

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2016/02479

In the matter between:

SOUTH AFRICAN AIRWAYS SOC LIMITED

PLAINTIFF

and

JAMES ROBERT CAMM

1st DEFENDANT

SONYA PETRINA NANUSES

2nd DEFENDANT

ROCHE CHANDRE MANETTI

3rd DEFENDANT

BRIGITTE EIMAN

4th DEFENDANT

MALIAH SAM

5th DEFENDANT

JOSEPH BRINKMANN

6th DEFENDANT

JUANITA SONYA KLASSEN

7th DEFENDANT

MELLIKEN HOFNIE

8th DEFENDANT

JEFFREY RUKERO

9th DEFENDANT

NAMFLEX PENSION FUND

10th DEFENDANT

NAMFISA FINANCIAL INSTITUTIONS SUPERVISORY

11th DEFENDANT

AUTHORITY

Neutral Citation: *South African Airways Soc Limited v Camm* (HC-MD-CIV-ACT-DEL-2016/02479) [2019] NAHCMD 14 (31 January 2019)

Coram: PRINSLOO J

Heard: 18 January 2019

Delivered: 31 January 2019

Reasons: 06 February 2019

Flynote: Interlocutory application – Application for condonation – Rules of practice – Rule 32 (5), (9) and (10) – Non-compliance with rule 32 (9) and (10) – Effect thereof – Rule 54 – An application for condonation is an interlocutory proceeding – What compliance with rule 32 (9) and (10) entails – Peremptory requirements for the rule.

Application for condonation – Satisfy both requisites of good cause: acceptable explanation for the delay and reasonable prospects of success – Rule 55 and 56.

Summary: The first, second and fourth defendants (herein referred to as the defendants) filed two applications, on two separate occasions for condonation, in that they failed to file the necessary papers on time as per various case management court orders. On the first application, the defendants failed to file their supplementary witness statements on time and in the second application they also failed to file their answering affidavit and heads of argument on time.

Before launching the above applications, the defendants wrote an email in respect of each application, purportedly to resolve the matter amicably, in terms of which defendants requested the plaintiff to indicate whether or not they will object to the intended condonation applications. In terms of the first application, plaintiff's legal practitioner was not granted an opportunity to respond to the email as it was sent to her at 09h27 and was put to terms to respond by 10h00, which was within half an hour. In terms of the second application, there was no engagement with the opposing counsel

as the email was sent during recess and had no ample time to respond before a rule 32 (10) report was filed by the defendant.

It was plaintiff's contention that the said emails, on face value, would appear that the defendant's complied with rule 32 (9) and (10) as a rule 32 (10) report was filed, however it was a hasty and inadequate attempt to suggest that there was compliance and stated that the defendants did not comply with the peremptory requirements of rule 32 (9) and (10).

Furthermore, it was plaintiff's contention that the defendants had failed to address in their affidavit the essential allegations of good cause in order to succeed with an application for condonation.

Held - There was no engagement between the parties as required by the rule and in actual fact there was no compliance with rule 32(9) and (10) or rule 32(5) for that matter.

Held further - In order to succeed with an application for condonation the applicant must file an affidavit explaining, satisfactorily, the non-compliance with the rules and the reasonable prospect of success. The explanation must enable the court to fully understand how the delay came about.

Held further - The application for condonation is therefore struck from the roll for non-compliance with the provisions of rule 32 (9) and (10) and for failing to make out a case in the founding affidavit.

Held further – In terms of the counter-application, defendants' supplementary witness statements filed with the first application in terms of rule 55 should be struck out.

ORDER

- a) The points in limine are upheld. The defendants' applications in terms of Rule 55 of the Rules of Court are struck.
- b) The plaintiff's counter-application is granted as follows:
 - i) That the first, second and seventh defendants' supplementary witness statements are struck out.
 - ii) That the first, second and seventh defendants are barred as provided for in rule 93(6) from giving viva voce evidence on any matter included in the supplementary witness statements.
 - iii) That the first, second and seventh defendants are ordered to pay the plaintiff's cost as follows:
 - i) The plaintiff's costs in opposing the application for condonation, such costs to include the cost of one instructing and one instructed counsel;
 - ii) The plaintiff's costs occasioned by the counter application, such cost to include the costs of one instructing and one instructed counsel.
- c) No order as to cost in respect of the second application in terms of rule 55.
- d) The matter is postponed to 21 February 2019 at 15:00 for a Status Hearing.
- e) Joint status report must be filed on or before 18 February 2019.

