



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2019/00180

In the matter between:

DANIEL NDJAI GERSON ZAIRE

APPLICANT/DEFENDANT

and

HARALD DIETER VAN BILJON

RESPONDENT/PLAINTIFF

Neutral citation: *Zaire v Van Biljon* (HC-MD-CIV-ACT-OTH-2019/00180) [2019]
NAHCMD 253 (25 July 2019)

Coram: KANGUEEHI AJ

Heard: 4 July 2019

Delivered: 25 July 2019

Flynote: Interlocutory application – Application for condonation – Requirement of good cause, acceptable explanation for the delay and reasonable prospects of success – Rules 55 and 56 – Rules of practice – Rule 32(9) and (10) – Non-compliance with rule 32(9) and (10) – Effect thereof.

Summary: This interlocutory application is for condonation for the late filing of a plea pursuant to the case plan order made by this court – Court is of the view that

although, the prejudice suffered is relatively minor in light of the fact that the applicant sought to comply with rule 32(9) two days after failing to file the plea, the applicant has failed to meet the requirements of rules 32(9) and 32(10) – Court further holds that the failure by an applicant to establish prospects of success in a condonation application is fatal to such application.

ORDER

1. The application for condonation is dismissed.
2. The applicant is to pay the respondents' costs in terms of rule 32(11).
3. The matter is postponed to 14 August 2019 on Judge Tomassi's case management roll for status hearing.

JUDGMENT

KANGUEEHI AJ:

Introduction

[1] This is an interlocutory application brought by the defendant in the main matter, (the applicant herein) subsequent to his failure to file his plea on time and insolvency to the case plan which was made an order of court, pursuant to rule 23 of the rules of High Court of Namibia on 13 March 2019.

[2] According to the case plan of 13 March 2019, the applicant was ordered to file his plea on or before 2nd of April 2019. He did not do so.

[3] Two days thereafter, on 4th of April 2019, and in an attempt to comply with rule 32(9), a letter was penned to the plaintiff (respondent herein) in what the applicant alleges is his compliance with rule 32(9). The relevant parts of the letter read as follows:

- '3. ...We address this notice to seek an amicable resolution with respect to the aforementioned.
4. Writer has since the passing on of one of its client's, the late Ondonga King, being (sic) seized within extensive legal consultations on diverse urgent aspects occasioned by the death, which now culminated in an urgent application being filed and which has disabled the writer to meet deadlines including this one.
5. Kindly, but urgently indicate whether you intend to oppose the Plaintiff's Application for Condonation for its late filing of the Plea, alternatively propose an amicable resolution thereof.
6. Awaiting your response.'

[4] I pause to point out that rule 32(9), the requirements of which are set out hereunder, requires proper engagement between the parties to an interlocutory matter. The duty to comply with rule 32(9) and (10) lies with both parties, though I hasten to mention that the defaulting party should do more than the idle drafting of a letter.

[5] Rule 32 regulates interlocutory matters and its compliance is peremptory¹. The provisions of sub-rule 9 and 10 are set out 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.

¹ *Mukata v Appolus*

(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 sub-rule (9) without disclosing privileged information.'

[6] The respondent in response to the applicant's letter, in a reply dated 5 April 2019 and attached as SFK2 to their answering affidavit and further, presumably because of their dissatisfaction with the reasons furnished, stated that the reasons canvassed by the applicant for his default were 'vague' and as result could not make out whether they would oppose same or not. The content and relevant parts of the letter read as follows:

- '1. We refer to the abovementioned matter and your letter dated 4 April 2019.
2. Your letter of 4 April 2019 is unfortunately too vague on the details of the cause of your failure to have complied with the court order of 13 March 2019, neither can we partake in any attempt to resolve the issue of your client's non-compliance since your client is, in terms of the said court order *ipso facto* barred from participating in the matter.
3. In the absence of a proper explanation we are not in a position to consider whether or not to oppose any intended condonation application nor can we propose an amicable resolution. We cannot deduce from your explanation whether any good cause exists for the failure to comply with the court order.'

