

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, WINDHOEK, MAIN DIVISION

JUDGMENT

CASE NO: HC-MD-CIV-CON-2016/02484

In the matter between:

L A PROPERTIES DEVELOPMENT CC t/a

L A PROPERTIES CC

PLAINTIFF

and

JAN AFRICA PROPERTIES CC

DEFENDANT

Neutral Citation *LA Properties Development CC v Jan Africa Properties cc*
(2016/02484) [2017] NAHCMD 161 (9 June 2017)

CORAM: MASUKU J.

Heard: 7 June 2017

Delivered: 9 June 2017

Flynote: RULES OF COURT – Rule 60 – Application for summary judgment-

RULE 53 – Sanctions for non- appearance of Legal Practitioner.

Summary: The plaintiff, an estate agent, sued the defendant in the amount of N\$ 1 925 000 and interest thereof, which was its commission for sourcing an immovable property on the defendant's behalf in terms of a mandate.

The Plaintiff applied for summary judgment for the said amount, which was opposed by the defendant. The matter was set down for hearing on 7 June 2017. The defendant filed an affidavit opposing summary judgment, albeit out of time and a subsequent condonation application, which was opposed by the plaintiff followed. On the date of the hearing, the defendant's legal practitioner failed to appear and in addition failed to file its heads of argument. The plaintiff then moved for an order in terms of rule 53 of the rules of this court.

Held – that a party who fails to comply with the rules of court should without delay, apply for condonation and comply with the rules. In seeking condonation, the applicant have 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 defendant failed to appear on the date set for hearing the summary judgment application and no explanation was tendered to that effect. In those circumstances, the court was left with no option but to grant summary judgment as prayed against the defendant.

ORDER

- (1) To the extent necessary, the defendant's affidavit resisting summary judgment is hereby struck out.
- (2) Summary judgment is hereby be entered in favour of the plaintiff in the amount of N\$ 1 925 000, together with interest at the rate of 20 per annum and costs of suit.
- (3) The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J.;

Introduction

[1] At issue in this judgment is the propriety of granting an application for summary judgment in which the plaintiff has sued the defendant for payment of an amount of n\$ 1, 925, 000, interest and costs of suit.

Background

[2] According to the particulars of claim, the plaintiff, an estate agent, claims that it was engaged by the defendant and a mandate was entered into in terms of which the plaintiff was to source suitable industrial immovable property within the Walvis Bay area. The plaintiff avers that on 22 February 2016, it introduced the defendant to the industrial immovable property described as Erf 4452, erf 4453 and erf 4454, hereafter referred to as 'the erven'.

[3] It is further averred that as a result of the plaintiff having introduced the defendant to the owner of the erven, the defendant purchased the said erven and that the plaintiff was the effective cause for the said transaction to have taken place. The plaintiff further claims that it was an express term of the agreement between the parties that if the plaintiff was able to deliver on the mandate, it would be paid commission amounting to 5% of the purchase price of the property in question.

Case Planning Order

[4] The matter was allocated to me for purposes of managing same. In this regard, after hearing the parties and having considered their joint case plan, the following order was issued on 13 November 2016 at 10:17 am:

1. The parties are to comply with Rule 32 (9) and (10) by 20 October 2016.
2. The plaintiff is to file its summary judgment application by 18 November 2016.
3. The defendant is to file its opposing papers by 25 November 2016.
4. The case is postponed to 7 December 2016 at 15:15 for a status hearing.'

[5] It is common cause that the defendant failed to comply with the order, particularly in respect of the filing of the opposing affidavit. The affidavit resisting summary judgment was deposited to on 16 January 2017. It was only filed on 18 January 2017 and not on 25 November 2016, as ordered by the court.

Application for condonation

[6] In view of the non-compliance with the court order, as stipulated above, the defendant filed an application for condonation of the late filing, which was opposed in December 2016. In the affidavit filed in support of the application, Mr. Dirk Conradie, in essence deposed that the application for summary judgment called upon his clients to file an opposing affidavit within 14 days from the filing of the notice to oppose.