JUDGMENT

PRINSLOO J

Introduction

[1] On 2 August 2016 plaintiff issued summons against the 11 defendants as per the combined summons, seeking relief that is not relevant for the purposes of these proceedings. The current proceedings before me relates to the first, second and seventh defendants only (hereinafter referred to as the defendants).

[2] In order to understand the order that I will ultimately make, it will be necessary to briefly discuss the case management history that commenced around 12 July 2018 when the defendants were ordered to file their witness statements on or before 10 August 2018. The matter was adjourned from 12 July 2018 to 30 August 2018.

[3] On 29 August 2018 the plaintiff's counsel, Ms Klazen, filed a status report wherein she indicated that the defendants did not file their witness statements in terms of the 12 July 2018 court order and further informed the court that they received correspondence on 11 August 2018 from the defendants' counsel, Mr Elago, suggesting that the parties arrange for an in chamber meeting with the managing judge in order to arrange a variation of the 12 July 2018 court order so as to afford the defendants more time to file their witness statements. At this stage I must add that the defendants already filed witness statements on 19 September 2017 and the witness statements referred to would thus constitute supplementary witness statements.

[4] Ms Klazen indicated that the plaintiff would not oppose such an extension of time, provided the defendants' counsel filed an affidavit setting out the reasons for the delay in filing their witness statements. The defendants' counsel did not request a chamber meeting as proposed to plaintiff's counsel, however the court postponed the matter on 30 August 2018 from chambers on the strength of the plaintiff's status report making the following order:

'1 The parties must comply with the following:

1.1 Witness statement by First, Second and Seventh Defendants must be filed on or before 19/10/2018;

1.2 Counsel for the First, Second and Seventh Defendants must file affidavit explaining their non-compliance with the court order dated 12 July 2018, on or before 14/09/2018;

1.3 The Plaintiff is afforded time until 7/09/2018 to replicate to the amended pleas of the Fourth and Fifth Defendants.'

[5] The matter was postponed until 25 October 2018 for the parties to comply with the directions of the court. However, there was only limited compliance on the part of the defendants, in that the only order complied with was the required affidavit by Mr Elago which was filed on time. The defendants failed to file their supplementary witness statement on 19 October 2018, which gave rise to a condonation application which essentially gave rise to the matter before me.

[6] On 25 October 2018 the defendants filed a notice of motion praying for:

'1. Condoning the non-compliance of the court order dated 30 August 2018 in respect of the late filing of the witness statement as directed in terms of the order.

2. Extending the date for filing the witness statements of the 1st, 2nd and 7th defendant to 25 October 2018 at 15h00.

3. Granting such further and or alternative relief as the honorable court may deem fit.'

[7] In support of the condonation application a founding affidavit was filed, presumably by Mr Engelbrecht, counsel for the defendants. I say presumably as the affidavit does not confirm the identity of the deponent. This crucial portion of the affidavit was left blank.

[8] Simultaneously with the application for condonation, the defendants filed their supplementary witness statements.

[9] The application for condonation was opposed on behalf of the plaintiff on 25 October 2018 and in light of the opposition and possible counter-application, which the plaintiff intended to file, the court, on the same day, issued the following order:

1. The case is postponed to 18/01/2019 at 09:00 for Interlocutory hearing (Reason: Hearing/Ruling).
2. Parties must comply with the following procedural steps:
 - 2.1 Plaintiff must file Answering Affidavit and Counter-Application on or before 26 November 2018;
 - 2.2 First, Second and Seventh Defendant must file Answering Affidavit to the Counter-Application as well as Replying Affidavit on or before 29 November 2018;
 - 2.3 Plaintiff must file Replying Affidavit in respect of the Counter-Application on or before 03 December 2018;
 - 2.4 Heads of Argument must be filed on or before 03 December 2018.'

