REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: I 2725/2014

THE TOWN COUNCIL OF HELAO NAFIDI **APPLICANT/DEFENDANT**

And

NORTHLAND DEVELOPMENT PROJECT LIMITED **RESPONDENT/PLAINTIFF**

Neutral citation: *The Town Council of Helao Nafidi v Northland Development Project Limited (*I 2725/2014*) [2015] NAHCMD 73 (27 March 2015)*

CORAM: MASUKU AJ.

Heard: 5 March 2015

Delivered: 27 March 2015

Flynote: In an opposed application for condonation for late filing of a plea and discovery affidavit, the applicant alleged that the delay in filing the pleadings was

caused by efforts to settle the matter out of court and attached letters exchanged between the parties setting out the negotiations. The court held that it was improper to include privileged information in such applications. Held further that the reasons given for the delay were reasonable and that the applicant acted with reasonable promptitude in applying for condonation. On the question of costs, the court held that an applicant for condonation requests an indulgence and should ordinarily pay the wasted costs occasioned by an application for condonation. The application for condonation was granted and the applicant was ordered to pay the wasted costs.

ORDER

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1. The applicant's non-compliance with the court order dated 8 October, 2014 regarding the filing of the plea and discovery affidavit is hereby condoned.
2. The automatic bar is hereby lifted and the plea filed by the applicant on 19 November, 2014 is hereby deemed and declared to have been properly filed and served.
3. The applicant is ordered to pay the costs occasioned by the application.

JUDGMENT

MASUKU AJ.,

1. In what circumstances does the court grant an application for condonation for non-compliance with the rules or an order of court? This is the main question that confronts the court in this matter.

2. In order to appreciate the setting in which the question arises, it is important to briefly sketch the facts which give rise to the present dispute. The facts are largely common cause and are not in serious dispute and they acuminate to this: By combined

summons dated 6 August, 2014, the respondent sued the applicant for an amount of N$ 114 489, 13 which was alleged to represent damages suffered by the respondent as a result of development costs it incurred after property donated to it by the applicant for development purposes failed to obtain ministerial consent and therefore fell by the wayside.

3. It would appear that the applicant had purported to donate an undeveloped property to the respondent within its locality to develop and build thereon a shopping complex which was to be called “Northland City”. After the property had been transferred to the respondent by the applicant, ministerial consent, which should have been a condition precedent as it were, to the transfer, was not obtained and the deal fell away. It is the respondent’s case that after the agreement was reached with the applicant, it incurred expenses including surveying, servicing relocation and legal and developmental costs, which are the damages it claims in the combined summons.

4. As it was entitled to, the applicant entered its appearance to defend and the matter was then subjected to judicial case management procedures in terms of the rules of court. A joint case plan dated 29 September, 2014 was adopted by the court as the blueprint for the conduct of the case at various stages of its development. In terms of that plan, the parties agreed that the applicant was to file its plea on or before 24 October, 2014. It is now a historical fact that the applicant failed to do so hence the present application for condonation which is couched in the following terms:

a. Condoning the non-compliance of (*sic*) the Court Order dated 8 October, 2014 with the regard to the time limits for the filing of the Defendant’s Plea and Discovery Affidavit;
b. Uplifting the automatic bar and allowing the Plea to be deemed received and stand in the ordinary course of litigation as served and filed on 19 November, 2014;
c. Paying any wasted costs to the Plaintiff/Respondent that it may have incurred in respect of this application.

5. A reading of the affidavit filed in support of the application suggests that the main reason proffered for the failure to meet the deadline stipulated in the case plan which was subsequently adopted as an order of court, was that the parties entered into negotiations to attempt to resolve the matter amicably and out of court.

6. Before dealing with the substantive issues in the application, an issue occurred to me during the argument of the application and which the parties had not adverted their minds to in the preparation of the application and the heads of argument and this related to the disclosure of settlement negotiations to the court. I accordingly directed the parties' representatives to prepare heads of argument to deal squarely with this issue and how it affects the application, if at all.

7. Rule 32, dealing with interlocutory matters and applications for directions, provides the following:

> 'The party bringing any proceeding contemplated in this rule must, before instituting the proceeding, file with the registrar details of the steps taken to have the matter resolved amicably as contemplated in subrule (9), without disclosing privileged information.'