[7] The applicant then filed a notice in terms of rule 32(10) on 8th of April 2019, presumably as a rule 32(10) report, without referring to the above quoted response from the respondents. There is no explanation why this was not referred to in the rule 32(10) notice. What was in fact attached to the notice was a letter marked ES2, attached to the applicant's rule 32(10) notice, drafted by the respondent coincidentally on the 4th of April 2019 to the applicant. The relevant parts thereof stated that as a result of the applicant being *ipso facto* barred owing to this failure to file his plea on time, the respondent intends to file a unilateral status report and would request the court to set the matter down for default judgment.

[8] The rule 32(10) notice was filed on 8th April 2019. At that point the applicant was already in possession of the respondent's letters in reply. It was hence incumbent on the applicant to include the said letter in the notice. A failure to do so is suspect and in any event not in keeping with the requirements of rule 32(10).

[9] The applicant then proceeded to file a condonation application², which the respondent opposed.

[10] The applicant's main contention in his condonation application was that because of the passing of one of his clients, the late Ondonga King, he (the legal practitioner) was seized with extensive legal consultations on diverse urgent aspects occasioned by the death which needed his attention. These consultations led to an urgent application being filed and which disabled the applicant to meet deadlines including the one that was required of him to file his Plea by the 2nd April 2019.

[11] The respondent's answering affidavit to this application raised the following points *in limine*:

- (i) Non-compliance with rules 32(9) and 32(10);
- (ii) Incompetent relief sought; and
- (iii) Non-compliance with rule 55(1).

[12] The crux of the respondent's argument advanced by Mr Boonzaier and as it appears to the court are three-fold; firstly, that there has been non-compliance with rules 32(9) and (10) in that the applicant did not really attempt to amicably resolve the matter. Further that the rule 32(10) notice does not pass muster as it does not clearly indicate the efforts made (steps taken) to resolve the matter amicably before lodging the interlocutory.

[13] The second point *in limine* is that the relief sought is incompetent for the following reasons:

² The founding affidavit herein was attested to by the defendant's legal practitioner.

- (i) The applicant is barred in terms of rule 54(3). He should therefore have sought to uplift the bar and not merely seek condonation.
- (ii) The applicant filed an amended notice of motion wherein it sought to uplift the bar. But same came late on ... and in any event did not seek to amend its notice of motion as is required in rule 52.

[14] The third point *in limine* is that the application for condonation does not show good cause, in that same lacks the following requirements:

- (a) A reasonable explanation for the non-compliance.
- (b) Good prospects of success i.e a *bona fide* defense to the main claim.

[15] Mr Boonzaier, who appeared for the respondent, argued that the failure to make out a case for good cause in the founding affidavit is fatal to their application for condonation. In argument, the court was referred to *Stipp and Another v Shade Centre and Another*³ where the Supreme Court confirmed the principle that only in exceptional circumstances should courts depart from the general rule which is to consider, with reference to the founding affidavit only, whether appellants made out a *prima facie* cause of action. It was incumbent on the applicant to meet these requirements in his founding affidavit. The omission was further compounded by the applicant not remedying same in the replying affidavit after being alerted thereto by the respondent in the respondent's answering affidavit.

[16] Ms Mcleod, for the applicant, conceded that their papers do not deal with the requirement of a *bona fide* defence or prospects of success. She, however, argued that their application was substantially compliant with the requirements.

[17] In response to the respondent's answering affidavit, an amended notice of motion was later filed with a prayer for the upliftment of the bar⁴. The court however, notes that this amended notice of motion is not properly before it as the applicant did not comply with rule 52.

³ *Stipp and Another v Shade Centre and Another* 2007 (2) NR 627 (SC) [29] and [30].

⁴ This was filed together with the replying affidavit on 6/06/2019.

[18] Ms Mcloed further argued that there was substantial complinace with rules 32(9) and (10) and that despite the shortcomings in their condonation application, it is nonetheless reasonable and acceptable. She further submitted that the court should desist from being overzelous in adopting a strong-arm approach to the decorum of the rules as the delay caused was relatively short, namely two days.

[19] Ms Mcleod referred the court to *Angula v LorentzAngula Inc.*⁵ at para 7, where Miller AJ stated:

‘Although the overall objective of the case management system is to expedite the machinery of pleadings and ultimately the proceedings as a whole, there will always be some cases where delays are experienced for a variety of reasons. To adopt an implausible rigid attitude may lead to situations where a litigating party is prevented from fairly ventilating his or her case. I accept that there will be cases where the negligence or carelessness on the part of a litigant is of such a nature that the court will not assist ... The explanation given for the delay, although not perfect, is nonetheless reasonable and acceptable.’