[10] The plaintiff complied with the timelines as set out in the court order dated 25 October 2018 and proceeded to file its answering affidavit and notice of motion in respect of the counter-application, giving notice that the plaintiff will, at the hearing of the defendants' application for condonation, pray for an order in the following terms:

1. That the first, second and seventh defendants' pleas are struck out with costs.
 2. That the plaintiff is granted leave to file its application for default judgment against the first, second and seventh defendants.
 3. That the application for default judgment is postponed until such a time as the plaintiff has lead evidence and closed its case against the remaining defendants.
- In the alternative to paragraph 1, 2 and 3
4. That the first, second and seventh defendants' supplementary witness statements are struck out.
 5. That the first, second and seventh defendants are barred as provided for in rule 93(6) from giving *viva voce* evidence on any matter included in the supplementary witness statements.
 6. That the first second and seventh defendants are ordered to pay the plaintiff's cost as follows:
 - 6.1 The plaintiff's wasted costs occasioned by the first, second and seventh defendants' delays, such cost to include the costs of one instructing and one instructed counsel;

6.2 The plaintiff's costs in opposing the application for condonation, such costs to be taxed outside the scale of rule 32(11) and to include the cost of one instructing and one instructed counsel;

6.3 The plaintiff's costs occasioned by the counter application, such cost to be taxed outside the scale of rule 32(11) and to include the costs of one instructing and one instructed counsel.

7. Further and/or alternative relief.'

The Condonation application:

[11] As intimated above, the condonation application was supported by the founding affidavit of presumably Mr Engelbrecht, who deposed to the fact that he only joined the firm of Tjombe-Elago Inc. on 15 October 2018 and that the legal practitioner who was seized with the matter resigned prior to him taking up his position with the firm. The matter *in casu* was assigned to him on 19 October 2018 and he immediately made contact with the defendants to schedule consultation in order to prepare their witness statements as directed by the court order dated 30 August 2018.¹

[12] Mr Engelbrecht explained that due to personal circumstances of the defendants, he could only consult with them during the course of 23 October 2018. Mr Engelbrecht stated that he takes full responsibility for the non-compliance with the court order and assured the court that this non-compliance was not due to his wanton disregard for the court rules but that the non-compliance came about due to the said personal circumstances of the defendants.

¹ The court order dated 30 August 2018 read as follows:

'1 The parties must comply with the following:

1.1 Witness statement by First, Second and Seventh Defendants must be filed on or before 19/10/2018;
 1.2 Counsel for the First, Second and Seventh Defendants must file affidavit explaining their non-compliance with the court order dated 12 July 2018, on or before 14/09/2018;
 1.3 The Plaintiff is afforded time until 7/09/2018 to replicate to the amended pleas of the Fourth and Fifth Defendants.

2 The case is postponed to 25/10/2018 at 15:00 for Status hearing (Reason: Documents Exchange and pending the issuing of certificate in terms of Sec 12 of Legal Aid Act, 29 of 1990).'

Rule 32(10) report

[13] The report filed by Mr Engelbrecht in terms of rule 32(10) recorded the following:

- '1. Attempted communicating telephonically with the Legal Practitioner of record of the parties in this matter but to no avail.
2. Sent emails to the legal practitioners of record to these proceedings requesting them to indicate whether or not they will be objecting to the intended application.
3. The Legal Practitioner of record for the 5th defendant has indicated that he will not be objecting to the intended application.

[14] This report was dated and signed 25 October 2018 and filed at 10h25 on e-justice.

The Opposing affidavit

[15] Ms Klazen deposed to an answering affidavit on behalf of the plaintiff and raised a point in limine on the issue of non-compliance with rule 32(9) and (10).

[16] The issue that Ms Klazen took with the application before court was that, although on face value it would appear that the defendants complied with rule 32(9) and (10) as a rule 32(10) report was filed, it was a hasty and inadequate attempt to suggest that compliance was made but stated that it did not satisfy the peremptory requirements of the rule.

[17] She stated that having regard to the provisions of rule 32(5) read with rule 32(9), the application launched by the defendants should have been done at least on 4 days notice to the other party, which follows that there was compliance with rule 32(9) as an email was received by plaintiff's legal practitioner from the defendants' legal practitioner at 9h30 on the morning of 25 October 2018, insisting on plaintiff's reply as to their position with regard to the application by 10h00 that morning. An hour later, a notice of motion together with an affidavit and a cryptic rule 32(10) report was filed by the

defendants' legal practitioner. Ms Klazen however submitted that for this reason alone, the application should be struck from the roll.

