

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, WINDHOEK, MAIN DIVISION
RULING

CASE NO. I 3519/2015

In the matter between:

OKAHAO TOWN COUNCIL

APPLICANT / PLAINTIFF

and

MARILYN DAWN CAMPBELL N.O.

RESPONDENT / DEFENDANT

Neutral Citation *Okahao Town Council v Campbell N.O. (3519/2015)*
[2017] NAHCMD 160 (9 June 2017)

CORAM: MASUKU J

Heard: 18 May 2017

Delivered: 9 June 2017

Flynote: RULES OF COURT – RULE 55 – Application for condonation
– **RULE 53** – Sanctions for failure to comply with rules of court.

Summary: The Applicant sued the Respondent in his capacity as the executrix in the estate of late Jairus Shikale for an amount of N\$ 1 177 965.49, which was allegedly for municipal services rendered to the

Respondent. The Respondent excepted to the Applicant's particulars of claim in October 2016. The Applicant then moved for an application in terms of rule 52 to amend its particulars of claim, an order directing the latter to bring its application was issued in November 2016. The Applicant failed to comply with that order and on that basis brought an application for condonation , albeit only in March 2017, the juncture at which it claims only became aware of its non- compliance with rule 52. The Respondent opposed the condonation application as well as the Applicant's application to amend its particulars of claim.

Held – that an application for condonation is not a mere formality. The trigger for it is the 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 applicant has to make out its case 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.

Held further – that the Applicant failed to give a full, detailed and accurate explanation that meets the standard as set out above, which would allow the court to exercise its discretion in the Applicant's favour. In these premises, the court ordered the Applicant's legal practitioner to pay the costs of this application *de bonis propriis* in terms of Rule 53 (2) (d).

ORDER

- (1) The applicant's application for condonation of the order dated 9 November 2016 is refused.
- (2) The applicant's legal practitioner of record is ordered to pay the costs of this application *de bonis propriis* in terms of Rule 53 (2)(d).
- (3) The matter is postponed to 5 July 2017 at 15:15 for a status hearing to determine the future conduct of the matter.

RULING

MASUKU J,;

Introduction

[1] Two principal questions serve for the court's determination in this matter. The first, is whether the applicant cited above, should be granted condonation for its failure to comply with this court's order dated 9 November 2016. The second issue, is whether the applicant's application for leave to amend its particulars of claim should be granted.

[2] As will be evident above, the second question for determination will largely hinge on whether the application for condonation is granted and to a large extent, if granted, the question will be what sanction the court will be minded to impose, if any. I shall, for purposes of this ruling, refer to the parties as the applicant and respondent, respectively,

Background

[3] The questions for determination arise in the following context: The applicant sued out a combined summons from the office of the Registrar of this court, claiming payment of an amount of N\$ 1 177 965. 49 from the defendant, who is cited in her capacity as the *executrix* in the estate of the late Jairus Shikale. The amount claimed is in respect of municipal services allegedly rendered to the respondent in respect of the deceased's business situate within the applicant's municipal boundary.

[4] As the respondent was entitled to, she filed a notice of exception to the applicant's particulars of claim, dated 28 October 2016, alleging that same

were excipiable in manners that I need not traverse for present purposes, save to mention that same were alleged to lack averments that set out a cause of action and were also, in some respects, alleged to be vague and embarrassing.

[5] It is a matter of record that the court, on 9 November 2016, issued an order in the following terms:

- '1. The parties are to comply with Rule 52(4) by 30 November 2016.
2. That the matter is postponed to 25 January 2017 for trial dates.'

I should mention that the latter part of the order appears to be a misnomer and would suggest that there was a typographical error on the part of the court. It would, in all probability have been an order for the setting of dates for hearing an application for amendment as rule 52, it is common cause, deals with amendment of pleadings.

[6] It appears plain that in the light of the respondent's exception adverted to above, the applicant chose to amend its particulars of claim. It is a matter of record that the application for leave to amend was opposed by the respondent thus culminating in a fully blown application for leave to amend being filed and which the respondent opposed. That matter, depending on the ruling issued in this matter, remains live for possible determination by the court, if at all, at the appropriate juncture.

