and in my view prudent and preferable, to apply for the extension of time before the lapse of the period prescribed by which the doing of the act must be done. It is also evident, from the allegations made that the defendant did not apply for relaxation of the periods stated for by the time it moved the application, it already had the documents it claims resulted in the non-compliance with the case plan order.

[24] Applying the process of elimination, it would appear to me that the one issue to consider, having come to the view that the other parts or portions of this subrule do not appear to be applicable, is the one for condonation. And this, it would seem to me, applies in instances where a party has been ordered by the court or in terms of the rules, to do a certain act by a specified time but fails to do so. In that event, that defaulting party should then approach the court and apply for condonation of its non-compliance. It is in those circumstances that the requirements stated in the *Petrus* case become applicable. I should also mention that in relation to the other issues falling under the subrule in question, the issue of showing good cause is inescapably necessary. That this is the position that can be seen from rule 55 (1), which allows the court ‘on good cause shown’ to invoke its powers to uplift the bar, extend the time, relax the conditions or condone non-compliance.

[25] In order to come to a definitive conclusion as to whether the defendant has made out a case for condonation, one has to have regard to the affidavit filed. It is as sparse as can be. First the deponent thereto states that its failure to comply was not due to ‘wilful or intentional or wilfully ignorance of the Honourable Court’s order’. It ascribes the

non-compliance to the allegation that it had to obtain the documents from the said Rossing Uranium. Mr. Nakuumba says at paragraph 3.3 and I quote:

'As a result, I had to obtain several documents from Rossing Uranium, which are necessary to include in the affidavit opposing summary judgment. It took me more time to obtain some of this (*sic*) documents and this was also hampered by the several public holidays which was (*sic*)in between 22nd April, the date that the matter was in court to 11 May 2015 when the defendant was suppose (*sic*)to file its affidavit. The document includes several invoices for an extended period of time which made the process to obtain this documents longer'.

[26] At paragraph 4, Mr. Nakuumba says, 'I have now managed to get most of the necessary documents, and I have submitted same to defendants, legal practitioners, (sic) to begin with the opposing affidavit.' It is therefore plain that the affidavit filed resisting summary judgment was only filed on 21 July 2015, this is two or so months after the date on which the affidavit was to be filed. This was a day before the hearing of the summary judgment application, providing the defendant very little time, if any, to consider same and take instructions before the hearing. The question to determine, is whether on the papers filed, there is a case made out for a reasonable explanation for the delay.

[27] As intimated above, the affidavit is as bare as can be. There is no full and proper disclosure of the facts and circumstances leading to the delay. No dates are given as to the important events connected to the non-compliance. A glib allegation is made to the effect that there was a 'number of holidays' in between the important periods. The number of holidays and particulars of the holidays alleged is not mentioned and how they affected the defendant's ability to comply with the time limits placed by the court. In *Luderitz Tuna Exporters (Pty) Ltd v Cato Fishing Enterprises and Others,*[3] Schimming-Chase A.J., had the following lapidary remarks to say about a similarly worded affidavit:

'Even the vague allegation that there were, "several" holidays between 23 April 2012 and that his staff went on leave is at best glib. There were holidays, but no several holidays. It

[3] (I 3961/2011) [2013]NAHCMD 166 (18 June 2013) at paragraph [24].

highlights the unperturbed manner in which the applicant went about exercising his rights. The applicant's unexplained inaction was undertaken at its own peril.'

I adopt these remarks as being fully applicable to the case at hand.

[28] Furthermore, no indication is also given regarding the periods over which the documents requested spanned, neither is the court told the nature of the documents and their voluminous nature to be able to relate that to the period of delay. It is also well to consider that the period between 11 May 2015, when the affidavit resisting summary judgment was to be filed and the date when the application under consideration was filed has not been explained at all. In aggregate, the period from 22 April to 3 June 2015 remains unexplained. How is the court, in such circumstances, expected to come to the rescue of a party that is economic with essential information that should otherwise enable the court to properly exercise its discretion? Such a party is shooting itself in the foot and should not lay the blame to anyone's door should the court refuse to come to its aid.

[29] In *I A Bell Equipment Co. Namibia (Pty) Ltd v E. S. Smith Concrete Industries CC*[4] this court expressed itself as follows on this very point at page 10 para [24]:

'Furthermore, the applicant has failed to fully explain the entire period of the delay. In this regard, a blow by blow account of the delay in (*sic*) necessary in order to place the court in the shoes of the applicant in deciding whether the delay was reasonable in the circumstances.'