[18] Ms Klazen further submitted in her affidavit that the defendants failed to provide the court with a satisfactory explanation for their remissness. She further stated that the defendants failed to address the essential allegations that need to be made in order to succeed with an application of that nature and prayed that the application be struck, alternatively be dismissed with costs.

Subsequent non-compliance:

[19] In spite of the court order dated 25 October 2018, the defendants failed to file their answering affidavit to the counter-application which was due on 29 November 2018 and thereafter failed to file their heads of argument on 3 December 2018. Instead, defendants counsel filed a notice of motion for condonation on 14 December 2018, which date is determined from the e-justice system, although the notice of motion is dated 25 October 2018.

[20] The answering affidavit to the counter application and the heads of argument was however only filed a day later, on 15 December 2018.

[21] In the notice of motion filed on 14 December 2018, the defendants prayed for an order in the following terms:

- '1. Condoning the non-compliance of the court order dated 25 October 2018 in respect of the late filing of the Answering Affidavit to the Counter Application and the late filing of the Heads of Argument in respect of the Condonation application brought on 25 October 2018.
2. Extending the date for filing the Answering Affidavit of the 1st, 2nd and 7th defendants to the Counter Application brought by the plaintiff to 14 December 2018 at 14:00.
3. Granting such further and or alternative relief as the honorable court may deem fit.'

[22] Together with the aforesaid notice of motion, Mr Engelbrecht filed a founding affidavit and a rule 32(10) report.

[23] I do not wish to delve too deeply into this last application for condonation for reasons that will become clear hereunder but must for the sake of completeness refer to the reasons advanced by Mr Engelbrecht for his failure to comply with the court order dated 25 October 2018.

[24] The gist of his founding affidavit is that his secretary was on compassionate leave from 26 November to 7 December 2018, which left him without his 'to-do' list which is on her computer and that he only recorded the next judicial case management date of the matter in his diary and had no record of the date for the filing of the answering affidavit on the counter-application or heads of argument. According to him, on 12 December 2018 when he then became aware of his remissness, he contacted Ms Klazen but his calls and email went unanswered.

[25] No supporting affidavit was filed in support of the averments that Mr Engelbrecht made regarding his 'to-do' list.

Plaintiff's Heads of Argument

Points in limine

[26] In its heads of argument Mr Jones, on behalf of the plaintiff, contends, in limine, that the defendants had not complied with the requirements of rule 32(9) and (10).

[27] The court was referred to the benchmark case of *Mukata v Appolus*² where Parker AJ held that the provisions of rule 32(9) and (10) is preemptory for all interlocutory applications. The court was further referred to *CV v JV*³ which echoed the sentiments as set out in the *Mukata* matter. On the onus in rule 32(9), that is to set the

² *Mukata v Appolus* 2015 (3) NR 695 (HC).

³ *CV v JV* 2016 (1) NR 214 (HC) at 216J-217C par 10-11.

process in motion, this court was referred to the judgment of Masuku J in *Bank Windhoek Ltd v Benlin Investment CC*.⁴

[28] It was contended on behalf of the plaintiff that the court will have regard to the rule 32(10) report to ascertain if the parties have complied with the peremptory provisions of the rule, which need to be done prior to the launching of the rule. Mr Jones' contention is that the defendants' rule 32 attempts were wholly inadequate and do not satisfy the peremptory requirements of the rule and that the purported sending of an email to the plaintiff's legal practitioners at 09h30 on the date of hearing and then launching the application an hour later is not rule compliant.

[29] In conclusion on the issue of compliance with rule 32, Mr. Jones submits that the defendants did not afford the plaintiff the opportunity of engaging with them or even allow the plaintiff for that matter to reply to the defendants' email.

[30] A further point in limine was raised on behalf of the plaintiff, i.e. the defendants must have made out their case in the founding papers. In this regard it was contended that the defendants on the face of it, have not provided sufficient fact and evidence in the founding affidavit to substantiate the relief sought.

