



**Neutral citation:** *Advance Refrigeration and Electrical Services CC v Nickelback Bricks CC* (HC-MD-CIV-ACT-CON- 2018/01437) [2018] NAHCMD 371 (19 November 2018)

**Coram:** USIKU, J

**Heard on:** 19 November 2018

**Delivered:** 19 November 2018

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**ORDER**

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1. The application for condonation for late filing of the answering affidavit is struck from the roll on account of Plaintiff's non-compliance with Rule 32(9) and (10);
2. Case No HC-MD-CIV-ACT-CON-2018/01437 is transferred to the Northern Local Division of the High Court of Namibia and the Registrar is directed to do all things necessary to give effect hereto;
3. Case No. HC-MD-CIV-ACT-CON-2018/01437 is consolidated with case HC-NLD-CIV-ACT-CON-2017/00252 where it shall be proceeded with in accordance with the directions of the managing judge in case No HC-NLD-CIV-ACT-CON-2017/00252;
4. The Plaintiff is directed to pay the Defendant's costs of the application for transfer and consolidation, as well as of opposing the application for condonation, such costs to include the costs of one instructing and one instructed counsel.
5. The main is removed from the roll of the main Division of the High Court

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**REASONS: PRACTICE DIRECTIONS 61 (9)**

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USIKU J:

Introduction

[1] In the present matter, the Defendant in the main action, (Case No. HC-MD-CIV-ACT-CON-2018/01437) applies for an order to:

- (a) transfer the action to the High Court of the Northern Local Division, and to
- (b) consolidate the present action with the action under the Case No. HC-NLD-CIV-ACT-CON-2017/00252,

together with costs.

[2] The reasons advanced for the application for the transfer include the following:

- (a) both parties and witnesses are resident in the North;
- (b) it will be convenient to all parties concerned if the action is transferred to the Northern Local Division.

[3] The reasons advanced by the Defendant for the aforesaid matter to be consolidated include the following:

- (a) the parties in both matters are substantially the same,
- (b) both actions are based on agreements substantially between same parties, and that,

(c) it will be convenient to all parties concerned if the two actions are consolidated.

[4] The Plaintiff had filed its answering affidavit to the application for the transfer and consolidation, late. At the hearing, it was common ground that the application for condonation for the late filing of the answering affidavit was filed with the Plaintiff without having complied with the provisions of Rule 32(9) and (10). The application for condonation by the Plaintiff was, therefore, struck from the roll on that account and the application for the transfer of the action and the application for consolidation proceeded on an unopposed basis.

#### The nature of the actions

[5] In regard to Case No. HC-MD-CIV-ACT-CON-2018/01437 the Plaintiff (Advanced Refrigeration) claims from the Defendant (Nickelback Bricks) payment in the amount of N\$ 187,308.81 together with ancillary relief, arising from a partly oral and partly written agreement, to supply goods and render electrical services by the Plaintiff to the Defendant. The contract was entered into on or about 20 November 2016 at Oshakati.

[6] In regard to case No HC-NLD-CIV-ACT-CON-2017/00252 the Defendant (Nickelback Bricks) claims from the Plaintiff (Advanced Refrigeration) and from Santiago Investments Twenty Nine CC and Oshana Power Lines CC, payment in the amount of N\$ 1,111,158.00, together with ancillary relief, arising from a partly written and partly oral contract in terms of which the Defendant had allegedly manufactured and erected a steel structure on Erf 1330, Oshakati at the instance of Advanced Refrigeration, Santiago Investments and Oshana Power Lines. The contract was entered into on or about 30 November 2017, at Oshakati.

#### Analysis

[7] I have read the pleadings and documents filed of record and have listened to oral argument.

[8] From the evidence given and oral argument advanced, it appears to me clear that:

- (a) the cause of action in respect of both matters, arose in the North;
- (b) the parties in both actions, ordinarily reside in the North;
- (c) witnesses in respect of both actions, by and large, reside in the North;
- (d) the place of execution of the ultimate judgment in respect of both matters, will most likely take place in the North;
- (e) all parties in respect of both actions are being represented by the same set of legal practitioners.

[9] I am of the considered view that it will be convenient and reasonable in the circumstances that trial in the present action proceed in the Northern Local Division.

[10] Insofar as the application for consolidation is concerned, it appears to me that the parties are for all intents and purposes the same. Both actions are concerned with a contract between, by and large, the same parties. Determining the two actions separately will result in a multiplicity of actions with more than one court being asked to decide on facts and issues which essentially involve same parties.

[11] In my opinion it would be convenient to the parties and to the interest of justice to consolidate the two actions. I do not find any prejudice that would be suffered by anyone of the parties (and no convincing instance of a possible prejudice was suggested to me), if the two actions were to be consolidated.

[12] In the result, I therefore make the following order:

1. The application for condonation for late filing of the answering affidavit is struck from the roll on account of Plaintiff's non-compliance with Rule 32(9) and (10);
2. Case No HC-MD-CIV-ACT-CON-2018/01437 is transferred to the Northern Local Division of the High Court of Namibia and the Registrar is directed to do all things necessary to give effect hereto;
3. Case No. HC-MD-CIV-ACT-CON-2018/01437 is consolidated with case HC-NLD-CIV-ACT-CON-2017/00252 where it shall be proceeded with in accordance with the directions of the managing judge in case No HC-NLD-CIV-ACT-CON-2017/00252;
4. The Plaintiff is directed to pay the Defendant's costs of the application for transfer and consolidation, as well as of opposing the application for condonation, such costs to include the costs of one instructing and one instructed counsel.
5. The main is removed from the roll of the main Division of the High Court.

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B Usiku  
Judge

## APPEARANCES:

## PLAINTIFF:

M Mwandingi  
of Mwandingi Attorneys, Windhoek

## DEFENDANT:

SJ Jacobs (with him Z Majiedt)  
instructed by Engling, Stritter & Partners,  
Windhoek