REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. I 2679/2013

In the matter between:

QUENET CAPITAL (PTY) LTD **PLAINTIFF**

and

TRANSNAMIB HOLDINGS LIMITED **DEFENDANT**

Neutral citation: *Quenet Capital (Pty) Ltd v Transnamib Holdings Limited (I 2679/2015) [2016] NAHCMD 104 (8 April 2016)*

CORAM: MASUKU J

Heard: 29 March 2016
Delivered: 08 April 2016

FLYNOTE: RULES OF COURT – Rule 55 – application for condonation. Rule 103 – applications for rescission of judgment and/or setting aside or varying an order of court – Certificate in terms of Rule 130. LEGAL ETHICS – a legal practitioner should act as

an officer of the court and avoid partaking of his or her client's cause in such a manner that affects his or performance of his or her duty to court.

SUMMARY: The applicant filed an application for condonation of its failure to attend a case planning conference, culminating in the court striking out its defence. *Held* – in applications for condonation, an applicant had to present a reasonable and acceptable explanation for its non-compliance with the rules or a court order and to show that it has a *bona fide* defence to the claim. *Held* – the applicant failed to deal at all with the issue of its defence and that for that reason the application should fail. *Held further* – that even if the application for condonation were to succeed, it would be of no assistance to the applicant because the order striking its defence was left unshaken. *Held* – the applicant should have filed an application in terms of rule 103 for rescission of the court order. *Held further* – that rule 103 applies not only at the post-trial stage but also in instances where an order that is alleged to be erroneously sought or granted has been granted by the court. *Held further* – that legal practitioners, as officers of the court should avoid partaking in the emotions of their clients' causes and should bring an unbiased and professional judgment to bear on the cases they present to court. *Held further* - that counsel should ensure that when they file a certificate in terms of rule 130, that the contents thereof are true and correct. Legal practitioners warned not to merely pay lip service to the requirements of the said rule. Application for condonation dismissed with costs and applicant granted leave to file a fresh application to deal with the order sought to be set aside.

ORDER

---

1. The application for condonation is dismissed.

2. The applicant is granted leave, if so advised, to file an appropriate application within 14 days of this order, for appropriate relief.
3. The costs of this application are awarded to the respondent on the basis of one instructing and one instructed counsel.
4. Messrs. Murorua and Associates are called upon to show cause within 10 days of the grant of this order, why they should not be ordered to pay the costs of the application *de bonis propriis.*
5. The matter is postponed to 15 June 2016 at 15h15 for a status hearing.

JUDGMENT

MASUKU J.;

[1] An order issued by this court, dated 27 January 2016, striking out the defendant's defence for failure to comply with a court order is the subject of an application for condonation which is the subject matter of this judgment. I will revert shortly to the background of the present proceedings.

[2] The plaintiff, by combined summons sued the defendant for an order declaring a lease agreement *inter partes* valid and binding and of full force and effect and an order directing the defendant to comply with its obligations in terms of the aforesaid lease agreement. In the alternative to the foregoing, the plaintiff prayed for an order for payment of an amount of N$ 16 500 000 and costs of suit.

[3] The defendant entered its appearance to defend the suit, culminating a case planning conference notice issued by this court dated 9 November 2015 calling upon the parties to attend court on 25 November 2015 and to file a joint case plan three days before that date. No such case plan was filed and on the appointed date, the plaintiff appeared by its legal practitioner Ms. Beukes but the defendant, for unexplained

reasons, did not. The court, on that day issued an order calling upon the defendant to show cause on 27 January 2016 why its defence may not be struck out.

[4] There was no response to this court order. As a result, the court issued an order dated 27 January 2016 striking out the defendant's defence and postponed the matter to 30 March 2016 for a status hearing. By the latter date, the applicant had already filed an application on notice, purportedly in terms of the provisions of rule 55, seeking the following relief:

1. The defendant's notice of intention to defend is reinstated.
2. That the parties' case plan be consequentially adjusted.
3. Costs of the suit only in the event that this application is opposed by the plaintiff.
4. Further and/alternative relief.

