
ORDER

1. The plaintiff's condonation application is struck from the roll.
 2. The plaintiff is to pay the costs of the application and limited in terms of rule 32 (11).
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RULING IN TERMS OF PD 61 OF THE PRACTICE DIRECTIVES

PRINSLOO J:

[1] This is an application for condonation by the Plaintiff for non-compliance with a court order as set out in the Notice of Motion as follows:

'PLEASE TAKE NOTICE THAT application will be made on behalf of the plaintiff at the hearing of this matter for an order in the following terms:

- 1.1 Condoning the non-compliance with the court order issued on 21 September 2017,
- 1.2 Such further or alternative relief as the court may deem fit.'

[2] For purposes of this ruling, I will refer to the parties as in the main action.

Factual Background

[3] This court adopted a proposed draft pre-trial order dated 21 September 2017 and ordered as follows:

- 3.1. Date for filing plans, photos, diagrams and model: on or before 17 October 2017.
- 3.2. Date for filing expert summaries and reports by all parties: on or before 24 October 2017.

3.3. Date for filing witness statements: on or before 24 October 2017.

The court then postponed the matter to 2 November 2017 for a further pre-trial conference hearing.

[4] In terms of the E-Justice system, the plaintiff filed its witness statements and expert summaries on 31 October 2017, 7 days later than the date as ordered by this court. Furthermore, the late filing of the said documents were not accompanied with a condonation application, one which was filed only on 1 November 2017, one day after the documents were filed.

Issues in dispute

[5] The defendant took upon the issue that the plaintiff failed to comply with rule 32 (9) and (10) before proceeding to file its condonation application and further failed to comply with rule 55 and 56 in terms of meeting the requirements in respect of condonation applications.

Plaintiff's submissions

[6] The plaintiff mainly relies on the condonation affidavit filed on 1 November 2017 in which the legal representative gives an explanation for the non-compliance. In essence, what is averred is that the legal representative was in a haste when preparing the expert's witness statements and as a result, filed the wrong draft format. Furthermore, the plaintiff's witness statement as well as one other witness statement were prepared late due to the legal representative being instructed by another court to further prepare legal arguments to be heard on 19 October 2017. On top of that, the legal representative further indicates that she obtained further instructions from legal aid which in itself was allegedly urgent to time lines in that matter. As a result, the legal representative was only effectively able to prepare the expert summary report on 24 October 2017 but not the plaintiff and his witness's statement. It is further stated that

the plaintiff has good prospects of success as traversed in his particulars of claim and witness statements filed therewith.

[7] The plaintiff further submits that the defendant does not dispute any of the factual allegations related to the steps taken by the plaintiff's representatives and as a result, the explanation tendered by the plaintiff is full, accurate and detailed.

Defendant's submissions

[8] The defendant takes that point that prior to the plaintiff's application for condonation, the plaintiff's legal representatives never approached the legal representatives of the defendant in any way to reach an amicable resolution as required in terms of rule 32 (9) and (10) of the high court rules.

[9] The defendant cites *Standard Bank of Namibia Limited v Gertze*¹ where Parker J made the following observations:

“[5] In holding that rule 32(9) and (10) are peremptory provisions, I reasoned in *Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (12 March 2015), para 6 thus:

‘Considering the use of the word “must” in Rule 32(9) and (10) and the intention of the rule maker as set out in Rule 1(2) concerning the overriding objective of the rules (see *The International University of Management v Torbitt* (LC 114/2013) [2014] NALCMD 6 (20 February 2014)), I conclude that the provisions of rule 32(9) and (10) are peremptory, and non-compliance with them must be fatal.’

[6] In *Mukata*, having found that the plaintiff had failed to comply with rule 32(9) and (10), the application for summary judgment (ie the interlocutory application which the plaintiff had launched) was struck from the roll. By a parity of reasoning, I should strike the rule 61 application, which is also an interlocutory proceeding, from the roll. I respectfully decline Mr. Van Vuuren's invitation that I dismiss the application.”

¹ (I 3614/2013) [2015] NAHCMD 77 (31 March 2015) at para 5-6.

With the above judgment, the defendant submits that no interlocutory application may be heard if rule 32 (9) and (10) have not been complied with.

[10] With respect to rule 55 and 56, the defendant is of the view that it is a well-established legal precedence that a party seeking condonation must meet two primary tests, which he must show good cause/ bona fide explanation and secondly that good prospects of success are in existence.

[11] The defendant is of the view that the expert summary filed of record is not in compliance with rule 29 and as a result constitutes an irregular step in terms of rule 61 and cannot be regarded as evidence tendered on behalf of the plaintiff. The defendant further submits that in the absence of the purported expert witness summary, the plaintiff fails to demonstrate any prospects of success.

[12] In conclusion, the defendant submits that our courts are quite clear on the aspect of rule 32 (9) and (10) compliances and that any relief to be granted would be solely on the discretion of the court. The defendant further submits that this court should not grant condonation where a party shows disregard for the rules of court and an abuse of process.

Conclusion

[13] From the plaintiff's legal representatives' submissions in the founding affidavit, it is clear that she could not tend to orders in this matter due to other commitments and as a result of these other commitments, could not effectively apply her mind in the expert summary report and the preparation of the plaintiff and its witness' statement.

[14] As unfortunate as it may seem, the court is of the view that its orders must be complied with as ordered and it is the duty of the legal representative to approach to the

opposing counsel and the court, if need be, to seek an extension for whatever reason, this is the purpose of rule 32 (9) and (10) for cases such as these.

[15] As compliance with rules 32 (9) and (10) is peremptory for interlocutory applications, the condonation application will have to be struck from the roll with costs due to the plaintiff's non-compliance with rules 32 (9) and (10). This court has pronounced itself quite clear with respect to rules 32 (9) and (10).²

[16] In the result, I then make the following order:

1. The plaintiff's condonation application is struck from the roll.
2. The plaintiff is to pay the costs of the application and limited in terms of rule 32 (11).

J S Prinsloo
Judge

APPEARANCES:

² *Mukata v Appolus* 2015 (3) NR 695 (HC) at [6]; *CV v JV* 2016(1) NR 214(HC) at [8] to [12], *Bank Windhoek Ltd v Benlin Investment CC* 2017(2) NR 403 (HC) at [8]; *Standard Bank of Namibia v Silas Hafeni Nekwaya* (HC-MD-CIV-ACT-CON-2017/01164) [2017] NAHCMD 365 (01 November 2017).

FOR THE PLAINTFF:

S NAMBINGA

of AngulaCo Inc., Windhoek

FOR THE DEFENDANT:

A JANTJIES

of Siyomunji Law Chambers