[20] Though I am in agreement with the sentiments of my brother, Miller AJ in the *Angula* matter, I am of the view that the matter before this court is distinguishable and falls short of the protective net provided for in the *Angula* case. The reason for this is simple. Not only were certain defects in the applicant’s condonation application fatal but also the lethargic application of the rules and procedure in this application sets this matter amongst cases where the negligence or carelessness on the part of a litigant is of such a nature that the court will not assist him.

[21] To proceed to consider the merits of a condonation application where it fails to meet the most basic requirements for condonation applications, will be putting the cart before the horse. Only when a condonation application meets its basic requirements will the court proceed to consider its merits.

Condonation

⁵ *Angula v LorentzAngula Inc* (I 599/2015) [2016] NAHCMD 78 (17 March 2016).

[22] Applications for condonation are common place in our jurisdiction. The requirements for same are thus trite. A party must satisfy the requisites of good cause, by offering an acceptable explanation for the delay and also establishing reasonable prospects of success. It goes without saying that a failure to meet those cardinal requirements may result in the dismissal of the condonation application⁶. [Emphasis added].

[23] In the matter of *Katjaimo v Katjaimo*⁷, the Supreme Court, though said in the context of an appeal, at para 25 of that judgment held that the requirements applicable to applications for condonation remain the same, and quoted with approval the approach to condonation applications as outlined in *Beukes and Another v South West Africa Building Society (SWABOU) and Others*⁸ as follows:

‘An application for condonation is not a mere formality; the trigger for it is non-compliance with the Rules of Court. The jurisprudence of both the Republic of Namibia and South Africa indicate that a litigant is required to apply for condonation and to comply with the rules as soon as he or she realises there has been a failure to comply.’

[24] The applicable law to condonations were more recently considered by this court in *South African Airways Soc Limited v Camm*⁹, where Prinsloo J, referred to the Supreme Court matter of *Balzer v Vries*¹⁰ where the court pronounced itself on this matter as follows:

‘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.’

[25] Not only is it expected of legal practitioners to comply with procedural and substantive legal requirements but to diligently comply with the rules of court. In this

⁶ *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.

⁷ (SA 36/2013) [2014] NASC (12 December 2014).

⁸ *Beukes and Another v South West Africa Building Society (SWABOU) and Others* (SA 10/2006) [2010] NASC 14 para 12.

⁹ *South African Airways Soc Limited v Camm* (HC-MD-CIV-ACT-DEL-2016/02479) [2019] NAHCMD 14 (31 January 2019).

¹⁰ *Balzer v Vries* 2015 (2) NR 547 (SC) at 661J-552F.

regard, the Supreme Court in *Arangies t/a Auto Tech v Quick Build*¹¹, expressed its displeasure with sluggish compliance with court rules.

'The absence of any sense of diligence or attention to compliance with the court's rules renders the explanation for the delay in filing the court record weak and unpersuasive.'

[26] Ms Mcleod referred the court at length to the requirements of rule 56¹². She argued that the application for condonation meets the circumstances mentioned therein. In that the application, she argued was made promptly, only two days of default, that it was not made intentionally and that in her view the reasons advanced were reasonable, so the argument went. This rule deals with relief from sanctions and adverse consequences and reads as follows:

- '56. (1) On application for relief from a sanction imposed or an adverse consequence arising from a failure to comply with a rule, practice direction or court order, the court will consider all the circumstances, including –
- (a) whether the application for relief has been made promptly;
 - (b) whether the failure to comply is intentional;
 - (c) whether there is sufficient explanation for the failure;
 - (d) the extent to which the party in default has complied with other rules, practice directions or court orders;
 - (e) whether the failure to comply is caused by the party or by his or her legal practitioner;
 - (f) whether the trial date or the likely trial date can still be met if relief is granted;
 - (g) the effect which the failure to comply has or is likely to have on each party; and

¹¹ *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC).

¹² Paragraph [55] *Nzianga v Carlos* (I 1077/2014) [2017] NAHCMD 364 (17 August 2017).