[5] The gravamen of the applicant's application contained in an affidavit deposed to by the applicant's attorney of record Mr. Lucius Murorua is that the application for condonation was that the applicant was not aware of the case plan notice as same was not addressed to and therefore not received by the said law firm. He further deposed that for some inexplicable reason, the said law firm failed to capture the status hearing of 27 January 2016 in the diary. It is further deposed that it was only at the stage of filing the plea that the defendant's legal representatives that it first dawned that an order striking out the applicant's order had been issued and this was brought to the applicant's legal practitioner's attention by letter dated 17 November from the respondent's legal practitioners. It is then, it is claimed that the applicant, for the first time, got to know about the order hence the application for condonation.

[6] The applicant contends that its application for condonation is based on the provisions of Article 12 (1) (e) of the Constitution of Namibia which enshrines a party's right to present a defence to a case brought against it. This right, the applicant contends it was denied. The applicant further submitted that from the events set out in the preceding paragraphs, it had made out a case for condonation and that it has

demonstrated good cause and a valid and justifiable explanation for the non-compliance with the aforesaid court order. Lastly, it was urged upon the court to find that neither the conduct of the applicant nor that of its attorneys was not tantamount to a waiver of their constitutional right to present a defence.

[7] The respondent's position is that the application is totally misplaced and must for that reason be dismissed. First, it is stated on affidavit filed by Ms. Beukes that the applicant is barking the wrong tree as it has approached the matter in terms of the provisions rule 55 and not rule 103 as should have been the case. It is further contended in the affidavit that the applicant has failed to disclose what its defence to the claim was as required by case law on condonation. Furthermore, Ms. Beukes states that on 26 November 2016, a case plan was served by her office on the applicant's legal practitioner's offices. This case plan indicated the status hearing date of 27 January 2016 and which should have put the applicant's legal practitioners on red alert about that date. It is thus submitted on the respondent's behalf that the failure to attend court on the said date can be said to be an excusable error. The respondent accordingly applied for the court to dismiss the application as meritless.

[8] Before I deal with the issues that arise, I find it proper to issue a word of rebuke to the applicant's legal representative. In his opening address, Mr. Murorua went on an emotional tirade and emphasized on how 'his', not even his client's estate was likely to suffer diminution in the amount on N$ 16 500.000 claim as a result of the striking out of the applicant's defence. I considered this emotive approach to the legal issues at play to be unfortunate and tantamount to some emotional blackmail that should not be part of legal practitioner's arsenal in arguing cases. It became evident that Mr. Murorua's professional judgment was very much clouded by his client's case such that he could not bring a dispassionate, impartial and independent judgment to bear on the case as an officer of this court and this is regrettable. I said as much during the hearing.

[9] More importantly, it is very wrong and misleading to suggest, as he did, that the applicant's estate stood to be diminished in the said amount and I say so primarily for

the reason that the striking out of the defendant's defence did not automatically result in the monetary claim being granted against the applicant. This is so for the reason that the main claim by the respondent from the particulars of claim was not for payment of the said amount but it was for a declarator as stated earlier and for an order calling upon the applicant to comply with its obligations in terms of the lease agreement in issue. It is important to observe that the monetary claim was presented as an alternative prayer and only in the event that the court was, for any reason, not minded to grant the first two prayers mentioned above. This sensationalism is totally out of order and not expected from counsel. I would thus encourage legal practitioners not to partake in their clients' causes and to also confine themselves strictly to legal issues and not play on the court's emotions in arguing cases. Persuasive legal argument, without any emotional additives suffices. Only when practitioners do so will they perform their twin duties to the court and their clients in a proper, balanced and professional manner.

[10] Furthermore, even if it was correct that the monetary claim was to be granted, it is trite that a court, acting properly does not grant an order as claimed simply because the defendant has not defended or because as in this case, the defence has been struck out. The court has an extra duty, particularly where there is no opposition, or where the opposition has fallen away, to ensure that the pleadings are technically in order and that there is no anomaly glossed over that may later ground an application for rescission or such other order. This is even more pronounced when a claim to the extent of the alternative claim is before court. The court would certainly act scrupulously and with great circumspection to ensure that at the end justice is done, even if one of the parties has for whatever reason, been unable to present its case to the court.