I am of the view that this privileged information includes what is referred to as negotiations privilege or statements made without prejudice. In this regard, Schmidt and Rademeyer[1], say the following on the subject:

> 'It is in the public interest that persons involved in litigation should be able to negotiate with a view to settlement without fearing that any concessions or admissions may subsequently be used against them if no settlement is reached. Consequently, the law recognizes a privilege that covers the content of a statement aimed at settling a dispute… The words 'without prejudice' are accepted as a standard formula indicating that the writer of the letter intends to invoke privilege in respect of the contents of the letter… The presence of these or absence of these words is not, however, decisive. If the statement

[1] The Law of Evidence, Lexis Nexis, Butterworths, 2003 at 20~19

forms part of a genuine attempt to settle a dispute, the privilege applies even if the words 'without prejudice' are not used.'

8. In the instant case, foundational to the applicant's case and a reason proffered for the delay in complying with the case planning order is that the parties were engaged in settlement negotiations. Not only that, the applicant proceeded to attach to the affidavit in support of the application for condonation, copies of correspondence exchanged by the parties, containing terms on which the matter was sought to be settled. There is no gainsaying that it would seem therefrom that these are letters that the parties engaged in genuine efforts, it would seem, to settle the matter amicably and out of court. I will not traverse the contents of the letters as they clearly are privileged.

9. It would appear to me, from the foregoing that the applicant's attorneys have breached the provisions of rule 32 (9) by disclosing what is clearly privileged information as shown above. Legal practitioners should be astute and ensure that such privileged information is not disclosed to the court as it might affect the court's ability, in the long run to bring a completely impartial and dispassionate mind to bear on the proceedings, having been exposed to previous positions of the parties on the same dispute serving before court in genuine attempts to settle the matter.

10. In the instant case, having been exposed to the various positions of the parties explicitly contained in the exchange of letters, places me awkwardly such that I cannot maintain the requisite impartiality in the proceedings, the very reason in part, for privileged information not to be placed at the court's disposal. I have thus become disqualified to deal with the matter beyond this stage should the matter proceed to trial. I shall address myself to the appropriate manner to deal with this quandary at the appropriate time. See Prior t/a Pro Security v Jacobs t/a Southern Engineering.[2]

[2]2007(2) NR 584 (HC).

11. I do, however, have a measure of sympathy for the applicant's attorneys in the peculiar circumstances of this matter. A reasonable explanation is required for the non-compliance with the case planning order in condonation applications. In an attempt to take the court fully into their confidence, in providing that explanation, they then ventured into what is otherwise forbidden territory and made disclosures that should not by law have been made.

12. In *Telecom Namibia Limited v Michael Nangolo And 43 Others*[3], Damaseb J.P. undertook a review of the law relating to applications for condonation as found in case law.[4] He thereafter postulated the main conclusions applicable. I, however, propose to deal with those of them applicable to the present case and I do so presently:

(1) Applications for condonation are not a mere formality and will not be had merely for the asking. The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation;
(2) There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate;
(3) The degree of delay is a relevant consideration;
(4) The entire period during which the delay had occurred and continued must be fully explained;

13. I now proceed to consider the affidavit filed in support of the application in order to consider whether the above requisites, or those of them applicable in this matter have been met. The affidavit filed in support of the application is deposed to by one Tuwilika Ndafapawa Shailemo, the applicant's attorney. As earlier indicated, it is a precipitous exercise to closely examine and outline all the details included in the application that resulted in the delay in this matter. What is, however evident is that the matter was very close to settlement and a cheque was issued in settlement, to the respondent's attorneys but this cheque was however stopped very late because there were certain

[3] Case No. LC 33/2009
[4] *Ibid* at page 4 para [5]

aspects of the matter that were not satisfactory in the settlement proposals. This, in a nutshell, is the reason for the delay.

14. I am of the considered view that having regard to the affidavit filed in support of the application, a blow by blow account of the delay is given and it appears to me on the evidence that the parties were fully committed to settling the matter to the extent that a cheque in settlement was issued as aforesaid and deposited in the respondent's attorneys account but was stopped shortly after that and this was after some issue was not clarified to the applicant's satisfaction. In the circumstances, it does appear to me that the applicant was of the genuine belief that settlement was to eventuate very soon but for the issue that later proved treacherous.

15. I should point out that there have been recriminations arising from the applicant's decision belatedly to stop payment. This appears to have irked the respondent's attorneys considerably, and probably understandably too. This, however, is not part of the issues I have to decide and I shall say no more of it.

