

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2551/2014

In the matter between:

COLIA LOUIS FAMILY TRUST

APPLICANT

and

KOMSBURG FARMING (PTY) LTD (in Liquidation)

1ST RESPONDENT

THE MASTER OF THE HIGH COURT

2ND RESPONDENT

Neutral citation: *Colia Louis Family Trust v Komsberg Farming (Pty) Ltd (in Liquidation)* (I 2551/2014) [2018] NAHCMD 9 (29 January 2018)

Coram: OOSTHUIZEN J

Heard: 27 OCTOBER 2017

Delivered: 29 JANUARY 2018

Flynote: Application for leave to appeal – application for condoning late filing of the leave to appeal – prospects of success on appeal – bona fide defence.

Summary: Applicant applied for condonation of its failure to comply with a court order. Rule 54 (3) of the Namibian High Court Rules automatically bar a litigant in the event it did not plea timeously. Rule 55 requires a party to show good cause in condonation application. Rule 56 (2) requires evidence under oath. Good cause requires a party to fully explain its remiss under oath.

Held, applicant failed to satisfy the court that it had a bona fide defence.

ORDER

Having heard argument from counsel for applicant and respondent on 27 October 2017 and after reading their heads of argument and the relevant documents filed of record –

IT IS ORDERED THAT –

1. Annexures “TG 1”, “TG 2” and “TG 3” be disregarded as being inadmissible for want of compliance with Rule 128(2).
2. Paragraphs 16, 19, 20, 20.2, 20.3, 20.4, 22, 23, 24, 26, 26.1, 26.2, 26.3, 26.3.1, 41, 42, 43, 44, 44.1, 44.2, 57, 57.1, 57.2, 57.3, 57.4, 57.5, 58, 59, 59.1, 59.2, 84, 84.1, - 99, inclusive of annexures “TG 13.1’ to “TG 13.3”, “TG 14”, “TG 15”, “TG 18”, “TG 22”, “TG 23” to “TG 32.3” be struck out as being irrelevant.
3. Paragraphs 26, 26.1, 43, 57, 58, 59 be struck out as being frivolous and/or vexatious.
4. The condonation application for the late filing of applicant’s leave to appeal and the leave to appeal are refused and dismissed.

5. Applicant to pay the costs of the respondent, inclusive of the costs of one instructing and two instructed counsel, which costs shall not be capped as provided for in rule 32 (11) of the Rules of Court.
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JUDGMENT

OOSTHUIZEN J:

- [1] In this judgment “respondent” refer to first respondent.
- [2] On 26 June 2017 the applicant applied for –
- (a) leave to appeal against the whole order, inclusive of costs handed down by Miller AJ in the High Court of Namibia, Main Division, Windhoek on 31 July 2015, and
 - (b) Condonation for the late filing for leave to appeal.
- [3] The order by Miller AJ on 31 July 2015 dismissed applicant’s application for condonation and upliftment of the automatic bar to file a plea (in terms of rule 54(3) of the High Court Rules) and costs, including the costs of one instructing and two instructed counsel.
- [4] Applicant has failed to deliver its plea to the respondent’s counterclaim on or before 30 October 2014 as ordered by the Court.
- [5] Applicant has erroneously laboured under the impression that the Namibian Court Rules are not different from the South African Court Rules which require a notice of bar before barring a litigant to plea. Applicant is a South African entity represented by South African attorneys (who instructed Namibian attorneys as their representatives for issuing and receiving court process).

[6] The dismissal of applicant's application has the effect that the automatic bar to file a plea, remains in place.

[7] Applicant filed a notice to appeal with the Supreme Court on 25 August 2015 because applicant maintains that the order by Miller AJ was final in effect and as of right appealable.

[8] The Registrar of the Supreme Court did not place the appeal on the roll and allocate a hearing date due to her view, shared by respondent, that Miller AJ made an interlocutory order for which leave to appeal is required by section 18(3) of the High Court Act of 1990.

[9] Applicant persisted with its view that leave to appeal was not required, but filed the present application for condonation and leave to appeal on 26 June 2017 in order to move the matter forward.