[31] It was submitted that the defendants must satisfy both the requisites of good cause, by providing an acceptable explanation for the delay and establishing reasonable prospects of success. The failure to meet those requirements may result in a dismissal for condonation.⁵

[32] The court was further referred in this regard to *Stipp and Another v Shade Centre and Another*⁶ where the Supreme Court confirmed the principle that only in exceptional circumstance should courts depart from the general rule which is to consider, with

⁴ *Bank Windhoek Ltd v Benlin Investment CC* 2017 (2) NR 403 (HC) par 17.

⁵ *Namiseb v Etosha Transport (Pty) Ltd* (LCA 102/2010) [2014] NALCHMD 25 (4 June 2014) at [11] referred to, with approval, to the case of *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764-5.

⁶ 2007 (2) NR 627 (SC) [29] and [30].

reference to the founding affidavit only, whether appellants made out a prima facie cause of action.

[33] It was contended that the founding affidavit filed on behalf of the defendants does not address the requirements set out in rule 55 nor does it address the requirements in rule 56 in any detail at all. Further to this, the defendants' prospects of success (bona fides) are not even touched upon nor is their defence canvassed.

[34] In concluding, it was submitted that it was incumbent on the defendants to demonstrate under oath a sufficient factual matrix and evidence in support thereof that they at least enjoyed prima facie prospects of success but failed to do so. On the points in limine raised on behalf of the plaintiff, it is prayed that the defendants' application be dismissed with costs, such cost to include the cost of one instructed and one instructing counsel.

Defendant's Heads of Argument

[35] As can be seen from the further application for condonation, it is common cause that the defendants' heads of arguments were not filed in accordance with the court order dated 25 October 2018. The heads of argument was filed on 15 December 2018. I will not have regard to these heads of argument for reasons that appear hereunder.

Subsequent proceedings

[36] As the matter was postponed for the court to make a ruling on the papers and due to the various non-compliances by the defendants, the court elected to first hear the parties on the prevailing issue of non-compliance before ruling on the condonation applications and the counter-application.

The applicable law

Rule 32(9) and (10)

[37] First and foremost the court will consider the points in limine raised on behalf of the defendants.

Rule 32 regulates interlocutory matters and applications for directions read as follows:

‘(9) In relation to any proceeding referred to in this rule, a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication by the court.

(10) The party bringing any proceeding contemplated in this rule must before, instituting the proceeding, file with the registrar details of the steps taken to have the matter amicably resolved as contemplated in subrule (9) without disclosing privileged information.’

[38] There is a myriad of cases emanating from this court emphasizing the need to comply with the rules in this regard. A non-compliance with this process, in terms of, particularly Rule 32(9), renders an interlocutory application defective and such an application stands to be struck from the roll.⁷

[39] In the *Bank Windhoek* matter⁸ Masuku J held as follows, in summary:

(a) That the writing of a letter, calling upon the other party to say ‘how you intend to resolve the matter amicably’ cannot, even with the widest stretch of the imagination amount to compliance with the rule;

⁷ *Bank Windhoek Limited v Benlin Investment* CC [2017] NAHMD 78 (15 March 2017); *Naanda v Edward* (I 2097//2014) [2017] NAHCMD 107 (22 March 2017).

⁸ Footnote 7 supra.

- (b) That the rule 32 process is initiated by the party seeking to deliver the interlocutory application, and must necessarily involve the full and undivided attention and participation of both parties to the *lis*;
- (c) Having failed to reach common ground, it is then opportune for the plaintiff to record and inform the registrar of the actual steps taken by the parties to attempt to resolve the matter amicably in terms of sub-rule (10). This should include not just the writing of a letter by the initiator, but that the parties met at a certain place on a named date to discuss the matter and regrettably did not manage to resolve it;
- (d) Rule 32(9) and (10) is not merely incidental rules. They actually go to the core of the edifice that should keep judicial case management standing tall and strong;
- (e) Legal practitioners should take the peremptory provisions in question seriously and make every effort to fully and deliberately engage in the process of attempting to resolve matters amicably; and
- (f) The parties will not be allowed to merely go through the motions.

