

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2017/02946

In the matter between:

HAROLD NDEVAMONA AKWENYE

PLAINTIFF

and

SOPHIA NDESHIPANDA AMADHILA

DEFENDANT

Neutral Citation: *Akwenye v Amadhila* (HC-MD-CIV-ACT-CON-2017/02946)
[2018] NAHCMD 114 (27 April 2018)

CORAM: PRINSLOO J

Heard: 11 APRIL 2018

Delivered: 26 APRIL 2018

Reasons: 27 APRIL 2018

Flynote: Civil Procedure – Condonation and upliftment of bar – Party to give satisfactory explanation for non-compliance of court order – Lack of explanation or unsatisfactory explanation will lead to refusal of condonation irrespective of

prospect of success – Limit beyond which litigant can escape practitioner's lack of diligence and insufficiency of explanation.

Summary: The plaintiff instituted action against the defendant for a claim in terms of an oral agreement wherein the defendant agreed to sell the plaintiff immovable property on condition that the plaintiff was to pay an amount to Nedbank Namibia Limited. The plaintiff allegedly performed as per the agreement and the defendant failed by breaching the terms of the agreement in allegedly failing and refusing to give transfer of the property into the plaintiff's name, despite demand. The defendant defended the action and the matter was resultantly allocated to a managing judge.

The plaintiff submits that the defendant has made no factual allegations whatsoever on whether she has any defence to the plaintiff's claim and no defence whatsoever is disclosed. The plaintiff's legal practitioner further submits that the court cannot in the circumstances, exercise its discretion in favour of the defendant, considering the deficiency and defectiveness of the application. In the absence of such facts and evidence relevant to the prospects of success and any defence, the condonation application is fatally defective and stands to be dismissed with costs.

The defendant's legal practitioner further submits that the application made by the defendant is *bona fide* and not with a reckless disregard for the court order but rather with the confidence that the defendant has good prospects of success.

The defendant's legal practitioner further submits that due to the amount claimed by the plaintiff is a large amount of money, it would be very harsh, unjust and against the administration of justice, if the defendant is not awarded the opportunity to bring its case before the court.

Held – the condonation application and the application for the upliftment of the bar is interlocutory in nature and falls under the provisions of Rule 32 and the Rule 32(9) and (10).

Held – that non-compliance with process in terms of particularly Rule 32(9) renders an interlocutory application defective and such an application stands to be struck from the roll.

Held further – In the absence of the facts and evidence relevant to the prospects of success and any defences, the condonation application is fatally defective and stands to be dismissed.

ORDER

- a) The application for condoning the defendant's failure to comply with court order dated 26 October 2018 is refused with costs, cost of one instructed and one instructing counsel.
- b) Matter is postponed to 24 May 2018 at 15:00 for Status Hearing (Reason: Plaintiff intend to move an application for default judgment in terms of Rule 15).
- c) Aforesaid application must be set down in terms of the Rules and Practice Directions.

JUDGMENT

PRINSLOO J:

Introduction

[1] The plaintiff instituted action against the defendant for a claim in terms of an oral agreement wherein the defendant agreed to sell the plaintiff immovable

property on condition that the plaintiff was to pay an amount to Nedbank Namibia Limited. The plaintiff allegedly performed as per the agreement and the defendant failed by breaching the terms of the agreement in allegedly failing and refusing to give transfer of the property into the plaintiff's name, despite demand. The defendant defended the action and the matter was resultantly allocated to a managing judge.

[2] The parties completed a joint case plan dated 25 October 2017 which the timelines suggested by the parties was made an order of court, indicating the following:

- a) The defendant is to deliver her plea and counterclaim if any on or before 30 October 2017.
- b) Defendant's discovery be delivered on or before 17 November 2017.

The defendant failed to deliver her plea and counterclaim as per the above court order.

[3] The plaintiff, with the reliance of Rule 54 (3) that the defendant is barred from delivering a plea or counterclaim, proceeded to set the matter down for default judgment on 30 November 2017. On receipt of the default judgment application, the defendant filed an application for condonation for its non-compliance with court order dated 26 October 2017 and thereafter launched a further application seeking the upliftment of the bar. The plaintiff opposes these applications.

Submissions of the parties

Defendant

[4] The defendant submits that after the draft case plan was sent to the plaintiff's legal practitioners and in which was adopted by court, the defendant's legal practitioners extended numerous requests to the defendant to obtain further instructions in respect to the filing of the plea and obtaining necessary evidence for discovery purpose with no success. On 14 November 2017, the defendant's legal practitioner successfully managed to get a hold of the defendant and consulted with her.