[10] Applicant explained the delay in bringing the leave to appeal application in its founding papers. Applicant also explained the delay for timeously filing its plea in the condonation application before Miller AJ. Both explanations did not escape severe criticism from the respondent.

[11] Due to the view this court take of the present condonation application and leave to appeal application, this court refrains from discussing the delay in the present application and of making any findings thereon.

[12] "The enquiry into prospects of success applies to condonation and an application for leave, and both should fail if there are no prospects that an applicant will succeed in the appeal".¹ This court concurs.

[13] Applicant is bound by the case it made out in its founding affidavit for the upliftment of bar and condonation for late filing of its plea in 2014 before Miller AJ. It is trite law that an applicant bears the onus to show in his founding affidavit the

¹ *Ethekwini Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC) para [33].

reasons for non-compliance with the rules and remiss to comply with a court order timeously in condonation applications², as well as a bona fide defence to the claim³.

[14] Applicant did not show good cause in its 2014 founding affidavit in the sense that it failed to satisfy the court on oath that it had a bona fide defence. Apart from saying under oath it has a bona fide defence, it failed to support it with evidence⁴. Respondent could not deal with the alleged bona fide defence in answer and the court could not consider it.

[15] On appeal the applicant will be faced with the very same dilemma. All the new matter not included in the first application before Miller AJ is irrelevant and should not form part of the appeal record. Respondent applied for the striking out thereof and it is so ordered.

[16] This court can come to no other conclusion as that applicant has failed to show that it had reasonable prospects on appeal in that it failed to set out a bona fide defence.

[17] In the result, it is ordered that –

17.1 Annexures “TG 1”, “TG 2” and “TG 3” be disregarded as being inadmissible for want of compliance with Rule 128(2).

17.2 Paragraphs 16, 19, 20, 20.2, 20.3, 20.4, 22, 23, 24, 26, 26.1, 26.2, 26.3, 26.3.1, 41, 42, 43, 44, 44.1, 44.2, 57, 57.1, 57.2, 57.3, 57.4, 57.5, 58, 59, 59.1, 59.2, 84, 84.1, - 99, inclusive of annexures “TG 13.1’ to

² *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at 297. Also *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & others* 2011 (2) NR 469 (SC) at 479 par [24].

³ *Solomon v De Klerk* 2009 (1) NR 77 (HC) at 79 G – H. Rule 55 (1) of the High Court rules.

⁴ As required by Rule 56 (2). See also *Salomon v De Klerk*, op cit, at 81, par [14], D – F. “With reference to the requirements of a bona fide defence, it has been held that the minimum that the applicant must show is that his defence is not patently unfounded; that it is based on facts (which must be set out in outline) which, if proved, would constitute a defence; and that the application has not been made with the intention of delaying the action. See *Motaung v Mukubela and Another*, NNO; *Motaung v Mothiba*, NO 1975 (1) SA 618 (O) at 624E–G; *Ford v Groenewald* 1977 (4) SA 224 (T) at 226G–H; *Flugel v Swart* 1979 (4) SA 493 (E) at 497F; *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 214G–H and 216D–E.”

“TG 13.3”, “TG 14”, “TG 15”, “TG 18”, “TG 22”, “TG 23” to “TG 32.3” be struck out as being irrelevant.

- 17.3 Paragraphs 26, 26.1, 43, 57, 58, 59 be struck out as being frivolous and/or vexatious.
- 17.4 The condonation application for the late filing of applicant’s leave to appeal and the leave to appeal are refused and dismissed.
- 17.5 Applicant to pay the costs of the respondent, inclusive of the costs of one instructing and two instructed counsel, which costs shall not be capped as provided for in rule 32 (11) of the Rules of Court.

GH Oosthuizen
Judge

APPEARANCES

APPLICANT: Mr De Friz
Instructed by Francois Erasmus & Partners, Windhoek

RESPONDENTS: Mssrs Heathcote and Schickerling
Instructed by Van Der Merwe-Greef Andima Inc,
Windhoek