

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON CONDONATION

Case no: I 924/2016

In the matter between:

SITTA ELKE VOIGTS

PLAINTIFF

and

HARALD GUNNAR VOIGTS

DEFENDANT

Neutral Citation: *Voigts v Voigts* (I 924/2016) [2018] NAHCMD 46 (28 February 2018)

CORAM: PRINSLOO J

Heard: 26 February 2018

Delivered: 28 February 2018

ORDER

1. The plaintiff's condonation application in respect of prayers 1, 2 and 3 of the Notice of Motion is dismissed.
2. Plaintiff must file an affidavit on or before 05 March 2018 setting out why her pleadings should not be struck and why the plaintiff should not be barred from prosecuting her claims in terms of Rule 53(2) (a) and (b) in terms of the Rules of Court.
3. The plaintiff is to pay the costs of the application and limited in terms of Rule 32 (11).
4. Defendant is instructed to index and paginate the court file on or before 05 March 2018.
5. The trial date of 06 – 09 March 2018 is confirmed.

RULING IN TERMS OF PD 61 OF THE PRACTICE DIRECTIVES

PRINSLOO J:

[1] This ruling is premised on the condonation application by the plaintiff for various non-compliances, namely being the late filing of witness statements of the plaintiff, the

late indexing of the court file and the late filing of this application. For purposes of this ruling, I will refer to the parties as in the main action.

Factual Background

[2] For purposes of this ruling it is important to consider that the application before court for condonation is not an isolated event which can be gleaned from the case management history. Two prior applications for condonation were served before court for failing to comply with court orders.

[3] On 08 June 2017 the proposed pre-trial order was adopted and made an order of court. In terms of the pre-trial order the plaintiff had to file her witness statement on or before 28 July 2017 and the defendant had to file his witness statement on or before 11 August 2017. Plaintiff was further ordered to index and paginate the court file on or before 31 August 2017. However, on 27 July 2017, the plaintiff's legal practitioner informed the defendant's legal practitioner that she will not file witness statements since the parties were engaged with settlement negotiations.

[4] On the said date the matter was also set down for trial for 06 – 09 March 2018. A pre-trial status hearing was scheduled to confirm the trial readiness of the matter. On 07 February 2018 the parties filed a status report indicating that the matter is not ready for trial due to the fact that the plaintiff failed to index and paginate the court file and because the plaintiff failed to file her witness statement which was due by 28 July 2017. Plaintiff however proceeded to file her statement on 07 February 2018 without leave of court.

Issues in dispute

[5] The issue in dispute is now whether the plaintiff has met the requirements for a condonation application and whether the defendant will suffer prejudice if the condonation is granted by this court.

Plaintiff's submissions

[6] The plaintiff referred to a plethora of decisions on condonation which have become trite in our jurisdiction. The plaintiff, in concluding on the case law, referred to *Balzer v Vries*¹ where the Supreme Court held that:

“[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.”

[7] The plaintiff submits that there are three main reasons for which she did not comply with the court order instructing her to file her witness statements and index and paginate the court file, namely being:

7.1. She was desperately pursuing a settlement with the defendant in order not to have to go on trial and incur massive legal costs.

7.2. She did not have the necessary funds to pay the required deposit into her legal practitioner's trust account, and

7.3. She had to work outside Windhoek, which made communication with her legal practitioner very difficult during the period of June 2017 – December 2017.

[8] The plaintiff further submits that in light of the fact that the plaintiff and the defendant have been divorced since October 2013 and struggling to get the defendant to honour the terms of their ante-nuptial agreement, the plaintiff avers that she is financially struggling and desperate to settle the matter out of court without having to

¹ 2015 (2) NR 547 (SC) at 661J – 552F.

incur hefty legal costs associated with trial and ancillary thereto. In this vein, the plaintiff further submits that the defendant is using the plaintiff's dire financial circumstances to eventually wear her down, give up and withdraw the action entirely.

[9] The plaintiff further submits that with regards to the settlement negotiations, the plaintiff and the defendant had various oral agreements in which the defendant agreed to settle with the plaintiff, but these have not seemed to be fruitful as the plaintiff may have expected. In the result, the plaintiff came to the realisation that she has no other option but to proceed to trial. The plaintiff then further submits that at this point of realisation, another delay was occasioned by her not having sufficient funds to continue with the matter. The plaintiff submits that by the time she had the necessary funds, it was at the end of the year and her legal practitioner's office had closed for the festive season.

[10] The plaintiff submits in concluding that as the said witness statement, indexing and pagination of the file had been done on 7 February 2018 and the defendant in failing to file his witness statement to date, there should be no reason to vacate the trial dates set down in this matter as the defendant will not suffer any prejudice.

Defendant's submissions

[11] The defendant is of the position that the plaintiff should not be granted condonation for the late filing and indexing-pagination of the court file as the plaintiff wilfully and intentionally disregarded this court's order dated 8 June 2017 by instructing her legal practitioner not to file any witness statement. The defendant further submits that the plaintiff has had a sequence of non-compliances in court orders and likens the plaintiff's non-compliances of court orders to a habit since the divorce proceedings from October 2011 to October 2013. The defendant makes reference to the defendant's provisional witness statement accounting for all the non-compliances by the defendant, which, on one occasion amongst many and due to a non-compliance with a case management order dated 8 August 2012, her counter-claim was struck by Damaseb JP

on 12 October 2012, after the court granted the plaintiff another opportunity to file her counterclaim.