16. It would appear to me that having realized that settlement negotiations had crumbled irredeemably, the applicant did not rest on its laurels but straightway proceeded to launch the present application without delay. This factor also weighs in the applicant's favour. In this regard, it is apparent from the founding affidavit that after the parties failed to find common ground around 17 November, 2014, the application was launched some two days later.

17. In this regard, I should mention that the order was to the effect that the plea and discovery should have been filed on or before 20 October, 2014 and as explained above, settlement seemed guaranteed. The date between the time fixed for the filing of the plea and the date when the present application was eventually filed, must be viewed from the position of the last-minute breakdown of the settlement initiatives and the applicant's speed of a deer, so to speak, to approach the court for condonation soon after realising that settlement was no longer possible. For that reason, it appears to me

that neither a deliberate nor a reckless and disregard of the rules can be detected from the applicant's conduct.

18. In *Cairns Executors v Gaarn*[5], the following was stated by the court regarding what 'good cause' is supposed to signify in such cases:

> '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 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.'

That indescript or nebulous "something" spoken of in the above quoted judgment, appears to me to be present in the present case. There can also be no question, in my view about the *bona fides* of the applicant in this matter, particularly considering that the parties had an agreement to have the applicant donate property to the defendant which failed as a result of certain statutory formalities not having been followed. This agreement, had it not fallen through, it seems, would have benefitted both parties.

19. Mr. Vaatz on behalf of the respondent argued that the applicant does not have a defence to the claim and that the exercise of granting condonation is a waste of precious time. He contended strenuously that a look at the plea filed at present shows that no defence is borne out. In response, Ms. Shailemo argued that whereas the plea may not for present purposes disclose a defence, once the door to condonation had been opened, the applicant is at large to amend its plea, particularly. She argued that because the agreement between the parties was in her submission, illegal in that ministerial approval had not been sought and obtained, that for that reason, no legal consequences may flow from it, including the present claim for damages.

20. I am of the view that to finally close the door in the face of the defendant in such a case may result in injustice. It may well be that given the opportunity to defend the matter, a defence along the lines suggested may be put up. I would in the circumstances exercise this court's discretion in the applicant's favour. Mr. Vaatz

[5] 1912 AD 181 at 186in this case

prevailed on the court to grant judgment in the amount of N$ 56 917,00 which was previously admitted and refuse the application for condonation. As will have been seen earlier, this admission, if indeed it was, was during settlement negotiations and this is privileged information that the court cannot have regard to in this case. I will, for that reason, not give in to this entreaty.

21. The last issue relates to question of costs, which I must say both parties neglected to address in their initial heads of argument. It is trite law that a party which seeks condonation in essence asks for an indulgence. For that reason, that party ordinarily pays the wasted costs which can reasonably be associated with the opposition that is in the circumstances reasonable and not vexatious or frivolous.[6]

22. The learned authors Herbstein and Van Winsen[7], say the following regarding applications for condonation:

> 'The general rule that costs follow the event is not applicable to successful applications for the grant of an indulgence by the court. In respect of such applications the general rule is that costs do not follow the event. The general rule is that the applicant should pay the costs of the application. In certain circumstance, the applicant may even be ordered to pay the costs of the opposition to the application.[8]'

23. In the instant case, the applicant actually asked for the court to order it to pay the costs of the application. This is evident from the notice of motion quoted above. During the hearing, Ms. Shailemo attempted to execute a *volte face* and tried to argue that the said prayer in the notice of motion had been erroneously drafted, a position that I do not accept. In point of fact, the said notice is fully consistent with the law as stipulated above.

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[6] Erasmus, Civil Court Practice, 2010 B1-p173

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24. In the premises, I am of the view that there is no reason why the rule applicable to applications where an indulgence is sought from the court should not apply. I accordingly grant the applicant the following relief:

4. The applicant's non-compliance with the court order dated 8 October, 2014 regarding the filing of the plea and discovery affidavit is hereby condoned.
5. The automatic bar is hereby lifted and the plea filed by the applicant on 19 November, 2014 is hereby deemed and declared to have been properly filed and served.
6. The applicant is ordered to pay the costs occasioned by the application.[9]

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TS Masuku, AJ

[9] The Civil Practice of the High Courts of South Africa, 5th ed, 2009 at page 969