[11] I now turn to consider whether the applicant is entitled, in terms of the law, to the orders sought in the notice of motion. The first issue to consider is whether the respondent is correct in submitting that the application for condonation is ill suited regard had to the entire conspectus of the matter. The first issue to do in this regard, is to consider are the provision of rule 55. The said provision provides the following:

'(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 any 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 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'.

[12] There is plethora of local jurisprudence on the application of the rule relating to condonation, both at the High Court and Supreme Court levels. It is to these cases that we need to turn to consider whether the application for condonation is the correct one and particularly whether the requirements for condonation stipulated in case law have been met by the applicant.

[13] One of the important cases on condonation and to which Ms. Van der Westhuizen for the respondent referred to in her eloquent and persuasive address was that of *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others*[1] Langa AJA stipulated the principles applicable to applications for condonation even under the new rules. In dealing with condonation, the learned Judge of Appeal stated the following[2]:

'An application for condonation is not a mere formality. The trigger for it is non-compliance with the Rules of Court. Accordingly, once there has been non-compliance, the applicant should, without delay, apply for condonation and comply with the Rules. . . In seeking condonation, the applicants have to make out their cases on the papers submitted to explain the delay and the failure to comply with the Rules. The explanation must be full, detailed and accurate in order to enable the Court to understand clearly the reasons for it.'

[1](SA 10-2006) [2010] NASC 14 (5 November 2010).
[2] Para 12 and 13of the judgment.

[14] At para [20], the court reasoned as follows regarding prospects of success:

'I have borne in mind that prospects of success are often an element, sometimes an important factor that could influence a decision whether or not to grant condonation in a proper case. It is however also true that, in the jurisprudence of both South Africa and Namibia, although prospects of success would normally be a factor in considering whether or not condonation should be granted, this is not always the case when non-compliance of the Rules is flagrant and there is glaring and inexplicable disregard of the processes of the court.'

[15] It therefore appears that for an application for condonation to succeed, it is important for the applicant to address the twin elements of a reasonable explanation for the delay or non-compliance together with the issue of prospects of success. If there should be any doubt about this, the Supreme Court spoke unequivocally on this issue in *Petrus v Roman Catholic Archdiocese,*[3] O'Regan AJA spoke in the following terms:

'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."' (Emphasis added).

[16] Mr. Murorua argued strenuously that local jurisprudence does not require a party seeking condonation to deal with the issue of prospects of success. I must emphatically say that that is not the position of the law in this jurisdiction. Prospects of success play a pivotal role in some cases and have to be specifically addressed on affidavit as the court may be faced with a perilous situation where a good and acceptable explanation is given by the party applying for condonation, yet if there are no prospects of success, granting condonation may well be a waste of time and money as the case on the merits may be bound to fail. See also *I A Bell Equipment (Pty) Ltd v E S Smith Concrete Industries CC.*[4]

---

[3] 2011 NR 637 at para [10].
[4] (I 1860/2014) [2015] NAHCMD 68 (23 March 2015) at para [9] and [10].

[17] In *Teek v President of the Republic of Namibia and Others*[5] the Supreme Court reasoned as follows:

'The court has a duty to consider whether condonation should in the circumstances of the case be granted. In this regard the court exercises a discretion. That discretion must be exercised in the light of all the relevant factors. These factors include the degree of delay, the reasonableness of the explanation for the delay, the prospects of success, the importance of the case, the interest in the finality of litigation and the need to avoid unnecessary delay in the administration of justice. These factors are interrelated and not exhaustive.' (Emphasis added).

[18] A last word on this issue! In *Balzer v Vries*[6] the Supreme Court once again pronounced itself on this matter in a manner adverse to the submissions of the applicant. The court said:

'[20] It is well settled that an application for condonation is required to meet the two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal.' (Emphasis added).

