

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**REASONS**

Case no: I 4073/2015

In the matter between:

**TWO THOUSAND AND TEN PROPERTY INVESTMENTS CC**

**PLAINTIFF**

and

**MONDESA PROPERTY INVESTMENTS CC**

**DEFENDANT**

**Neutral citation:** *Two Thousand and Ten Property Investments CC v Mondesa Property Investments CC* (I 4073/2015) [2017] NAHCMD 319 (9 November 2017)

**Coram:** OOSTHUIZEN J

**Heard:** 3 OCTOBER 2017

**Order delivered:** 4 OCTOBER 2017

**Reasons:** 9 NOVEMBER 2017

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**ORDER**

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Having heard **Mr Totemeyer** for plaintiff and **Mr Kambueshe** for defendant on 3 October 2017 and having read the affidavit of Mr Kambueshe for condonation and postponement of the trial dates, as well as the answering affidavit of the plaintiff's Mr Cheng-Yuan Lee –

**IT IS ORDERED THAT –**

1. Defendant's request for condonation of its non-compliance with the court orders of specifically, 10 July 2017, 28 August 2017 and 18 September 2017, is refused.
2. Defendant's request for the vacating/postponement of the trial dates on the action floating roll (2 – 6 October 2017), is refused.
3. In terms of Rule 53 of the High Court Rules, defendant's pleadings and defence are struck and it is not allowed to oppose the claims of the plaintiff.
4. Final judgment is entered for the plaintiff against the defendant for –
  - 4.1 Payment in the amount of N\$2 434 964.80.
  - 4.2 Interest a tempore morae on the aforesaid amount at the rate of 20 % per annum as from 11 February 2016 to date of final payment.
  - 4.3 Costs of suit taxed on a party and party scale, which costs shall include the costs of one instructing and two instructed counsel, preparation for trial, opposing defendant's application and two trial days.

5. The court shall supply reasons for the above order and judgment, if so requested by the defendant in writing within 14 days of this order, on or before 31 October 2017.
6. The matter is finalised and is removed from the action floating roll.

(Order handed down in Court on 4 October 2017 at 09h00)

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## REASONS

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OOSTHUIZEN J:

[1] Plaintiff claimed for (re)payment in the amount for N\$2 434 968.80 which was paid to the defendant as a 20% deposit in terms of a written building contract, interest and costs of suit (including the costs of one instructing and two instructed counsel). Summons was issued on 11 December 2015. Service of the summons and particulars of claim was effected on 10 February 2016.<sup>1</sup>

[2] The case proceeded through its various Judicial Case Management stages and on 15 August 2016 the defendant by way of an amended plea, pleaded specially that the claim arises from a written contract which provide for arbitration of any dispute between the parties. On the merits it pleaded that the deposit was not fully paid and therefor it was not obliged to commence with the work. Defendant admitted demands. Furthermore defendant pleaded settlement of the disputes, alternatively that it lawfully cancelled the building contract.<sup>2</sup>

[3] Plaintiff, on 16 November 2016, replicated in detail to the special plea raised by defendant. In the replication plaintiff clearly set out how and when the different

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<sup>1</sup> Pleadings bundle, pp 1 – 10.

<sup>2</sup> Pleadings bundle, pp 47 – 53.

payments were made over a period of 4 months totalling the amount it claimed it should be repaid and pleaded that the defendant never commenced with the construction works.<sup>3</sup>

[4] On 25 November 2016 the parties filed their joint proposed pre-trial order. Therein they inter alia agreed on the identity of witnesses and reserve their rights to call further witnesses for which they will supply witness statements and agreed that all witness statements will be filed on 18 August 2017. They also agreed to exchange requests for trial particulars by 23 June 2017, which should be answered within 10 days thereafter.<sup>4</sup>

[5] Defendant was throughout represented by instructing and instructed counsel until January 2017, when they withdrew due to defendant's non-payment of fees.<sup>5</sup>

[6] On 5 December 2016 this court adopted and ordered the proposed pre-trial order of 25 November 2016 and postpone the matter to 10 July 2017 for a status hearing.<sup>6</sup> Note that this court already on 26 September 2016 set the matter down for hearing from 2 – 6 October 2017.<sup>7</sup>

[7] Defendant's Mr Kambueshe personally and on behalf of defendant received the Notice of withdrawal, the court order and the proposed pre-trial order on the 25<sup>th</sup> of January 2017 from the acting deputy sheriff of Swakopmund.<sup>8</sup>

[8] In the said Notice of Withdrawal Ms Lubbe of Du Pisani Legal Practitioners specifically pointed out to the defendant that the matter is set down for trial from 2-6 October 2017 as well as the deadlines for the filing of documents and the status hearing stipulated in the court order of 5 December 2016 and the proposed pre-trial order.<sup>9</sup>

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<sup>3</sup> Pleadings bundle, pp 54 – 58.