[7] He further deposed that since the summary judgment application was generated by ejustice, he operated under the mistaken belief that the court order would be corrected so as to bring it in sync with the notice of application for summary judgment. He tendered his apologies for that erroneous misapprehension.

[8] He deposed further that according to his calculation, the *dies* for filing the opposing affidavit was up to 15 December 2016. He further stated that he had prepared the opposing affidavit for his client's signature but his client was unfortunately 'presently travelling overseas on business'. He finally submitted that the failure on his part to file the opposing affidavit was not deliberate nor in flagrant disregard of the court order.

[9] On 19 April 2017, the matter was postponed to 7 June 2017 for the hearing of the application for summary judgment. The court further ordered the parties to file their respective heads of argument 3 and 5 days before the hearing date.

Events on 7 June 2017

[10] When the matter was called for hearing on the morning of 7 June 2017, two things were apparent. First, the defendant did not file its heads of argument as had been ordered to do by the order of 19 April 2017. Second, there was no appearance for the defendant in the matter. An officer was dispatched to call the defendant's name or its representative but there was no response.

[11] In the premises, Ms. Van Der Westerhuizen for the plaintiff, applied for the court to grant summary judgment as prayed. In particular, she invited the court to apply the sanctions recorded in rule 53, in particular, the provisions of subrule (2) thereof.

[12] The relevant portions of rule 53 (1) read as follows:

'If a party or his or her legal practitioner, if represented, without reasonable explanation fails to –

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*

(c) comply with a case plan order, case management order, a status hearing order or the managing judge's pre-trial order;

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(e) comply with deadlines set by the court,
the managing judge may enter any order that is just and fair in the matter including any of the orders set out in subrule (2).

[13] Rule 53 (2). On the other hand, reads as follows:

'Without derogating from any powers of the court under these rules the court may issue an order –

- (a) refusing to allow the non-compliant party to support or oppose any claims or defences;
- (b) striking out pleadings or part thereof, including any defence, exception or special plea;
- (c) dismissing a claim or entering final judgment; or
- (d) directing the non-compliant party or his or her legal practitioner to pay the opposing party's costs caused by the non-compliance.'

[14] Ms. Van der Westerhuizen moved the court to sanction the defendant in terms of rule 53 (2) (b) and (c) for their non-compliance. Is it proper to do so in the present circumstances?

[15] I am of the view that she is eminently correct in her submissions and I say so for the following reasons: First, it is clear that the defendant failed to comply with the case plan order and purported to file the affidavit resisting summary judgment way out of time. With due respect, even taking into account what Mr. Conradie stated in the affidavit in support of the application for condonation is true, there is no authority needed to pronounce that practitioners are expected to comply with orders of court and any other period stated in any proceeding or pleading filed in court play second fiddle.

[16] For that reason, there should be no confusion in the mind of a legal practitioner, should there be any inconsistency between an order of court and

some time lines stipulated in a pleading regarding the carrying out of a particular activity in the progression of a matter or cause before court. In this regard, whatever it is worth, I cannot find that there is a reasonable explanation for the non-compliance in the circumstances. In any event, it appears to me that the affidavit filed lacks any particularity as all it states is that the defendant's deponent 'is overseas on business' and no more.

[17] In *Telkom Namibia v Michael Nangolo and 34 Others*,¹ the learned Judge President Damaseb set out some of the important considerations that inform a decision whether or not to grant an application for condonation. These include (a) that condonation must be brought as soon as the non-compliance has come to the fore;² (b) the degree of delay is a relevant consideration;³ (c) the entire period during which the delay occurred must be fully explained.⁴ On a mature consideration of the affidavit filed on behalf of the defendant, it does not appear to me that the above principles were addressed.