[5] On 16 November 2017, the defendant's legal practitioners handed over all files to another candidate at the firm, however at the time, she was on study leave due to the Legal Practitioner Qualifying Examinations.

[6] The defendant submits that the defendant's previous legal practitioner of record resigned at the end of November 2017 and that all the files of the firm were transferred to the current legal practitioner of record during the last week of November 2017. In this week, on the 28th of November 2017, the new legal practitioner of record received a notification on the E-Justice system that the plaintiff had filed an application for default judgment and it is only this day allegedly that the new legal practitioner of record became aware of the non-compliance of court order dated 26 October 2017. An application for condonation, extension and upliftment of bar together with the founding affidavits were filed accordingly.

[7] The defendant's legal practitioner, although admitting that a period of 21 days for the plea and counterclaim and 6 days for the discovery affidavit had lapsed from the date in which they were to be filed, submits that it must be acknowledged that a month has not yet passed in both instances, which in themselves portray the fact that the delay was not ill-founded or a blatant disregard of having them filed in time but merely a matter of receiving instructions in time. In this regard, the defendant's legal practitioner submits through the founding affidavit filed in support of the condonation application that numerous attempts were made to obtain further instructions from the defendant but the

defendant only became available at a later stage, providing for the delay occasioned.

[8] The defendant's legal practitioner further submits that the founding affidavits filed satisfactorily explain the non-compliance in that as soon as the delay was realized, attempts were promptly made to obtain instructions. The defendant's legal practitioner further submits that the defendant has a bona fide defence to the claim, hence her opposition to the plaintiff's claim and further that the attempt to remedy the non-compliance is aimed in utmost good faith.

[9] The defendant's legal practitioner further submits that the consequences of not granting the application for condonation would effectively close the doors of the court on the defendant which would cause significant prejudice to the defendant as the plea would not be considered by this court.

[10] With respect to the condonation for failure to comply with Rule 32 (9) and (10), the defendant's legal practitioner argued in her oral submissions that to dismiss the application altogether would be very harsh in the extreme without having dealt with the issues arising on the merits. The defendant's legal practitioner further submits that because the application was brought promptly, no prejudice will be suffered by the plaintiff and that any prejudice can be cured by an appropriate cost order. The defendant's legal practitioner further submits that the plaintiff and the defendant's legal practitioners were in contact regarding the late filing prior to the bringing of the application wherefore the plaintiff was also in a position to file a report in terms of Rule 32 (10).

[11] The defendant's legal practitioner further submits that the application for default judgment is defective in that it does not comply with Rule 15, Rule 32 (9) and (10) and Practice Directive 57, which on that ground is not properly before this court. The defendant's legal practitioner further submits that the application made by the defendant is *bona fide* and not with a reckless disregard for the court order but rather with the confidence that the defendant has good prospects of success.

The defendant's legal practitioner further submits that due to the amount claimed by the plaintiff, which is a large sum of money, it would be very harsh, unjust and against the administration of justice, if the defendant is not awarded the opportunity to bring its case before the court.

Plaintiff

[12] The plaintiff's legal practitioner submits that with respect to Rule 32 (9) and (10), the defendant has failed to provide explanation for the non-compliance in the founding papers and as a result, the two applications filed by the defendant are fatally defective.

[13] The plaintiff's legal practitioner further submits that the defendant's submissions on her non-compliance with Rule 32(9) and (10), have no merit. Rule 3(4) provides for considerations that the Court takes into account when applying the overriding object of case management. This would be relevant where the defendant has in fact sought condonation for not complying with Rule 32(9) and (10). It does not excuse the defendant from complying with Rule 32(9) and (10).

[14] Regarding the submission made by the defendant's legal practitioner that the offices of the defendant and the plaintiff were in contact regarding the late filing prior to the condonation applications, the plaintiff's legal practitioner submits that this is factually incorrect. The plaintiff's legal practitioner submits that the plaintiff's legal practitioner's secretary had a telephonic discussion with Mr Asser (as the assistant to the previous legal practitioner), in regard to the late plea, who undertook to revert, which he did not do. A follow-up email that was sent by the plaintiff's legal practitioner to the defendant's legal practitioners, to which no reply was received.