[7] In order to cure its non-compliance with the order dated 9 November 2016, as aforesaid, the applicant launched an application dated 6 April 2017 and in which application the following relief is sought:

- '(a) Condoning the applicant's non-compliance with the court order dated 9 November 2016 and 25 January 2017.
- (b) Allowing the Applicants to argue their amendment Application dated 14 February 2017.
- (c) Costs in the event this application is opposed.'

[8] It is this application that is the subject of this ruling in part. I propose to consider this application closely, in relation to the requirements for condonation and will proceed to consider whether an application for the relief sought is made out by the applicant, having due regard to the requirements of the rules and the particular allegations contained in the affidavit on which the application is predicated. I should necessarily point out that the application is opposed by the respondent and answering affidavits in this regard were filed on the respondent's behalf.

Application for condonation

[9] It is a matter of note that from the notice of motion of the applicant referred to above, it seeks the condonation for non-compliance with two court orders. The other one, which has not yet been adverted to, is dated 25 January 2017. As it forms part of a new package, as it were, I find it necessary to quote its contents. It reads as follows:

'That the matter is postponed to 15 February 2017 at 15:15 for trial dates.'

[10] Besides the obvious incorrect reference to trial dates in the above order, it being common cause that the matter could not, on any scale, be regarded as ready for trial as it was at the nascent stage of pleading, it is in my view not apparent what it is that was ordered on 15 February 2017 that the applicant did not comply with and which thus needed to be condoned. Prayer (b) of the notice of motion therefore appears to me to be superfluous and I will waste no further time or effort to deal with it. Why it was included in the relief sought remains a mystery.

[11] Turning to the prayer (a) of the notice of motion, the affidavit filed in support of the prayers sought is deposed to by Mr. Silas-Kishi Shakumu, the applicant's legal practitioner of record. In explaining the non-compliance, the applicant's legal practitioner states that he was unaware of the non-compliance and was labouring under the mistaken belief that the non-

compliance was in relation to the manner in which the application in terms of rule 52(4) had been lodged and that it was only when he appeared in court on 15 March 2017 that he for the first time learnt of the exact nature of the complaint, namely that the plaintiff had not filed the notice in terms of rule 52 and had thus been *ipso facto* barred.

[12] In *Quenent Capital Ltd v Transnamib Holdings Ltd*,¹ this court considered the provisions applicable to applications for condonation, namely rule 55 (1) and (2) of this court's rules. The court proceeded, in addressing the requirements, to quote with approval the judgment of the Supreme Court in *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others*, where Langa A.J.A. stated the following requirements regarding an application for condonation²:

'An application for condonation is not a mere formality. The trigger for it is the 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.'

[13] Having regard to the affidavit filed by the applicant in the instant matter, I form the view, which I express without fear of contradiction, that the applicant has not even left the starting blocks in explaining the failure to comply with the rules, let alone doing so by giving a full, detailed and accurate explanation as set out in the above judgment. There is, in my view just no explanation whatsoever. I say so in view of the fact that the practice in this court is for court orders granted in matters to be pronounced in open court and in the presence of the legal practitioners.

¹ Case No. (I 2679/2015) [2016] NAHCMD 104 (8 April 2016).

² (SA 10 – 2006) [2010] NASC 14 (5 November 2010).

[14] That is not all. The court orders are also typed, initialled by the Judge concerned, signed by or on behalf of the Registrar and then placed in the pigeon holes of the legal practitioners concerned for them to be left in no doubt whatsoever regarding what was ordered and what it is that they have to do in compliance with the court order and when. There is, in the circumstances, no reason for Mr. Shakumu to say that he was not aware of the order issued and with which his client, who was seeking an indulgence from the court, so to speak, had to comply.

[15] To rub pepper, and not just salt to the injury, the applicant took an inordinately long time to move the application for condonation for the non-compliance. As indicated above the order not complied with is dated 9 November 2016 but the applicant only filed its application for condonation some five months later, i.e. in April 2017. This delay, is by any standards, egregious. To crown it all, no explanation, let alone a satisfactory one is furnished for this serious, long and sustained non-compliance.