This in turn leads the defendant in making reference to *Swanepoel v Marais and Others*² where the court stated that:

“The Rules of Court are an important element in the machinery of justice. Failure to observe such rules can lead not only to the inconvenience of immediate litigants and of the courts but also to the inconvenience of other litigants whose cases are delayed thereby. It is essential for the proper application of the law that the Rules of Court, which have been designed for that purpose, be complied with. Practice and procedure in the courts can be completely dislocated by non-compliance.”

[12] With regards to the settlement negotiations as mentioned by the plaintiff, the defendant submits that during mediation proceedings on 2 December 2016, a possible settlement was on the table but it was subject to the approval of a third party. The defendant submits that the mediator adjourned proceedings to 9 December 2016 for the defendant to get in contact with the third party. Upon commencement of proceedings on 9 December 2016, the defendant informed the parties during the proceedings that the third party did not consent to the settlement, which resulted in the mediation failing at that point. The defendant further submits that the plaintiff's submission that in September 2017 she was still waiting for an answer from the defendant with regards to the third party's consent was unreasonable in the circumstances and there was no correspondence in that regard. The defendant submits that the settlement negotiations debate was a “ruse”.

[13] The defendant further submits that the plaintiff provided no reasonable explanation as to why the condonation application had to take seven months before it was brought before this court and that further, the court has granted the plaintiff on more than one occasion condonations for non-compliance with court orders.

² 1992 NR 1 at 2J-3A.

[14] In conclusion, the defendant submits that it is not sufficient to refer to a witness statement which is not yet before this court and which is in any event not under oath and furthermore that the plaintiff has no prospects of success in proving the settlement negotiations in which she highly relies on for the non-compliance.

The relevant law

[15] Factors relevant in determining condonation applications are: The extent of non-compliance, reasonableness of explanation offered, bona fides of the application, prospects of success on the merits of the case, importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.³

[16] One of the leading cases in this jurisdiction on applications for condonation was delivered, with clarity, by O'Regan AJA. in *Petrus v Roman Catholic Archdiocese*⁴ where the learned Supreme Court Judge made the following remarks:

'It is trite that a litigant seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. Moreover, it is also clear that a litigant should launch a condonation application without delay. In a recent judgment of this court, *Beukes and Another v SWABOU and Others [2010] NASC 14 (5 November 2010)*, the principles governing condonation were once again set out. Langa AJA noted that "an application for condonation is not a mere formality" (at para 12). The affidavit accompanying the condonation application must set out a "full, detailed and accurate" (at para 13) explanation for the failure to comply with the rules. 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 (*Beukes*, at para 20).'

³ *Alberto Gomes Felisberto v Alan John Mayer* SA 33/2014 [12 April 2017].

⁴ 2011 (20 NR 637 (SC).

[17] In the case of *Rainer Arangies t/a Auto Tech v Quick Build*⁵ O'Regan AJA again confirmed the principles set out above but goes further and held that –

'There are times, for example, where this Court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been 'glaring', 'flagrant' and 'inexplicable'

[18] In *P.E. Bosman Transport v Piet Bosman Transport*⁶ Muller JA stated the following:

'In a case such as the present, where there has been a flagrant breach of the Rules of this court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should in my opinion, not be granted whatever the prospect of success may be.'

Was the plaintiff's non-compliance with the court order glaring, flagrant or inexplicable?

[19] It is common cause that the plaintiff instructed her counsel not to file her witness statement. Plaintiff states in paragraph 12 of her founding affidavit:

'My legal practitioner has informed me of the dates in August 2017 when my witness statement must be filed and the court file indexed. I have instructed her to leave the filing of the further pleadings documents as respondent and I are engaged in settlement negotiations.'

[20] Although the plaintiff's candor in this regard is admirable it does not strengthen her argument in support of this application.

[21] I must accept that the plaintiff's legal practitioner, as an officer of this court, would have cautioned her about the dangers of blatantly disregarding a court order, especially seeing that the plaintiff elected to stay on the course she embarked on.

⁵ 2014 (1) NR 187 (SC)

⁶ 1980 (4) SA 794 (A) at 799D.

[22] I say this because as an officer of this court, the plaintiff's legal practitioner would surely have advised her client that there is an obligation on the parties and their legal practitioners in relation to case management.