[17] In particular, I am not satisfied that standard and level of disclosure necessary for condonation applications, which is very clear and quite demanding was observed by the defendant. In this particular regard, and to buttress the position stated by the learned Judge President above, Langa AJA stated the following in *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others*:⁵

'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

¹ Case No. LC 33/2009.

² *Ibid* at p4 para [5] 3.

³ *Ibid* at para [5] 4.

⁴ *Ibid* at para [5] 5.

⁵ Case No. ((SA 10/2006) [2010] NASC 14 (5 November 2010).

Rules. The explanation must be full, detailed and accurate in order to enable the Court to understand clearly the reasons for it.'

[18] I am of the view that the defendant has dismally failed to meet that high standard. The court has not been placed in a position to fully understand the reasons behind the non-compliance and to fully appreciate the reason why the court should exercise its discretion in the applicant's favour. For that reason, it is my considered view that there is nothing to be said in favour of the defendant in this regard, pointing inexorably in the correctness of the submissions made on the plaintiff's behalf.

[19] I may, perhaps have gone ahead of myself in the immediately preceding paragraphs by making the conclusions I did. I say so for the reason that my consideration of the affidavit is made on the assumption that the application for condonation is properly before court and appropriate remedies are moved by the applicant therefor. What is beyond dispute in this regard is that there was no application made for the condonation application and no heads in support thereof were in any event filed. All I can say, in line with what I have said above, is that the application for condonation was very weak, lacking in substance, particularity and also devoid of the reasons why the court should exercise its discretion in the applicant's favour.

[20] Because of the unexplained non-appearance of the defendant's legal practitioners, it follows naturally as night follows day that nothing was said on the defendant's behalf regarding the application for the granting of the application for summary judgment. In this regard, I must again mention that the defendant was once again in default of filing its heads of argument as ordered by the court on 19 April 2017. There is no application for condonation in this regard and hence no explanation, sustainable or not, for the court to consider.

[21] What appears incontrovertible, in the circumstances, is that the defendant prosecuted this matter in the most lackadaisical manner, violating court orders in the process. The high-water mark of its disregard, was not

appearing in court, for what it was worth, in the absence of applications for condonation, to at least make oral submissions to mitigate, if at all possible, whatever damage had been done by the non-compliance referred to above.

[22] There is simply nothing before to be said for the defendant. I say so taking into account that the defendant is deemed to be aware of all the orders that were duly uploaded on ejustice, including the cut-off date for the filing of the affidavit, the heads and the date of hearing. To make no room of escape, it is also clear that the matter was listed on the court's day roll of 7 June 2017 for the hearing of the summary judgment application. In my assessment, the defendant simply has no legs to stand on. The defendant has placed itself in a predicament in that it has itself amputated any legs it may well have had.

[23] I am acutely aware that summary judgment has often been described as an extra-ordinary and stringent remedy. Although there is no opposition properly before court in the absence of a favourable order for the condonation of the defendant's default, I have taken the trouble to closely consider the plaintiff's particulars of claim and I find them to be technically in order. All the necessary allegations on which the remedy is sought are predicated, have been made. I am also of the view that the affidavit filed in support of the application for summary judgment makes all the relevant and mandatory allegations and it is also technically in order.

[24] In the premises and for the foregoing reasons, I am of the view that in the light of the various non-compliances by the defendant, including its failure to properly and timeously file its opposing affidavit, this is a proper case for the court to sanction the defendant as empowered by the rules of court quoted above.

[25] I therefore issue the following order:

- (1) To the extent necessary, the defendant's affidavit resisting summary judgment is hereby struck out.

- (2) Summary judgment is hereby entered in favour of the plaintiff in the amount of N\$ 1 925 000, together with interest at the rate of 20 per annum and costs of suit.
- (3) The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

PLAINTIFF: C. Van der Westhuizen
Instructed by: Delport-Nederlof Inc.

DEFENDANT: No Appearance

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