

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-ACT-DEL- 2017/03952

In the matter between:

AUTOVERMIETUNG SAVANNA CC

PLAINTIFF

and

GIDEON NANGOLO

FIRST DEFENDANT

OLUZIZI CONSTRUCTION CC

SECOND DEFENDANT

Neutral citation: *Autovermietung Savanna CC v Nangolo* (HC-MD-CIV-ACT-DEL-2017/03952) [2018] NAHCMD 351 (16 October 2018)

Coram: USIKU, J

Heard on: 16 October 2018

Delivered: 16 October 2018

Released: 06 November 2018

Flynote: Civil Procedure – Interlocutory application – Application for condonation – Non-compliance with court orders – Unacceptable explanation for non-compliance – Application for condonation dismissed with costs.

Summary: The Defendants applied for condonation for non-compliance with court orders dated 01 June 2017 and 16 August 2017. It was argued on their behalf that a filing clerk at the Defendants' legal practitioner's office misplaced the file, hence the delay in filing the plea. However no confirmatory affidavit deposed to by the said filing clerk was filed. Explanation for the delay in filing the application does not fully cover the period of delay. Prospects of success not adequately covered.

Held: Application dismissed with costs

ORDER

1. The Defendants' application for condonation is hereby dismissed;
2. The Defendants are ordered to pay the Plaintiff's costs of opposing the application;
3. The matter is postponed to 07 November 2018 at 15:15 for hearing of Plaintiff's application for default judgment, if any;
4. The Plaintiff is directed to file its application, in that regard if any, on or before 31 October 2018.

RULING

USIKU, J:

Introduction

[1] This is an opposed interlocutory application in which the Defendants seek condonation for their non-compliance with a court orders dated 01 June 2017 and 16 August 2017 with regard to the time limits for the filing of the Defendants' plea and for the filing of the application for condonation, respectively. The Defendants further pray for an order uplifting the automatic bar and granting them leave to file plea and prosecute their defence.

[2] The facts that gave rise to the present dispute appear hereunder. By combined summons issued on 30 November 2016, served on the Defendants on 07 December 2016 the Plaintiff sued the Defendants for an amount of N\$ 336,080, which is alleged to represent damages suffered by the Plaintiff as a result of a motor vehicle collision between the Plaintiff's vehicle and the 2nd Defendants' vehicle. The Plaintiff further claimed interest on the aforesaid amount and costs.

[3] By court order dated 1st June 2017, the Defendants were directed, among other things, to file their plea on or before the 17 June 2017. This, the Defendants did not do. There is no dispute that the Defendants failed to file plea by the 17 June 2017.

[4] On 16 August 2017 this court ordered the Defendants to file their application for condonation for the non-compliance with the court order dated the 1st June 2017 and for the upliftment of the automatic bar, on or before the 23 August 2017. However, the Defendants filed the envisaged application only on 20 September 2017. Also there is no dispute that the Defendants are in default of having not complied with the court order dated 16 August 2017.

[5] On or about the 28 March 2018, before the aforesaid application for condonation could be heard, the Defendants indicated that they withdraw their application for

condonation filed on 20 September 2017 and that they tender costs occasioned by the aforesaid application.

[6] On or about 17 May 2018 the Defendants indicated they wished to file a fresh application for condonation for the non-compliance with the court orders dated 1st June 2017 and 16 August 2017 and the Defendants sought directions in respect of the dates for the exchange of pleadings and documents and the time for the hearing of the matter. The order giving such directions was granted, dated 17 May 2018. In terms of this order the Defendants were directed, among other things, to file their intended application for condonation on or before the 28 May 2018. The Defendants did not so, however, they filed the application on the 29 May 2018.

The application

[7] The application presently serving before this court is filed on 29 May 2018, and the Defendants seek an order:

- (a) condoning the Defendants' non-compliance with the court orders dated 1st June 2017 and 16 August 2017;
- (b) uplifting the automatic bar and granting the Defendants leave to file plea and prosecute their defence.