[40] I am in absolute agreement with the findings of Masuku J in the *Bank Windhoek* matter.

[41] At first glance it would appear that there was compliance with rule 32(9) and (10) because an e-mail was forwarded to the plaintiff in an attempt to comply with rule 32(9), and subsequently a notice of motion and an affidavit was filed with the rule 32(10) report.

[42] It is quite clear from the e-mail attached to Ms Klazen's affidavit that the email was sent to the plaintiff's legal practitioner at 09h27 on 25 October 2018, which was the date of the hearing, which was scheduled for 15h00.

[43] The wording of the e-mail is as follows:

'Good Morning,

Kindly be advised that we intend to bring an application for condonation for the late filing of our witness statements in contravention of the order dated 30 August 2018 at the status hearing scheduled for today.

Kindly indicate whether you intend to lodge objection to the intended application by no later than 10h00 by which we intend to file a Rule 32(10) report.

Your cooperation in the hope of finding an amicable solution is much appreciated.'

[44] In this instance the plaintiff's legal practitioner did not even have the opportunity to respond to the e-mail directed to her. She was put on terms and had to respond within half an hour to state what position the plaintiff will be in respect of the application for condonation.

[45] As the defendants' legal practitioner sent an e-mail prior to launching the application, can it thus be said that there was compliance with rule 32(9)? The answer must be emphatically No. The way in which the defendants' counsel dealt with this matter was merely paying lip service to the rule so that he can say to this court all the boxes have been ticked off as there was an email which was, so-called, in compliance with rule 32(9) and a report filed also in, so-called, compliance with rule 32(10) but in reality nothing can be further from the truth.

[46] Interestingly enough, the rule 32(10) report refers to 'emails' directed to the plaintiff's counsel but it is quite clear that that is not a true and correct reflection of what happened. It appears to be a single email and that was that. There was no engagement between the parties as required by the rule.

[47] There is in fact no compliance with rule 32(9) and (10) or rule 32(5) for that matter which provides that a party making any application under sub-rule (4) must give not less than 4 days' notice of the application to the other party or parties. The plaintiff

had more or less half an hours' notice. This is clearly contrary to the Rules of Court and against the spirit of the core values of judicial case management.

[48] The email correspondence directed to the plaintiff's counsel in respect of the second condonation application fares no better. In fact, this email was sent to Ms Klazen during the recess period⁹ and then a report was filed in an attempt to illustrate the steps taken to amicably resolve the issue.

[49] There was no engagement with the opposing counsel to resolve the second application amicably.

[50] It may quite correctly be noted that in the instance of non-compliance with a court order no agreement can be reached between the parties, however the purpose of engagement in terms of rule 32(9) in the case of condonation application is to determine if the opposing party will oppose the application. Had the parties engaged one another meaningfully and an agreement might have been reached, this could have resulted in the parties saving time and costs, obviating the need to file the interlocutory application for condonation.

[51] In neither instances was there compliance with rule 32(9) in that there was no meaningful engagement between the defendants and the plaintiff. In respect of the second application for condonation, which was again launched without engaging the plaintiff, the court will have no regard to the answering affidavit or heads of argument in deciding the first application.

Defendants had to make out their case in the founding affidavit

[52] The founding statement filed by Mr Engelbrecht does not take this matter any further apart from proffering a brief explanation of his employment status and the difficulty he had to have consultation with the defendants. By the time he had his consultation with the defendants, their statements were already past due.

⁹ High Court Practice Direction 3.

[53] No extension was sought from court in terms of rule 55 when Mr Engelbrecht got seized with the matter. If he received the file on 19 October 2018 he had to immediately realize that his clients were out of time and about to be in non-compliance of a court order as the statements were due on the very same day. Therefor he had to act immediately in applying for relaxation of the time lines, alternatively apply for condonation. Nothing prevented him from following the same route as proposed by his colleauge when there was non-compliance with the 12 July 2018 order by requesting an in-chambers meeting. This was not done. Instead he chose to launch the application in terms of rule 55 on the morning of the case management hearing. There is nothing before me as to why the witness statements were not attended to in the weeks preceding the hearing on 25 October 2018. I will accept that Mr Engelbrecht was the unfortunate recipient of a file which was apparently not attended to by his predecessor, but however unfortunate it might be, Mr Engelbrecht is the one before me and the counsel who needs to advance an explanation for the non-compliance.