<sup>4</sup> Case management bundle, pp 31-45.

<sup>5</sup> Notices and supplementary pleadings bundle, p6 and pp 70 – 72.

<sup>6</sup> Case management bundle, p47.

<sup>7</sup> Case management bundle, pp 29 – 30.

<sup>8</sup> Notices and Supplementary pleadings bundle, p93.

<sup>9</sup> Notices and supplementary pleadings bundle, p71.

[9] Mr Kambueshe, sole member of defendant, did nothing until 6 July 2017 when he addressed an 8 point request for time to seek legal counsel to the Registrar of the High Court.<sup>10</sup>

[10] On 10 July 2017 the court ordered<sup>11</sup> -

‘1. Defendant shall file its reply to plaintiff’s request for particulars on or before 25 August 2017.

2. Plaintiff shall file its witness statement on or before 25 August 2017.

3. The matter is postponed to Monday, 28 August 2017 at 14h00 for a status hearing.

**4. The matter remains set down for trial from 2 – 6 October 2017 at 10h00.’**

[11] On 28 August 2017 the court ordered<sup>12</sup> -

‘1. Defendant shall file its witness statement on or before 11 September 2017.

2. The e-mail address to wit [kambueshe@icloud.com](mailto:kambueshe@icloud.com) or [investments@pharlap.com.na](mailto:investments@pharlap.com.na) of the defendant is ordered to constitute the address for proper service by either the court or the plaintiff on the defendant.

**3. The matter remains set down for trial from 2 – 6 October 2017 at 10h00.’**

[12] On the 18 September 2017 the court, in the presence of Mr Kambueshe and after hearing him ordered<sup>13</sup> -

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<sup>10</sup> Annexure ‘C’ to Kambueshe’s affidavit of 25 September 2017.

<sup>11</sup> Case management bundle, p48.

<sup>12</sup> Case Management bundle, p50.

<sup>13</sup> Court Order of 18 September 2017.

1. Defendant shall file an affidavit setting out the arrangements with its previous legal practitioner, arrangements done so far to obtain fresh legal representation and request the vacation of trial dates of 2 – 6 October 2017 before 15h00 on 25 September 2017 at the SADC Tribunal Building.
2. Defendant's application in terms of Rule 96 (3) shall include a condonation for not filing witness statements and set out good cause.
3. Plaintiff shall answer to defendant's application by noon on 28 September 2017.
4. Mr Kambueshe is warned to attend the roll call on 29 September 2017 at 08h30 in front of Deputy Judge President Angula, presiding at the Main Division of the High Court in Luderitz Street.
5. **The matter remains set down for trial from 2 – 6 October 2017 at 10h00.'**

[13] On 25 September 2017 Mr Kambueshe filed an affidavit and at the end thereof prays for an order of condonation for not filing witness statements, extension of trial dates and further or alternative relief. His complete affidavit with annexures is not indexed or paginated but available on the court file and marked "Defendant's condonation and rule 96(3) application".

[14] This was met with plaintiff's answering affidavit with annexures filed on 28 September 2017. Same is likewise not indexed and paginated but available on the court file.

[15] On 18 September 2017, after hearing Mr Van Vuuren for plaintiff and Mr Kambueshe for the defendant and faced with trial dates given a year earlier for 2 – 6 October 2017, the court was not concerned with form but with substance when giving the order. For that reason the plaintiff's contention relating to form (i.e. notice of motion plus affidavit) is ignored as superfluous.

[16] The court ordered the filing of an affidavit setting out the arrangements with its previous legal practitioner, arrangements done so far to obtain fresh legal representation and request the vacation of the trial dates, condonation for not filing witness statements and the setting out of good cause.

[17] Mr Kambueshe on behalf of defendant in rather sketchy terms addressed the order of court dated 18 September 2017.

17.1 He admitted the notice of withdrawal of his legal practitioners in January 2017, but elected not to mention the rather full explanation and documents attached thereto which gave him the required information concerning the future due dates, status hearing date, trial dates and convey the information regarding legal aid.

17.2 He attached an acknowledgement of debt towards Du Pisani Legal Practitioners dated 18 September 2017 from which it inter alia appears that he and the Close Corporations he represent are active in the commercial sphere and involved in numerous commercial activities of no small measure.

17.3 He attached an annexure "B" which has no bearing on the defendant with a bold statement that it will restore his (not defendant's) financial prospects. Annexures "D" and "E" to his affidavit were likewise of no informative value and at best inadmissible hearsay and opinion.

17.4 He then went on to say there is a current arrangement to obtain fresh legal representation and upon proof of ability to honour financial obligations there are no less than 3 legal firms willing to offer legal representation. Again paucity and lack of confirmation.

[18] Mr Kambueshe went on to explain why the court should condone the failure to file witness statements. He say that he is a layman with no legal representation and the complexity of the court processes is beyond his comprehension and that he lacks substantive capacity to perform duly.