[16] In *Teek v President of the Republic of Namibia*,³ the Supreme Court expressed itself on this very question in the following emphatic terms:

‘The court has a duty to consider whether the 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 not exhaustive.’

[17] In my reading of the applicant’s affidavit, I find that there is not an even a feeble attempt to address any of these important factors, which are deliberately designed to enable the court to consider in the exercise of its discretion in an applicant’s favour in deserving cases. In this regard, there is

³ 2015(1) NR 51 (SC) at 61 E-H.

not even a mumbling word mentioned by the applicant about the issue of the prospects of success, which is another important consideration.

[18] It would appear to me that the applicant has, in this regard, shot itself in the foot as it has not placed the material necessary to enable the court to exercise its discretion in the applicant's favour. It is not for the court to go out of its way and take a fishing rod to assist a lazy or sedated applicant to establish its case for condonation. It is wrong and improper for the court to be expected to do so. It is the duty of a litigant who realises that he or she has not complied with court orders or directives, to go out of his or her way to make out a good case for the court to exercise its discretion. A party who fails to do so has no one to blame if the court refuses the application for condonation.

[19] Mr. Maasdorp, in his able and compelling argument, referred the court to the judgment in *Donatus v Ministry of Health and Social Welfare*,⁴ where this court dealt with non-compliance with court orders and considered the factors relevant to the exercise of its discretion in that regard.

[20] At para [20] of the judgment, the court considered the sanctions that had to be visited on the erring party and expressed itself in the following terms:

'It is clear from the foregoing that the court, in applying sanctions to an errant party, exercises a discretion and has at its disposal a panoply of alternatives in terms of punishing a party that is in default of a court order or direction. In this regard, it would seem to me that the court should enter an order that is just, appropriate and fair in all the circumstances. In this regard, it would seem to me that the court has to consider the case at hand; its nuances; the nature of the non-compliance; its extent; its effect on the further conduct of the proceedings; the attitude or behaviour of the party or its legal representative, to mention some of the considerations, and thereafter make a value judgment that will at the end meet the justice of the case.'

⁴ 2016 (2) NR 532 (HC).

[21] I have now reached that critical juncture. The main question that has to be asked, in view of what is recorded above, both in the quotation and the consideration of the conduct of the matter and the behaviour of the applicant's legal practitioner is this – is there anything to be said in the applicant's favour? I find that there is nothing to be said in favour of the applicant. The reasons for saying so are plain from what I have said above.

[22] What is more is that the respondent has in this case been dragged to court by an applicant who appears feeble or has withered hands making it difficult to prosecute its claim. As can be seen from the file, a number of times, Mr. Shakumu did not appear before court and there is no explanation tendered. Mr. Du Plessis was at pains as to what to do in moving the case forward without being seen as taking advantage of Mr. Shakumu's unexplained absence. On one occasion, the court ordered, despite a strong and understandable opposition from Mr. Du Plessis, postponement of the matter until Mr. Shakumu could appear and explain his absence.

[23] On a few occasions, Mr. Shakumu asked other legal practitioners to stand in for him. What is disconcerting in that regard though is that he gave wrong instructions which were irreconcilable with the conduct of the matter and the orders issued by the court, leaving the poor practitioners hanging their heads in embarrassment when the court pointed out the correct position. Mr. Petrus S. Elago, at least on one occasion, found himself in that embarrassing position. This is to be deprecated and must be brought to the door of Mr. Shakumu. This court cannot be treated with levity without stern action being taken and with telling consequences eventuating therefrom.

[24] What is plain from the foregoing chronicle and analysis, is that the overriding principles of judicial case management are being dealt a shattering blow by Mr. Shakumu's conduct and this has resulted in the court dancing as it were on the same spot, to the detriment of the vegetation, for months without advancing the matter towards finality, for no fault on its part nor that of the defendant's estate, which has been dragged to court. Such a situation cannot be countenanced one day longer.

[25] Another issue I cannot leave unmentioned relates to the fact that Mr. Kamanja was asked by Mr. Shakumu to represent the applicant in this matter during argument. He also found himself on a slippery slope as the extent and nature of the matters at hand seemed unexplained to him. He was not informed of the application for condonation but appeared ready to argue the application for leave to amend, thus putting the cart before the horse as it were. I say so for the reason that the issue of condonation has to be decided first and more importantly, in the applicant's favour before the court can be properly placed to deal with the application for leave to amend.