[54] Even though I already made a finding regarding non-compliance with rule 32(9) and (10), I feel compelled to make some remarks about the explanation advanced by Mr Engelbrecht in his second founding affidavit which relates to the non-compliance with the order of 25 October 2018.

[55] In respect of the second application, Mr Engelbrecht was fully in charge of the file and was the legal practitioner who was in court when the dates were set by court. To blame a non-compliance on his inability to access his 'to-do' list is unacceptable to say the very least.

[56] What Geier J said in *Cloete v Bank of Namibia*¹⁰ should serve as a reminder in this regard:

'[42] What compounds this problem is that it is common knowledge that a number of aids are available to modern legal practitioners and their clients to assist them in meeting the time lines

¹⁰Cloete v Bank of Namibia (LCA 86/2013) [2015] NALCMD 8 (22 April 2015).

imposed on them by the rules of court. Not only are conventional diaries, in hard copy, still available to assist in this task, but also the old – fashioned, time-tested diarisation practices followed in legal firms, which were designed to ensure compliance with the rules of court, the parameters within which a legal practitioner operates. Nowadays computers and cellphones all have calendar and other functions which can, in addition, be effectively employed to timeously alert their users as to when particular actions by them are required. These alerts usually ‘pop-up’, so-to-speak, on the screens of computers and cellphones, where they usually will remain until deliberately closed, through the click of the mouse or the touch of a button or touch-screen. So even if one would have forgotten about a task these ‘alerts’ – if activated – would have reminded a particular user that a particular action would be required at a particular time.’

And further

[43] ‘. . . . The practice of the proper diarisation of files is as old as the attorneys’ profession, and it does not take much to understand why diarisation of files has always been one of the fundamental cornerstones to conducting an efficient legal practice.’

[57] In concluding on this point, it is important to note that it is common cause that condonation is not merely asking and was quite correctly pointed out by Mr Jones in his heads of argument that the defendants had to demonstrate under oath sufficient factual matrix and evidence in support thereof that they at least enjoyed prima facie prospects of success. The defendants dismally failed in this regard.

The legal principles relating to condonation

[58] As the defendants failed to cross the hurdle of rule 32(9) and (10) the court need not express itself in respect of the merits of the applications. However, I need to point out that even if the defendants managed to convince the court that there were proper

compliance with the rule, the defendants cannot be successful on the merits of the applications.

[59] In order to succeed with an application for condonation, the applicant must file an affidavit explaining, satisfactorily, the non-compliance with the rules. This explanation must enable the court to fully understand how the delay came about. This however only deals with one aspect of the application for condonation.

[60] In *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others*¹¹ Langa AJA stipulated the principles applicable to applications for condonation even under the new rules. In dealing with condonation, the learned Judge of Appeal stated the following:¹²

'An application for condonation is not a mere formality. The trigger for it is non-compliance with the Rules of Court. Accordingly, once there has been non-compliance, the applicant should, without delay, apply for condonation and comply with the Rules. . . In seeking condonation, the applicants have to make out their cases on the papers submitted to explain the delay and the failure to comply with the Rules. The explanation must be full, detailed and accurate in order to enable the Court to understand clearly the reasons for it.'

[61] In the matter of *Balzer v Vries*¹³ the Supreme Court pronounced itself on this matter as follows:

'[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.'

¹¹ *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others* (SA 10-2006) [2010] NASC 14 (5 November 2010).

¹² Para 12 and 13 of the judgment.

¹³ *Balzer v Vries* 2015 (2) NR 547 (SC) at 661J-552F.

[62] None of this has effectively been dealt with by the defendants in the founding affidavit.

[63] The application for condonation is therefore struck from the roll for non-compliance with the provisions of rule 32 (9) and (10) and for failing to make out a case in the founding affidavit.

Counter-Application

[64] The plaintiff applied in its counter-application that the court exercises discretion and impose sanction on the defendants.