The plaintiff's legal practitioner submits that neither the telephone discussion nor email constitute the process envisaged in terms of the provisions of Rule 32(9) or compliance therewith. The plaintiff's legal practitioner submits that this in any event should have been addressed in a replying affidavit and not the defendant's heads of argument.

[15] The plaintiff's legal practitioner further submits that the defendant has made no factual allegations whatsoever on whether she has any defence to the plaintiff's claim and no defence whatsoever is disclosed. The plaintiff's legal practitioner further submits that the court cannot in the circumstances, exercise its discretion in favour of the defendant, considering the deficiency and defectiveness of the application. In the absence of such facts and evidence relevant to the prospects of success and any defence, the condonation application is fatally defective and stands to be dismissed with costs.

[16] The plaintiff's legal practitioner further submits that if the court is to find that the condonation application is not defective and addresses the defendant's prospects of success, the plaintiff's legal practitioner submits that mediation was conducted on 12 October 2017 already in this matter, for which purposes full instructions were already necessary. It is further after mediation where the defendant agreed to the timelines provided for in the case plan which was made an order of court. The plaintiff's legal practitioner further submits that by virtue of the case plan and the Order, the defendant and her representatives knew that the plea was due on 30 October 2017 and discovery was due on 17 November 2017. Despite having such knowledge already by 24 October 2017, no steps were taken to secure an extension or amendment of the time for delivery of the plea and discovery, either before or after such relevant due dates.

[17] In conclusion, the plaintiff's legal practitioner further submits that:

- a) The defendant has not provided a reasonable explanation for the delay and default;

- b) the application for condonation and upliftment of the bar is, in the circumstances, not bona fide and without disclosing any defence to the plaintiff's claim, only serves to delay the claim of the plaintiff;
- c) there has been a reckless or deliberate non-compliance with the Rules of Court;
- d) the defendant's case is patently unfounded;
- e) the plaintiff is prejudiced, and a costs order would not compensate the plaintiff for his prejudice in the circumstances;
- f) the defendant's application for condonation is fatally defective for a lack of compliance with Rule 32(9) and (10) and for failing to show good cause;
- g) the defendant has failed to make out a case for condonation and for the upliftment of the bar; the defendant has not discharged the onus on her and is not entitled to condonation and the upliftment of the bar; and
- h) in the circumstances the application for condonation and upliftment of the bar stands to be dismissed, and the plaintiff is entitled to a costs order against the defendant, such costs to include the costs of one instructing and one instructed counsel.

The law applicable

On compliance with Rule 32(9) and (10)

[18] The first hurdle that the defendant must cross in this application is compliance with Rule 32(9) and (10).

[19] The condonation application and the application for the upliftment of the bar is interlocutory in nature and falls under the provisions of Rule 32 and the Rule 32(9) and (10) is therefore applicable to the application launched by the defendant

[20] Rule 32 regulates interlocutory matters and applications for directions read as follows:

‘(9) In relation to any proceeding referred to in this rule, a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication by the court.

(10) The party bringing any proceeding contemplated in this rule must before, instituting the proceeding, file with the registrar details of the steps taken to have the matter amicably resolved as contemplated in subrule (9) without disclosing privileged information.’

[21] The provision of Rule 32(9) and (10) is peremptory in that it requires the attempt to amicably resolve the dispute before the interlocutory application is launched.

[22] In the matter of *Old Mutual Life Assurance Company of Namibia Ltd v Hasheela*¹ where Masuku J stated the following on substantial compliance with the rule:²

‘In the instant case, the purpose of the subrules in question, as stated earlier, is to ensure that in interlocutory proceedings, the parties seek to first amicably resolve the dispute before setting it down for determination by the court. It is clear from what I have said above that that purpose was met and the only deficiency was not placing the evidence of the attempts to amicably resolve the matter before the registrar. I therefore find that there

¹(I 2359-2014) [2015] NAHCMD 152 (26 June 2015)

² Paragraph [22]

has been substantial compliance with rule 32 (9) and (10) and for that reason, this court is at large to consider the interlocutory application without further ado.’

[23] There is a myriad of cases emanating this court emphasising the need to comply with the rules in this regard. A non-compliance with process, in terms of particularly Rule 32(9), renders an interlocutory application defective and such an application stands to be struck from the roll³. The applicant failed to comply with this rule in its entirety and from my reading of the founding papers the applicant also did not deal with the issue of this non-compliance at all.

