

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 638/2016

In the matter between:

SINCO INVESTMENTS TWENTY SIX (PTY) LTD

PLAINTIFF

and

M & P INVESTMENTS CC t/a QUALITY PHARMACY

(Registration number: cc 2009/5335)

FIRST DEFENDANT

MUONDE MURIDZO (ID 79022210669)

SECOND DEFENDANT

Neutral citation: *Sinco Investments Twenty Six (Pty) Ltd v M & P Investments CC t/a Quality Pharmacy (Registration number: cc 2009/5335) (I 638/2016) [2018] NAHCMD 15 (5 February 2018)*

Coram: OOSTHUIZEN J

Heard: 7 DECEMBER 2017

Delivered: 5 FEBRUARY 2018

Flynote: Application for sanctions by defendants.
Application for condonation by plaintiff.

Summary: Plaintiff's explanation for its delays unacceptable. Condonation refused. Defendants' sanctions application excessive.

ORDER

Having heard **Ms De Jager**, for the plaintiff and **Ms Visser**, for the defendants on 7 December 2017 –

IT IS ORDERED THAT:

1. Plaintiff's condonation application is dismissed.
2. Defendants' sanction application is granted to the extent set out hereinafter.
3. Plaintiff's summons and particulars of claim are struck.
4. Plaintiff's defence to defendants' counterclaim and its plea thereto are allowed to remain in place.
5. Plaintiff shall pay the costs of the defendants' opposition to the condonation application
6. Plaintiff shall pay the costs of the defendants' occasioned by plaintiff's non-adherence to the court order of 21 April 2017, plaintiff's failure to adhere to the rules, 60% of the costs of the sanctions application, defendants' appearance on 11 September 2017, and the defendants' resistance to the notice of intention to amend.
7. Plaintiff shall also pay the defendants costs for preparation and filing their heads of argument, appearance and argument on 7 December 2017.

8. The costs of 7 December 2017 is limited to 5 hrs or half a day fee.
9. All the above costs will make provision for one instructing and one instructed counsel and shall not be capped by the provisions of Rule 32 (11) of the High Court Rules.
10. A status hearing is called for 26 February 2018 at 14h00.

JUDGMENT

OOSTHUIZEN J:

[1] The parties are referred to as in the main action.

[2] Defendants brought a sanctions application on 7 September 2017 wherein they asked for an order that the plaintiff's pleadings, including plaintiff's defence to the defendants counterclaim be struck and the dismissal of plaintiff's claim as well as final judgement in favour of defendants.

[3] Plaintiff then applied for condonation of its non-compliance with the court order of 21 April 2017.

[4] Defendant pray for costs against the plaintiff for plaintiff's non-compliance, costs of plaintiff's suit, the costs of defendants' counterclaim and the costs of the applications, such costs to include the costs of one instructing and one instructed counsel.

[5] During argument the defendants conceded that they cannot obtain final judgment in their counterclaim without the leading of evidence. It also became clear that plaintiff's remiss did not affect its pleadings to the counterclaim.

[6] Plaintiff in this matter is a Namibian registered private company. Plaintiff however elected to instruct South African attorneys who appointed Namibian Legal Practitioners as their local correspondents. However plaintiff allowed its South African attorney to take control of the matter and to do its litigious work to the exclusion of the Namibian attorneys.

[7] Plaintiff's preferred South African attorney just could not manage the plaintiff's case satisfactory and kept this Court and the administration of plaintiff's case hostage to his own alleged very busy national schedule of appearances and legal work from the Cape to Gauteng and missed deadlines itself has chosen. In the process plaintiff did not abide by court orders and disregard this Court's rules.

[8] The South African attorney then valiantly took all the blame (despite the fact that plaintiff's executive went on leave at a crucial stage of plaintiff's case) and proffered that plaintiff will pay all the costs occasioned by its attorneys non-compliances.

[9] The case was case managed during 2016 and a trial date was obtained for May 2017. Plaintiff, during April 2017 then intimated towards defendants that it was not ready for trial and that it intended to amend its particulars of claim.

[10] Defendants were not adverse to the request by plaintiff and the parties approached the court for sanctioning their inter partes arrangement and to vacate the trial dates. The court heeded the request without insisting on a rule compliant application in terms of rule 96 (3) of the Namibian High Court rules and issued an order on 21 April 2017:

'IT IS ORDERED THAT:

1. The pre-trial status hearing scheduled for 24 April 2017 at 14:00 is vacated.
2. The status hearing scheduled for 25 April 2017 at 08:30 is vacated.