[23] These obligations are set out in Rule 19 of the Rules of the High Court which reads as follows:

'19. Every party to proceedings before the court and, if represented, his or her legal practitioner is obliged –

- (a) **to cooperate with the court and the managing judge to achieve the overriding objective;**
- (b) to assist the court in curtailing proceedings;
- (c) to limit interlocutory proceedings to what is strictly necessary in order to achieve a fair and expeditious disposal of a cause or matter;
- (d) **to comply with any order or direction given by the court at any stage of the proceedings;**
- (e) to attend all case management conferences, status and informal hearings arranged by the court;
- (f) **to comply with deadlines provided for the taking of any steps under these rules, the practice directions and any applicable law with diligence and promptitude;**
- (g) to use reasonable endeavours to resolve a dispute by agreement between the persons in the dispute;
- (h) to ensure that costs are reasonable and proportionate;
- (i) to act promptly and minimise delay;

- (j) to disclose critical documents to each other at the earliest reasonable time after the person becomes aware of the existence of the document; and
- (k) on receipt of critical documents referred to in paragraph (j), not to use the documents for a purpose other than in connection with the civil proceedings.’ (my emphasizes)

[24] It is clear from the Rules of Court that compliance with case management directions by litigants is fundamental to court in exercising its primary function which is to finally and conclusively determine the rights between the parties and to achieve the overriding objective as set out in Rule 1(3).⁷ Therefore, when a court order, which specify that a party to the proceedings must do some act by a specified date, and if that act is not done, some specified consequence will follow.

[25] During her argument Ms. Visser, instructed counsel acting on behalf of the plaintiff, valiantly argued that the non-compliance is not a flagrant disregard and that there would be no prejudice for the defendant should the court condone the non-compliance and emphasized the good prospects of success on the merits of the matter.

[26] Even if the court accepts that the parties were engaged in settlement negotiations during the period of July to September 2017, which I am hard-pressed to do, it does not excuse a party from complying with a directive made by court in the form of a court order. Nothing precludes the parties form engaging in settlement negotiations but it should not be at the expense of a court order. I must also add that the plaintiff’s

⁷ 1 (3) The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by -

- (a) ensuring that the parties are on an equal footing;
- (b) saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter;
- (c) dealing with a cause or matter in ways which are proportionate to -
 - (i) the amount or value of the monetary claim involved;
 - (ii) the importance of the cause;
 - (iii) the complexity of the issues and the financial position of the parties;
- (d) ensuring that cases are dealt with expeditiously and fairly;
- (e) recognising that judicial time and resources are limited and therefore allotting to each cause an appropriate share of the court’s time and resources, while at the same time taking into account the need to allot resources to other causes; and
- (f) considering the public interest in limiting issues in dispute.

explanation regarding the said settlement negotiations lacks particularity as to when, where and how, so it remains questionable.

[27] A deviation from a court order without seeking the court's indulgence must be viewed in a serious light. It is not up to a party to decide whether or not he/she wishes to comply with a court order or not. That would result in chaos and bring the court's authority into disrepute.

[28] For six months after the due date for the filing to the plaintiff's witness statement, nothing happens and in an attempt to seek the indulgence of this court, on 07 February 2018 the plaintiff files her witness statement and now wants the court to have regard to it.

[29] As alluded to earlier in this judgment, the current instance is not the only non-compliance with court orders. Twice before the court had to resort to sanctions in order to keep the case on track and twice the plaintiff was indulged and condonation for her non-compliances were granted.

[30] What is disturbing is that the plaintiff is *dominus litis* in this matter. She instituted the action against the defendant and brought the defendant to court and he is part of this litigation not by choice and yet plaintiff is the one who did not file her witness statement in compliance with the court order.

[31] The plaintiff's attempts to explain the delays in filing her witness statement does not address her failure to apply for extension of time, which should have and could have been done before the filing date of her witness statement in terms of the pre-trial order. She should have acted pro-actively by applying for an extension of time in terms of Rule 55(1).⁸

⁸ Rule 55(1) -the court or the managing judge may, on application on notice to every party and on good cause shown, make an order extending or shortening a time prescribed by these rules or by an order of court for doing an act or taking a step in connection with proceedings of any nature whatsoever, on such terms as the court or managing judge considers suitable or appropriate.

[32] It is trite that an application for condonation should be brought as soon as possible after the failure to comply comes to the attention of the party concerned. The failure to comply in this instance was intentional and she was aware from the get go that she was in default, however if the plaintiff was bona fide in her application, she would have brought it at the end of October already when she realised that there was no settlement to be had in this matter. At that stage her legal practitioner was paid to take the matter further yet the application for condonation was only filed on 07 February 2018. No explanation is offered as to why the application for condonation was not launched at that stage already.

[33] This is clearly a matter where the court can regard breach of the Rules of Court being so flagrant that the court need not have regard to the prospects of success of the plaintiff.

[34] My order is therefor as follows:

1. The plaintiff's condonation application in respect of prayer 1, 2 and 3 of Notice of Motion is dismissed.
 2. Plaintiff must file an affidavit on or before 05 March 2018 setting out her pleadings should not be struck and why plaintiff should not be barred from prosecuting her claims in terms of Rule 53(2) (a) and (b) in terms of the Rules of Court.
 3. The plaintiff is to pay the costs of the application and limited in terms of rule 32 (11).
 4. Defendant is instructed to index and paginate the court file on or before 05 March 2018.
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5. The trial date of 06 – 09 March 2018 is confirmed.

JS Prinsloo
Judge

APPEARANCES:

FOR THE PLAINTIFF:

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FOR THE DEFENDANT:

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