These sentiments should put paid to and sound a death knell to any prospects of the sustainability of Mr. Murorua's argument.

[19] In the instant case, the applicant has not bothered at all to deal with the issue of prospects of success or a *bona fide d*efence at all and for the foregoing reason, it is very difficult for the court to come to the assistance of a party in such a position as it has not given the court the wherewithal to be able to exercise its discretion accordingly. This is, assuming of course that the court is satisfied with the explanation that the applicant has tendered. In the premises, I am of the opinion that the applicant is not entitled to

[5] 2015 (1) NR 51 (SC) at 61 E-H.
[6] 2015 (2) NR 547 (SC) at 661 J – 552 F.

condonation as he has failed to set out all the requirements for same. I accordingly refuse to exercise the court's discretion in its favour.

[20] It is also important to point out that applications for condonation in terms of rule 55 apply in instances where a party has for reasons to be canvassed and found to be satisfactory to the court, been unable to comply with time limits prescribed by the rules or an order of court. In this regard, the situation may be such that the party seeks an extension of time in order to be able to comply or the shortening a period set out. It would also appear that the rule can be used in circumstances where a party seeks to uplift a bar that has been imposed, either automatically or by an order of court. It therefore becomes clear that the rule cited by the applicant is not of assistance to it as the non-compliance in this case was followed by an order precipitated by the said non-compliance.

[21] There is another issue that I raised with Mr. Murorua during the hearing and it relates to the view I hold that the application for condonation, even if granted by the court, would not have been of assistance to the applicant and thus fortifying the respondent's position that the application for condonation was ill-suited for these proceedings. My view was premised on the fact that even if condonation were granted, that would not in any way dispose of the order dismissing the applicant's defence. It was in my view necessary for the applicant to have applied for rescission or setting aside of that specific order as it is the one that closes the court's portals to the applicant regarding defending the matter at the present moment. Condonation would still not assist the applicant at all.

[22] Mr. Murorua argued that he could not have brought the application in terms of rule 103 for the reason that the said rule applies to post-trial situations. In this regard, he brought the court's attention to the heading of Part 11 of the said rule, which reads, 'Post-trial or Post hearing Matters'. I indicated that the heading does not in any event state that applications for rescission of judgments may only be made post-trial. In any event, the rule makes reference as well to 'post-hearing' and this would, to my mind

envisage situations where after a hearing it becomes necessary to move an application for rescission or variation of a court order or a judgment.

[23] It should not be forgotten that viewed in its proper context, this rule has been uplifted line, hook and sinker as it were from the repealed rules of court where it was rule 42. It is common cause that that rule was applicable at any stage where it was alleged that a judgment or order had been erroneously sought by an applicant or granted by the court. In the instant case, an order of court was granted and in respect of which the applicant has a complaint, arguing in essence that it was granted erroneously. The wording of 'post-hearing' employed by the lawgiver in the new rules applies squarely to the present scenario in my view.

[24] I do not, for that reason accept Mr. Murorua's argument that he could not have brought an application for the rescission of the order in terms of rule 103 for the reasons suggested. I am of the considered view that as matters stand, the order complained of stands as is and has not been the subject of any application for rescission or other order to have it set aside or varied. It is a wholesome legal principle that an order of court, even if perceived to be wrong stands and is valid and binding unless properly set aside by the court, either on its motion or at the instance of a party affected thereby.

[25] Mr. Murorua made a startling proposition to the effect that an order that is granted in error has no binding effect and that a party affected thereby has a right to ignore the said order. He cited the case of *Dada v Dada*[7] where Nicholas J. stated the following:

> 'When an action has been begun without due citation of the defendant, the subsequent proceedings are null and void, and any judgment given is of no force or effect whatsoever.'

I entirely agree with the statement of the law by the learned Judge but it does not, with respect, apply at all in the instant matter as the applicant *in casu* was cited in the

[7]

combined summons as a defendant. The *Dada* case is therefore of no application whatsoever to the present proceedings.