3. The trial date scheduled for 15 – 19 May 2017 is vacated.
4. Any and all pre-trial orders emanated from the proposed pre-trial order dated 15 September 2016 is/are set aside including the court order dated 20 September 2016.
5. The fresh pre-trial order dated 6 April 2017, in particular paragraph 1 to 9 thereof, is set aside.
6. The plaintiff's plea to the counterclaim is amended by substituting the heading "*Ad paragraphs 11.1 & 11.2*" on page 4 thereof with the heading "*Ad paragraphs 11.4 & 11.5*".
7. The plaintiff shall deliver its notice of intention to amend its particulars of claim on or before 24 May 2017.
8. Should the defendants wish to object to the plaintiff's aforesaid notice of intention to amend, it shall deliver its objection on or before 8 June 2017.
9. Should the defendants not object as aforesaid, the plaintiff shall deliver its amended particulars of claim on or before 22 June 2017.
10. The defendants shall file their amended plea, if any, on or before 13 July 2017.
11. The plaintiff shall file its supplementary discovery affidavit on or before 24 May 2017.
12. The plaintiff shall provide the defendants with a bundle of its supplementary discovered documents on or before 24 May 2017.
13. The defendants shall deliver its supplementary discovery affidavit on or before 31 May 2017.
14. The defendants shall provide the plaintiff with a bundle of their supplementary discovered documents on or before 31 May 2017.
15. Plaintiff and defendants shall, if they so wish, deliver their amplified witness statements as well as their further witness statements, if any, on or before 18 August 2017.
16. Parties shall file their substitute proposed pre-trial order on or before 4 September 2017.

17. The matter is postponed to Monday, 11 September 2017 at 14h00 for a pre-trial conference.
18. The plaintiff shall pay the defendants' taxed costs on a party and party scale occasioned by the chamber meetings held on 6 April 2017 and 18 April 2017 with the Managing Judge.
19. The plaintiff shall pay the defendants' taxed costs on a party and party scale occasioned by the above mentioned amendment of the particulars of claim, such costs to include the costs of one instructing and one instructed counsel.'

[11] In *Petrus v Roman Catholic Archdiocese*, 2011 NR 637 at para [10] O'Regan AJA unequivocally stated:

"In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant's prospects of success on the merits, save in cases of "flagrant non-compliance with the rules which demonstrate a "glaring and inexplicable disregard" for the processes of the court."

[12] In *Balzer v Vries* 2015(2) NR 547 (SC) at 661 J – 552 F the Supreme Court once again pronounced itself on this matter and said:

"[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."

[13] Plaintiff's explanation for its delay is unacceptable and insufficient in the circumstances.

[14] In the result the following order is made –

14.1 Plaintiff's condonation application is dismissed.

14.2 Defendants' sanction application is granted to the extent set out hereinafter.

14.3 Plaintiff's summons and particulars of claim are struck.

14.4 Plaintiff's defence to defendants' counterclaim and its plea thereto are allowed to remain in place.

14.5 Plaintiff shall pay the costs of the defendants' opposition to the condonation application

14.6 Plaintiff shall pay the costs of the defendants' occasioned by plaintiff's non-adherence to the court order of 21 April 2017, plaintiff's failure to adhere to the rules, 60% of the costs of the sanctions application, defendants' appearance on 11 September 2017, and the defendants' resistance to the notice of intention to amend.

14.7 Plaintiff shall also pay the defendants costs for preparation and filing their heads of argument, appearance and argument on 7 December 2017.

14.8 The costs of 7 December 2017 is limited to 5 hrs or half a day fee.

14.9 All the above costs will make provision for one instructing and one instructed counsel and shall not be capped by the provisions of Rule 32 (11) of the High Court Rules.

14.10 A status hearing is called for 26 February 2018 at 14h00.

GH Oosthuizen
Judge

APPEARANCES

PLAINTIFF: Ms De Jager
Instructed by Fisher, Quarmby & Pfeiffer, Windhoek

DEFENDANTS: Ms Visser
Instructed by Dr Weder, Kauta & Hoveka Inc, Windhoek