[8] The legal practitioner for the Defendants, Shimue Benjamin Mbudje ("Mr Mbudje"), deposed to the affidavit in support of the application. As to why the plea of the Defendants was not filed, Mr Mbudje explained that, the Defendants' file was, after the case plan hearing, misplaced by a filing clerk, and has not been found to this date. As a result, the matter was not diarized and was not brought to the attention of the legal practitioner and consequently the plea was not filed.

[9] As to why the Defendant did not file the condonation application by the 23 August 2017, Mr Mbudje explained that, on or about the weekend of Saturday 19 August 2017 he fell ill. He was booked-off for the period of Monday the 21 August 2017 to Friday the 25 August 2017. He had a follow-up consultation with the doctor the following Monday the 28 August 2017. During the week of Monday the 28 August 2017 he was only sporadically in office as he was still very ill. He only returned to work the following Monday the 04 September 2017 and could only attend to the filling of the application on the 20 September 2017.

[10] On the issue of whether or not the Defendants have a *bona fide* defence to the Plaintiff's claim, Mr Mbudje contends that the 1st Defendant did not cause the motor vehicle collision in question, rather, the accident in question occurred as a result of negligence on the part of the driver of the Plaintiff's vehicle. Mr Mbudje further argues that the 2nd Defendant's defence to the Plaintiff's claim is that the 1st Defendant drove the vehicle in question without permission of the 2nd Defendant and outside the scope of his (1st Defendant's) employment.

[11] In opposition, the legal practitioner for the Plaintiff, Francois Gustav Erasmus, ("Mr Erasmus") deposed to an affidavit on behalf of the Plaintiff. He contends that, from the explanation given on behalf of the Defendants, it is apparent that the Defendants did not pay any attention to the matter between 02 June 2017 and 16 August 2017. Mr. Erasmus further argues that there is no explanation alternatively, no acceptable explanation was given, by the deponent to the Defendants' affidavit for the failure to file the application immediately after illness has ceased.

[12] Mr. Erasmus contends that the Defendants failed to raise adequate and bona fide defence to the merits of the Plaintiff's claim. The collision in question occurred on a working day, and the Defendants do not give explanation how the 1st Defendant came into possession of the 2nd Defendant's vehicle on a business day without the 2nd Defendant permission, nor do the Defendants explain the nature of the personal business that the 1st Defendant was attending to, on a working day. In addition the 2nd

Defendant does not explain the steps it took subsequent to the collision as the result of the unauthorized use of its vehicle.

[13] Mr. Erasmus submitted that the Defendants have throughout failed to comply with the Rules and orders of this court and chronicled four separate instances when this had occurred, namely that:

- a) the combined summons were served on the Defendants on 07 December 2016, and the Defendants gave notice of intention to defend on 13 March 2017, some 47 court days late, in breach of Rule 14(1);
- b) by court order dated 1st June 2017 the Defendants were ordered to file plea by 17 June 2017, and they have not done so;
- c) by court dated 16 August 2017, the Defendant were ordered to file their condonation application by 23 August 2017, and they did not do so;
- d) by court order dated 04 October 2017 the Defendants were ordered to file their heads of argument in respect of the condonation application, by 07 November 2017, and they did not do so.

The legal principles

[14] In the matter of *Santam Namibia Limited v Ribs Logistics CC* (I551/2016) [2017] NAHCMD 143 (11 May 2017), at para [19], Prinsloo AJ as she then was, dealing with a similar matter had the following to say:

'In *Telecom Namibia Limited v Michael Nangolo and 43 Others*, Damaseb J.P identified the following as principles guiding applications for condonation:

1. It is not mere formality and will not be had for the asking. The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.
2. There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.
3. It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.
4. The degree of delay is a relevant consideration.
5. The entire period during which the delay had occurred and continued must be fully explained.
6. There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented. (Legal practitioners are expected to familiarize themselves with the rules of court.)
7. The applicant for condonation must demonstrate good prospects of success on the merits. But where the non-compliance with the rules of court is flagrant and gross, prospects of success are not decisive.
8. The applicant's prospect of success is in general an important though not a decisive consideration. In the case of *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*, Hoexter JA pointed out at 789I-J that the factor of prospects of success on appeal in an application for condonation for the late notice of appeal can never, standing alone, be conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with rules, should be considered.
9. If there are no prospects of success, there is no point in granting condonation.'