[26] The statement of the law by Mr. Murorua is dangerous and appears to suggest that a party can choose which orders to respect and which ones not to, based on whether in that litigant's view, the said order is correct or not. Such an approach would be highly subversive and inimical to the rule of law.

[27] I can do no better, in this regard, than to cite with approval the sentiments expressed by Mogoeng CJ in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*[8] in the following language:

> 'The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which will be given heed to. Our foundational value of the rule of law demands of us, as law-abiding people, to obey decisions by those clothed with legal authority to make them or else approach the courts of law to set them aside, so we may validly escape their binding force'.

[28] This excerpt, though appears at first blush to be referring, in the initial parts, to constitutional and statutory powers, applies with equal force to court orders. If there should be any doubt, the last sentence places the matter well beyond a shadow of doubt. I have no doubt in my mind that Namibia, just like South Africa, also subscribes to the notion of the rule of law as a foundational principle that helps cement this great Nation together.

[29] In the premises, and for the foregoing reasons, I am of the view that the applicant's application should fail. It has failed to make a sustainable case for

---

[8] (CCT 171/15) ZACC 11 (31 March 2016) at para 75.

condonation and has also not applied for the rescission, variation or indeed the setting aside of the order dated 29 January 2016.

[30] In view of the aforegoing, there is no basis upon which the court, in the absence of necessary allegations, may exercise its discretion in the applicant's favour and particularly as I am of the considered view that there is no patent error on the papers that may allow the court on its own initiative, to vary, rescind or set aside the said order. Clearly, allegations from the applicant as to how the order came not to be complied with and the error alleged, if any, must be pointed out by the applicant on affidavit.

[31] There is one other matter that I am in duty bound to comment about in this case. This relates to the certificate to be filed by practitioners in terms of rule 130. In terms of that rule, a legal practitioner who relies on foreign authority in heads of argument or in written or oral submissions in support of a proposition of the law, must certify that he or she was, despite a diligent search, unable to find Namibian authority on the said proposition and further certify that there is no Namibian law, including the Namibian Constitution, that precludes the acceptance by the court of the proposition of law that the foreign authority is said to establish.

[32] I note that most practitioners do not pay heed to the latter certification at all. That should not be the case. In relation to the former, it must be mentioned that the requirements of this rule are not pedantic and a mere shibboleth or religious incantation to be mumbled as a magic wand. The rule is to ensure homogenous growth and development of autochthonous jurisprudence and also to avoid conflicting judgments ushered in by foreign judgments which may unwittingly filter into our jurisprudence and bring uncertainty and hence confusion.

[33] It is incorrect for a legal practitioner to rely on foreign authority when local authority on the subject abounds. In the instant case for instance, most of the cases relied on by the applicant's legal representative were obtained from the Republic of

South Africa and they relate to legal propositions which abound in this jurisdiction. That this is the case can be seen from the local case law that decorates this judgment.

[34] Mere lip service to the requirements of rule 130 will not do. Practitioners must appreciate that the court takes and is entitled to take their word, including any certification by them on the face of it and as a bank guaranteed cheque. This is so because they occupy an especial position of being the officers of the court. If the court must start investigating the true circumstances behind a legal practitioner's certificate, it is a sign that we have tough times ahead and that a legal practitioner's certificate may be well returned marked 'refer to the drawer'.

[35] Having regard to the foregoing, I am of the view that the following order will suffice:

1. The application for condonation is dismissed.
2. The applicant is granted leave, if so advised, to file an appropriate application within 14 days of this order, for appropriate relief.
3. The costs of this application are awarded to the respondent on the basis of one instructing and one instructed counsel.
4. Messrs. Murorua and Associates are called upon to show cause within 10 days of the grant of this order, why they should not be ordered to pay the costs of the application *de bonis propriis.*
5. The matter is postponed to 15 June 2016 at 15h15 for a status hearing.

_____

T.S. Masuku

Judge

APPEARANCES

PLAINTIFF:	C. Van der Westhuizen
	Instructed by Engling, Stritter & Partners
DEFENDANT:	L. Murorua
	Instructed by Murorua & Associates