[24] Although the defendant failed to cross the first hurdle in her application, the court will proceed to discuss the issue of condonation briefly as there have been a disregard for the court rules and court orders through out.

Application for condonation

[25] The granting of condonation is not just for the asking. The Rules of Court and court orders are to be observed to facilitate strict compliance with them to ensure efficient administration of justice.⁴

[26] In the matter of *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others*⁵ 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:⁶

‘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

³ *Bank Windhoek Limited v Benlin Investment CC* [2017] NAHMD 78 (15 March 2017); *Naanda v Edward (I 2097//2014)* [2017] NAHCMD 107 (22 March 2017)

⁴ *S v Kakolo* 2004 N\$ 7 at 10 E- C.

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

⁶ Para 12 and 13 of the judgment.

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.'

[27] 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.'

[28] In order to succeed with an application for condonation the defendant must file an affidavit explaining satisfactorily the non-compliance with the rules. This explanation must enable the court to fully understand how the delay came about. This however only deals with one aspect of the application for condonation.

[29] In the matter of *Balzer v Vries*⁷ the Supreme Court pronounced itself on this matter as follows:

'[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.'

[30] None of this has effectively been dealt with by the defendant. The defendant makes no factual allegations whatsoever or whether she has any defence to the plaintiff's claim. In the absence of such facts the court not exercise her discretion in favour of the defendant.

⁷ 2015 (2) NR 547 (SC) at 661 J – 552 F.

[31] Therefore, in the absence of the facts and evidence relevant to the prospects of success and any defences, the condonation application is fatally defective and stands to be dismissed.

[32] Before I conclude on the issue of condonation, I need to point out that a variety of explanations were offered for the non-compliance of the court order of 26 October 2017 but at the end of the day this appear to be a comedy of errors on the part of defendant's legal practitioners. Seemingly one of the reasons could be that when the firm's files were, as per submission, being transferred to the "new" legal practitioner, the previous legal practitioner failed or neglected to fully inform the legal practitioner taking over the file on the urgency of this matter, with respect to the delayed filing of the plea and discovery, etcetera. Then to top it with the proverbial cherry on the cake, the defendant failed to timeously furnish her counsel with proper instructions as well.

[33] This court had regard to the matter of *Katjiamo v Katjiamo and Others*⁸ where Damaseb DCJ discussed the effect of negligence or remissness of a legal practitioner on a litigant as follows:

'The negligence and remissness of a legal practitioner are only to be visited on the litigant where he or she contributed thereto in some way, was aware of the steps that need to be taken in furtherance of the prompt conduct of the case, or through inaction contributed to the matter stalling and thus impeding the speedy finalisation of a contested matter. The following dictum by Steyn CJ in *Saloojee and Another NNO v Minister of Community Development*⁹ has been cited with approval by our courts:

"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 a disastrous effect upon the observance of the Rules of this Court."

⁸ 2015 (2) NR 340 (SC).

⁹ 1965 (2) SA 135 (A) at 141C; cited with approval in, for example, *Leweis v Sampoio* 2000 NR 186 (SC) at 193; *De Villiers v Axiz Namibia (Pty) Ltd* 2012 (1) NR 48 (SC) at 57 para 24.

[34] To refuse the application for condonation is a drastic step and is not one that I am taking lightly as the court is mindful of the prejudice that will be suffered by the plaintiff and the defendant in this regard. It need to be understood that it is not the intent of this court to punish parties for the neglect or disregard of their legal practitioners to comply with court directives, but it cannot be avoided. As officers of this court, legal practitioners are expected to ensure that court orders are complied with as ordered, in order to ensure the smooth operation of justice and ensuring that their client's case is executed as per instructions. Failure thereof can and will have dire consequences, as those evident in this matter.

Conclusion

[35] With the above discussion in mind, I am inclined to agree with the submissions made by the plaintiff in that the defendant failed to meet the requirements for the relief sought.

[36] My order is therefor as follows:

- a) The application for condoning the defendant's failure to comply with court order dated 26 October 2018 is refused with costs, cost of one instructed and one instructing counsel.
- b) Matter is postponed to 24 May 2018 at 15:00 for Status Hearing (Reason: Plaintiff intend to move an application for default judgment in terms of Rule 15).
- c) Aforesaid application must be set down in terms of the Rules and Practice Directions.

J S Prinsloo

APPEARANCES

PLAINTIFF:

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J McCleod

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