[65] Rule 53(1)(c)¹⁴ essentially provides that if a party or his or her legal practitioner, without reasonable explanation, fails to comply with a case management order the managing judge may enter any order that is just and fair in the matter, including any of the orders set out in sub-rule (2)¹⁵ of this rule.

[66] The defendants in their applications in terms of rule 55 have failed to provide a reasonable explanation for their continued remissness (or that of their counsel).

[67] This court cannot lose sight of the fact that the defendants failed to comply with three (3) case management orders on the trot. In respect of the 12 July 2018 order no

¹⁴ Rule 53 (1) states that:

'(1) If a party or his or her legal practitioner, if represented, without reasonable explanation fails to -
...;

(c) comply with a case plan order, case management order, a status hearing order or the managing judge's pre-trial order;

...',
the managing judge may enter any order that is just and fair in the matter including any of the orders set out in sub-rule (2).

¹⁵ Rule 53 (2) states that:

'Without derogating from any power of the court under these rules the court may issue an order -

(a) refusing to allow the non-compliant party to support or oppose any claims or defences;

(b) striking out pleadings or part thereof, including any defence, exception or special plea;

(c) dismissing a claim or entering a final judgment; or

(d) directing the non-compliant party or his or her legal practitioner to pay the opposing party's costs caused by the non-compliance.

application for condonation or application for extension of time line were brought before court. However, in light of the affidavit filed by Mr. Elago and the reasons advanced therein, the court did not take issue with the non-compliance and provided the defendants a further opportunity to file their supplementary witness statements. This in effect means that defendants had three and a half months to file the said statements but did not comply with the order of 30 August 2018.

[68] Then the court set timelines in the court order of 25 October 2018 for the filing of answering affidavit and heads of argument, however the said order was again not complied with.

[69] All litigants are obliged to comply with the Rules of Court and the Practice Directions. A party aggrieved by non-compliances with the rules by the other party is entitled to certain remedies, which the court could impose in its discretion.

[70] The defendants failed to provide the court with a reasonable explanation as to why they failed to comply with the case management order as provided for in rule 53(1) (c). The defendant failed to address rule 56 which sets out the circumstances which the court will take into account in order to consider possible relief from sanction or its adverse consequences arising from failure to comply with the rules, practice direction or court order. This rule was made in order to ensure that parties are guaranteed their rights to a fair trial when faced with the issue of sanctions. Such application for relief had to be supported by evidence.¹⁶

[72] The defendants however failed to address this in their founding affidavit(s) and by not filing an answer to the counter-application, for all practical purposes as ruled above, where sanctions are specifically sought.

[73] In their counter-application the plaintiff sought the striking out of the defendants' plea and although the defendants were in non-compliance with case management

¹⁶ *SV v HV* 2018 (2) NR 460 (HC) at paras 6 and 7.

orders on three occasions, I am of the opinion that it would be too drastic a sanction to impose under the circumstance. That would effectively close the door on the defendants in this matter. I am however satisfied that the supplementary witness statements filed with the first application in terms of rule 55 should be struck out.

[74] My order is therefor as follows:

- a) The points in limine are upheld. The defendants' applications in terms of Rule 55 of the Rules of Court are struck.
- b) The plaintiff's counter-application is granted as follows:
 - i) That the first, second and seventh defendants' supplementary witness statements are struck out.
 - ii) That the first, second and seventh defendants are barred as provided for in rule 93(6) from giving viva voce evidence on any matter included in the supplementary witness statements.
 - iii) That the first, second and seventh defendants are ordered to pay the plaintiff's cost as follows:
 - i) The plaintiff's costs in opposing the application for condonation, such costs to include the cost of one instructing and one instructed counsel;
 - ii) The plaintiff's costs occasioned by the counter application, such cost to to include the costs of one instructing and one instructed counsel.
- c) No order as to cost in respect of the second application in terms of rule 55.
- d) The matter is postponed to 21 February 2019 at 15:00 for a Status Hearing.
- e) Joint status report must be filed on or before 18 February 2019.

J.S. Prinsloo

Judge

APPEARANCES:

PLAINTIFF:

Adv JP Jones

INSTRUCTED BY:

Ellis Shilungudwa Inc., Windhoek.

DEFENDANT:

Mr HH Engelbrecht

OF:

Tjombe-Elago, Windhoek.