[19] Mr Kambueshe's statement defies his accomplished acumen in the commercial sphere as is brought out in the pleadings and the documents presented by himself. A witness statement requires a factual matrix in elucidating the pleadings, commenting on the witness statements of the plaintiff (which he priorly received) and underpinning the defendant's case. His humbleness and proclaimed ignorance ring false, designed to serve the purpose of excusing himself (and defendant) for not complying with court orders and delaying the administration of justice.

[20] Mr Kambueshe failed to enlighten the court and plaintiff with an acceptable factual underpinning and proof of the defendant's proclaimed financial inability to honour its obligations. Furthermore he failed to inform what the defendant did with the substantial deposit it allegedly received, and failed to present any financial statements of the defendant.

[21] Mr Kambueshe's statement under oath of the limited timeframe to arrange new legal representation brush over at least 7 months' inactivity on that score.

[22] Mr Kambueshe's attempt to intimate that as soon he was made aware by the court (on 18 September 2017), he swiftly responded to apply for condonation, cannot be regarded as bona fide in view of his and defendant's known inaction and default.

[23] Mr Kambueshe's reference to annexure "C" to his affidavit on behalf of defendant is self-defeating. It shows that the defendant on 6 July 2017 found a request on arrangements which were not in place then and only materialise on 18 September 2017 when he was faced with a very specific order.

[24] In a nutshell: defendant's ipsi dixit through Mr Kambueshe's affidavit filed on 25 September 2017 is devoid of informative substance.

[25] In general, an application for condonation and an application to vacate trial dates both require the showing of "good cause".



[26] Good cause requires a party applying for an indulgence such as condonation and vacation of trial dates to provide a reasonable explanation for his default and to establish a prima facie bona fide defence in setting out averments which, if established during the trial, would entitle him to succeed in his defence.

[27] Rules 53(1) and (2), 54(1) and 56(1), (2) and (3) of the High Court Rules, provide as follows –

#### 27.1 Rule 53(1) and (2)

'53. (1) If a party or his or her legal practitioner, if represented, without reasonable explanation fails to –

- (a) attend a case planning conference, case management conference, a status hearing, an additional case management conference or a pre-trial conference;
- (b) participate in the creation of a case plan, a joint case management report or parties' proposed pre-trial order;
- (c) comply with a case plan order, case management order, a status hearing order or the managing judge's pre-trial order;
- (d) participate in good faith in a case planning, case management or pre-trial process;
- (e) comply with a case plan order or any direction issued by the managing judge; or
- (f) comply with deadlines set by any order of 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).

(2) Without derogating from any power 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 a 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.

Sanctions for non-compliance in absence of defaulting party obtaining relief, relaxation, extension or condonation.'

## 27.2 Rule 54(1)

'54. (1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for a failure to comply imposed by the rule, practice direction or court order has effect and consequences for such failure and such effect and consequences follow, unless the party in default applies for and is granted relaxation, extension of time or relief from sanction.'

## 27.3 Rule 56(1), (2) and (3)

'56. (1) On application for relief from a sanction imposed or an adverse consequence arising from a failure to comply with a rule, practice direction or court order, the court will consider all the circumstances, including –

- (a) whether the application for relief has been made promptly;
- (b) whether the failure to comply is intentional;
- (c) whether there is sufficient explanation for the failure;
- (d) the extent to which the party in default has complied with other rules, practice directions or court orders;
- (e) whether the failure to comply is caused by the party or by his or her legal practitioner;
- (f) whether the trial date or the likely trial date can still be met if relief is granted;
- (g) the effect which the failure to comply has or is likely to have on each party; and
- (h) the effect which the granting of relief would have on each party and the interests of the administration of justice.

(2) An application for relief must be supported by evidence.

(3) The managing judge may, on good cause shown, condone a non-compliance with these rules, practice direction or court order.'

[28] The defendant did not show good cause in seeking condonation to file its witness statements, nor did it set out good cause in seeking the vacation of the trial dates. Defendant's explanation for its default lacks factual underpinning and did not provide a reasonable explanation and has furthermore dismally failed to satisfy the court that it has reasonable prospects to succeed in its defence.

[29] As a result the court made the order of 4 October 2017 after hearing Mr Totemeyer for plaintiff and Mr Kambueshe for defendant on 3 October 2017.

[30] The trial was set down from 2 – 6 October 2017 on the action floating roll.

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GH Oosthuizen  
Judge

## APPEARANCES

## PLAINTIFFS/RESPONDENTS:

Mr Totemeyer assisted by Mr Van Vuuren  
Instructed by Behrens & Pfeiffer,  
Windhoek

## DEFENDANTS/APPLICANTS:

Mr Kambueshe  
On behalf of defendant,  
Email: [kambueshe@icloud.com](mailto:kambueshe@icloud.com)  
[investments@pharlap.com.na](mailto:investments@pharlap.com.na)