- (h) the effect which the granting of relief would have on each party and the interests of the administration of justice.
- (2) An application for relief must be supported by evidence.
- (3) The managing judge may, on good cause shown, condone a non-compliance with these rules, practice direction or court order.'

Applying the law to the facts

[27] Mr Boonzaier, argued that the delay occurred from 13th of March 2019 when the case plan was made an order of court. I disagree with this submission for the simple reason that 'days' in default of a court order only run from the date the case plan was not complied with and not prior thereto. *In casu*, the delay commenced on the failure of the applicant to file his Plea on 2nd of April 2019.

[28] Objectively, the delay of two days is relatively short when one has regard to the fact that the applicant was in default of the case plan for only two days before taking action. The relatively short delay may very well have been cured by an appropriate costs order. Regrettably, however, the various non-compliances and disregard to simple rules and procedure drew fatal blows to applicant's case.

[29] Though, there are many issues with the condonation application, the omission which broke the camel's back is certainly the complete lack of the cardinal requirement of prospects of success and on that ground alone the application should fail. This being said, there, was also non-compliance with rules 32(9) and 32(10). I shall now move to that aspect.

Rule 32(9) and (10)

[30] In *South African Airways Soc Limited v Camm*¹³, Prinsloo J, held at para 38 of her judgment that non-compliance with the above rule, renders an interlocutory application defective and such an application stands to be struck from the roll¹⁴. The court in the *South African Airways* matter referred to the matter of *Bank Windhoek Limited v Benlin Investment CC*¹⁵ delivered by Masuku J, a judgment I am in full agreement with. Masuku J, held the following:

- (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;
- (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.'

¹³ *South African Airways Soc Limited v Camm* [2019] NAHCMD 14 (31 January 2019)

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

¹⁵ *Bank Windhoek Limited v Benlin Investment CC* [2017] NAHMD 78 (15 March 2017).

Non-compliance with rule 32(9) and 32(10)

[31] The letter drafted by the applicant on 4th of April 2019, attached as ES1 to the 32(10) notice filed of record, regrettably falls dismally short of compliance with rule 32(9). The said letter did not seek or suggest an amicable way of resolving the dispute.

[32] The rule 32(10) notice did not meet the requirements. All it referred to was the letter of 4 April 2019 written by the legal practitioner for the plaintiff/respondent. It said nothing on the letter by the applicant's legal representative. What is further of concern is that the response by the respondent dated 5 April 2019 was not attached or referred to. I therefore conclude that the said notice did not detail the steps taken to resolve the matter amicably.

[33] I am therefore of the view that rules 32(9) and 32(10) were not fully complied with.

Non-compliance with rule 55(1)

[34] The founding affidavit to the condonation application did not deal with or encapsulate an application for an upliftment of the bar. The defendant remained *ipso facto* barred in terms of rule 54(3). The Applicant filed an amended Notice of Motion which included a prayer for the upliftment of the bar. As mentioned earlier no notice to amend was filed prior to the filing thereof and the said document is therefore not properly before court.

Prospects of success

[35] As said above, the application for condonation omitted to deal with the requirement of showing that there are prospects of success. This was conceded to by Ms Mcleod. The Court was urged by Ms Mcleod to have regard to the Applicant's intended plea marked as ES6 and attached to the founding affidavit. This plea is still not before court until the bar is uplifted and the condonation granted.

[36] To ask to the court to have regard thereto would amount to a backdoor attempt to put before the court a pleading that is not properly before it. For the court to have regard to the applicants plea, would in all respects render the very application for condonation superfluous.

[37] What was required was for the applicant to make out his *bona fide* defense and/or prospects of success in the founding affidavit. This was lacking in the both the founding and the replying affidavits. I hold that such a failure was fatal to the condonation application.

Conclusion

[38] In light of the foregoing, I conclude that the defendant (applicant) has failed to show good cause in order for this court to condone his late filing of his Plea. I further hold that the applicant failed to apply for upliftment of the bar. I finally hold that the applicant has failed to meet the requirements of rule 32(9) and 32(10).

[39] In consequence whereof, I make the following order:

1. The court upholds all three points *in limine* raised by the respondent.
2. The application for condonation is denied.
3. The applicant is to pay the respondents' costs in terms of rule 32(11).
4. The matter is postponed to 14 August 2019 on Judge Tomassi's case management roll for status hearing.

APPEARANCES:

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