I therefore come to the inexorable conclusion in the circumstances that the defendant has, on the papers failed to present a reasonable explanation for the delay in complying with the court order, of which it was undoubtedly aware. This, it must be remembered, is not the only non-compliance by this very party. I have already condoned the non-filing of the notice of motion and this now appears to be a worrisome pattern in the defendant's appetite to comply with the court's rules and orders. Applications for condonation, it

[4](I 1860/2014) NAHCMD 66 (23 March 2015).

must be mentioned, are serious and an applicant can be lackadaisical in complying with the requirements to its own peril.

[30] The last requirement mentioned in the *Petrus* case, in relation to condonation, relates to the presence of a *bona fide* defence to the plaintiff's claim. This is a mandatory requirement that the defendant simply did not address at all, critical and decisive as it may well prove to be. The question is, if the defendant does not address this requirement, on what basis can this court grant condonation, for it is an exercise in futility for the court to grant condonation in case where the applicant therefor does not show or refuses to demonstrate that it has a *bona fide* defence to the claim? The answer is abundantly obvious in the circumstances. The defendant, has again shot itself in the foot. I cannot find that the defendant has a bona fide defence because there is just no material before me, which should be on affidavit from which I can properly come to that view. In my considered view, the application for condonation must fail.

[31] I must mention that the defendant was granted an opportunity to file an appropriate application after failing to meet the deadline stipulated in the order of court. It was for that reason that the matter was postponed at case management on 20 May 2015. The defendant, as stated above, decided to bark up the wrong tree by applying to lift a bar which was not there in the first place. In the circumstances, it is clear that an application for condonation would have been the appropriate relief having regard to the entire conspectus of the case.

[32] I must give guidance in this matter at this juncture. Where a party is in default of filing any pleading or document in terms of the rules of court, or an order of court, it is desirable and prudent to simultaneously attach the said pleading or document to the application for condonation and not to file the application and have it heard before filing the same. This is to save time and costs. The defendant in this matter apparently took the position that it would await the success of its application before it could prepare the affidavit for filing. This resulted in needless loss of time and opens the applicant for condonation to unpleasant consequences of having the application refused. Dealing

with the matter piecemeal is a precipitous course that should be avoided at all costs like a plague.

[33] This being a stringent remedy, that moreover, has the potential to close the door of the court in the face of the defendant in final fashion, I am of the considered view that it is condign that I consider the rest of the issues raised on behalf of the defendant. In this regard, it is always proper to conduct an audit, as it were of the papers, and determine whether they are in order, i.e. the combined summons, the affidavit in support of summary judgment, in particular.

[34] In *First National Bank of Namibia Limited v Louw*[5] this court dealt with what it referred to as the seven golden rules of summary judgment. One of these I quote below:

> 'It is permissible for the defendant to attack the validity of the application for summary judgment on any proper ground. This may include raising an argument about the excipiability or irregularity of the particulars of claim or even the admissibility of the evidence tendered in the affidavit in support of summary judgment, without having to record same in the affidavit.'

It would appear to me that there are issues raised by the defendant in its heads of argument that seem to relate to the above-quoted golden rule. It will be prudent to consider same and determine whether any of them hold water. I do so presently.

[35] One of the issues raised by the defendant in its heads of argument, is that the plaintiff did not attach the agreement relied upon in its particulars of claim. In this regard, reliance was placed on *Absa Bank Limited v Herbert Clifford Nicholas and Another* and *Absa Bank Limited v Elsa Johanna Nicholas and Another.*[6] In that judgment, Davis A.J. held that failure to annex an agreement relied upon in a judgment renders the summons incapable of disclosing a cause of action. In the instant case, the agreement relied upon has been annexed to the combined summons and this is

[5] (I 1467/2014) [2015] NAHCMD (12 June 2015) at para [19]
[6] Cases 19942/2011 and 18243/2011.

consistent with the requirements of rule 45 (7). This argument find no application in my view in the present circumstances.

[36] I am of the considered view that the particulars of claim and the affidavit filed in support of the application for summary judgment are technically in order. Nothing persuades me, in the circumstances against granting summary judgment in the present circumstances.

[37] In the result it is ordered that:

1. The application for condonation for late filing of the affidavit resisting summary judgment is dismissed with costs.
2. The summary judgment is granted as prayed.

_____

TS Masuku,

Acting Judge

APPEARANCES

PLAINTIFF:	Y Campbell Instructed by Fisher, Quarmby & Pfeifer
DEFENDANT:	M Ntinda Instructed by Sisa Namandje & Co. Inc.