[26] To put it graphic terms, Mr. Kamanja may well be described as having argued the application for leave to amend outside the courtroom, maybe near the court's windows. I say this because only the granting of an application for condonation would have granted Mr. Kamanja the right of audience to move the application for leave to amend.

[27] I pause and ask myself one critical question – is it fair or just that any sanction imposed, in the light of the serious and persistent non-compliance, should serve to punish the applicant, in view of the despicable conduct of his representative as described above? Is it not enough that such sanction should be restricted to the erring party and not the innocent one behind the scenes? Is it not correct in this case to punish the messenger?

[28] In *Saloojee and Another v Minister of Community Development*,⁵ Steyn CJ made the following trenchant remarks:

'There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have disastrous effect upon the observance of the rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity.'

⁵ 1965 (2) SA 135 (AD0 at 141 C-E).

[29] I may mention in passing that the application for condonation I have dealt with is not the only one on file. There is yet another application dated 18 April 2017 in which the very applicant applies for condonation for non-compliance with a court order dated 15 March 2017. The affidavit supporting the notice of motion is deposed to by Ms. Maria Nghiishililwa, a candidate legal practitioner who works with the applicant's law firm. In fairness to the applicant, this application is not opposed, although the respondent stated unequivocally that she did not accept the correctness of the allegations made in support of the delay in issue.

[30] This application and the manner in which this matter has been handled unfortunately exhibits a worrisome and dreadful pattern of non-compliance with court orders by the applicant's legal practitioner. This should not be allowed to continue and must be brought to an abrupt halt for the sake of the client and for the legal practitioner involved to do a self-introspection and to hopefully resolve to exorcise himself of the present afflictions.

[31] Having considered all the foregoing, I am of the considered view that this is the proper course to adopt in this matter. The conduct of the matter by the applicant's legal practitioner is in my view nothing less than atrocious. It behoves this court, in such matters, to take hard and at times painful decisions in order to drive the point home forcefully that the rules of court matter and that they cannot be regarded with levity, without negative consequences attaching to the errant party.

[32] Those who do so must know the heavy price tag hanging on the rules and thereby ensure that they act accordingly. Where for any good reason they have failed to live up to the demands or the expectations of the order, they should, without delay, make a full, honest and comprehensive explanation of their default. Anything less will be visited with harsh retribution as has to be the case *in casu*.

[33] Last, I should mention that the respondent has also filed an application for condonation of the late filing of its answering papers. This application was

not opposed by the applicant. It is a matter of record that the filing of the papers was late by four days which the respondent's legal practitioner attributes to him having erroneously counted the court days in view of a number of holidays that interspersed the days within which the filing was to be done. I accept the explanation and also consider that the delay is not unconscionable in the circumstances and visits no prejudice on the applicant.

[34] In the light of the conduct of the applicant's legal practitioner described above, I cannot, in good conscience, mulct the applicant with the costs of this application. It would, in my view, be perverse to do so. Rule 52 (2)(d) allows this court, in appropriate matters, to direct a party's legal practitioner to pay the costs occasioned by non-compliance with a court order. I find this a condign case to do so.

[35] It follows, from the foregoing that I am not, in the circumstances, required to make any ruling on the application for leave to amend as that is an issue that would have arisen if the application for condonation had been granted. I accordingly make no order thereon.

[36] In the premises, I issue the following order:

- (1) The applicant's application for condonation of the order dated 9 November 2016 is refused.
- (2) The applicant's legal practitioner of record is ordered to pay the costs of this application *de bonis propriis* in terms of Rule 53 (2)(d), that is to say from his own pocket.
- (3) The matter is postponed to 5 July 2017 at 15:15 for a status hearing to determine the future conduct of the matter.

T.S. Masuku
Judge

APPEARANCES

APPLICANT/PLAINTIFF: A. Kamanja
Instructed by: Shakumu & Associates

RESPONDENT/DEFENDANT: R. Maasdorp
Instructed by: Theunissen, Louw & Partners