[15] The above principles apply to the present matter with equal force.

Application of the legal principles to the present facts

[16] The first issue for determination by this court is whether the Defendants have given a satisfactory explanation for their non-compliance with the court order dated 1st June 2017. The explanation given by the Defendants is that the Defendants' file was, after the case planning conference, misplaced by a filing clerk and as a result, the matter was not diarized and was not brought to the attention of the legal practitioner, and consequently the plea was not filed.

[17] The Defendants' founding affidavit does not state the measures that the Defendants' legal practitioners have put in place to ensure that misplacement of files is a rare occurrence. Furthermore, the deponent to the Defendants' affidavit does not state how he acquired knowledge that the file got into the possession of the "filing clerk" and that the filing clerk had misplaced the file. There is no confirmatory affidavit filed by the filing clerk and there is no explanation why such affidavit was not obtained. In my view, a party that relies on another party's conduct to justify its own conduct should file an affidavit from the defaulting party explaining the part he/she played in the matter. Such a confirmatory affidavit is crucial in determining whether or not the explanation given for the non-compliance with the court order, is a reasonable explanation.

[18] I am of the opinion that the explanation put forward by the Defendants for their non-compliance with the court order dated the 1st June 2017 is not an acceptable explanation and the court declines to accept that explanation.

[19] As regards the non-compliance with the court order dated the 16 August 2017, the Defendants, have not given a full and detailed explanation on why the application was not filed during the period on which the Defendant legal practitioner was not ill; namely the periods 17-18 August 2017 and 04-19 September 2017. In that regard, the Defendants have not fully explained the entire period of the delay. The explanation covering the entire period of the delay is necessary for the court to determine whether the delay was reasonable in the circumstances.

[20] As was stated earlier, the application that the court is presently considering was launched on 29 May 2018, after the Defendants opted to abandon the earlier application filed on 20 September 2017. For any delay, there should be an acceptable explanation for such delay. There is no explanation at all for the delay occasioned thereby or for the reasons for abandoning the earlier application and for re-launching a similar application in May 2018.

[21] As far as a disclosure of a bona fide defence is concerned, I am not satisfied that the Defendants have disclosed the nature and the grounds of their respective defence(s) and the material facts upon which they rely for such defence. The 1st Defendant has not set out the grounds and the material facts upon which he relies for denying negligence in the matter. In regard to the 2nd Defendant, it has not set out the grounds and the material facts upon which it relies for its defence that the 1st Defendant's drove its vehicle without its permission and outside the scope of 1st Defendant's employment.

Conclusions

[23] In the result, I am of the opinion that the Defendants have not made out a case for the relief they seek, and their application accordingly stands to be dismissed with costs.

[24] I accordingly make an order in the following terms:

1. The Defendants' application for condonation is hereby dismissed;
2. The Defendants are ordered to pay the Plaintiff's costs of opposing the application;
3. The matter is postponed to 07 November 2018 at 15:15 for hearing of Plaintiff's application for default judgment, if any;

4. The Plaintiff is directed to file its application, in that regard if any, on or before 31 October 2018.

B Usiku
Judge

APPEARANCES:

PLAINTIFF

F G Erasmus
of Francois Erasmus & Partners,
Windhoek

DEFENDANT

S B Mbudje
of Mbudje and Brockerhoff Legal
Practitioners, Windhoek