



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-ACT-CON-2017/00888

In the matter between:

WILLEM JOHANNES LODIWIKUS BOOYSEN

RESPONDENT/PLAINTIFF

and

OTJA TRADING ENTERPRISES CC

APPLICANT/DEFENDANT

Neutral citation: *Booyesen v Otja Trading Enterprises CC* (HC-MD-CIV-ACT-CON-2017/00888) [2017] NAHCMD 200 (25 July 2017)

Coram: MILLER AJ

Heard: 20 July 2017

Delivered: 25 July 2017

ORDER

Having heard **Mr Diedericks** for the applicants and **Mr Visser** for the respondents on 20 July 2017, and having considered the documents filed of record –

IT IS ORDERED THAT –

1. The application is dismissed.
2. The applicant is ordered to pay the respondent's costs.
3. The matter is postponed to Thursday, 27 July 2017 at 15h30 for a status hearing be held before Prinsloo J.

RULING

MILLER AJ:

[1] In this interlocutory matter the applicant who is the defendant in the main action applied on notice of motion for essentially an order condoning its failure to file a plea to the plaintiff's claim.

[2] It is common cause that the applicant had been ordered to file that plea by not later than 21 April 2017 and that it has not done so.

[3] The application was launched on 21 June 2017 and on the eve of a sanctions hearing to be conducted by Prinsloo J, who is the managing judge. The sanctions hearing was scheduled for hearing on 22 June 2017.

[4] In the Notice of Motion the applicant stated that the affidavit of Mr Afrika Jantjies dated 21 June 2017 will be used in support of the application. Mr Jantjies is the legal representative who represent the applicant.

[5] The affidavit identified and mentioned in the notice of motion erroneously is headed a "Sanctions Affidavit". It appears to me taking into account all the facts and the history of the matter, that Mr Jantjies found himself somewhat at sixes and sevens as to how the affidavit should be titled. What is undisputedly clear is that despite all this, the so called Sanctions Affidavit was roped in to support the relief claimed in the Notice of Motion and was in proper parlance viewed as the founding affidavit.

[6] Mr Diedericks who led the unenviable task of arguing the applicant's case sought to argue that the so called sanctions affidavit was simply that and filed for a different purpose. Consequently, so the argument ran, there was no founding affidavit so to speak and for this reason the application should simply be struck from the roll.

[7] The submission has no merit. Whatever doubt may remain on that score is removed by the mere fact that in the Heads of Argument filed by Mr Jantjies reliance is placed on the contents of that affidavit. Paragraph 3.1.11 makes for telling reading. It reads as follows:

'in its Affidavit the Applicant/Defendant set out the grounds upon which it seeks the lifting of the bar operating against the it Applicant/Defedant and further conceded to all the averments made in the Respondents/Plaintiffs affidavit, regarding the fact that it made it practically impossible for the respondent/Plaintiff to comply with any court order as no plea and counterclaim were filed by Applicant/Defendant to be considered by Respondent/Plaintiff , taking the Court into confidence and extending professional courtesy to the Respondent.'

[8] It is trite that an applicant who seeks condonation has to meet two requirements. They are the following:

1. There must be a reasonable explanation for the applicant's non-compliance; and
2. The applicant must establish that it has reasonable prospects of success.

[9] Mr Diedericks properly and fairly conceded that the second requirement mentioned above was not established. In fact it was not even mentioned in the affidavit and no attempt was made to deal with it.

[10] I mention in passing that the respondent made much of the failure on the part of the applicant to comply with Rules 32(9) and 32(10). I need not deal with that in view of the conclusion I have reached concerning the applicant's failure to make out a case for condonation on its own papers.

[11] It follows that the following orders are made:

1. The application is dismissed.
2. The applicant is ordered to pay the respondent's costs.
3. The matter is postponed to Thursday, 27 July 2017 at 15h30 for a status hearing be held before Prinsloo J.

K MILLER
Acting Judge

APPEARANCES

PLAINTIFFS/RESPONDENTS:

Mr Visser
Of Koep & Partners, Windhoek

DEFENDANTS/APPLICANTS:

Mr Diedericks
Instructed by Siyomunji Law Chambers,
Windhoek