

“ANNEXURE 11”

Practice Direction 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Punyu Crusher (Pty) Ltd v Salamis Island Investments (Pty) Ltd and 4 Others</i>	Case No.: HC-MD-CIV-ACT-CON-2018/02998
	Division of Court: High Court (Main Division)
Heard/tried before: Honourable Mr Justice B Usiku J	Date of hearing: 24 July 2019
	Delivered on: 24 July 2019 Reasons released: 02 August 2019
Neutral citation: <i>Punyu Crusher (Pty) Ltd v Salamis Island Investments (Pty) Ltd and 4 Others</i> (HC-MD-CIV-ACT-CON-2018/02998) [2019] NACHMD 265 (2 August 2019)	
The Order: Having heard counsel for both parties and having read documents filed of record: IT IS ORDERED THAT: <ol style="list-style-type: none">1. The application for condonation by the first, third and fifth defendants is granted.2. The automatic bar is hereby lifted.3. The first, third and fifth defendants are ordered to pay the costs of the plaintiff, jointly and severally the one paying the other to be absolved, occasioned by plaintiff's opposition to the defendants' condonation application and such costs are to include costs of one instructing and one instructed legal practitioner.	

4. The defendants must file a plea and counterclaim, if any, on or before 08/08/2019;
5. The plaintiff must file a replication and plea to the counterclaim, if any, on or before 22/08/2019;
6. The parties are directed to file their respective discovery affidavits on or before 06/09/2019;
7. The matter is referred to court connected mediation, effective from 09/09/2019;
8. The parties are directed to file a draft mediation referral order as soon as they obtain mediation dates and to arrange to have same issued in chambers;
9. The parties are directed to file a joint status report or joint case management report on or before 19/09/2019.
10. The case is postponed to 25/09/2019 at 15:15 for Status hearing or for a Case Management Conference hearing.

Reasons: Practice Direction 61(9)

Introduction

- [1] This is an application by the first, third, and fifth defendants for an order:
- (a) condoning the defendants' non-compliance with court order dated 14 November 2018 (ie failure by defendants to file plea and/or counterclaim by 11 January 2019 and failure to file discovery affidavit by 28 February 2019);
 - (b) uplifting the automatic bar; and
 - (c) costs against the plaintiff in the event of the plaintiff opposing this application.

- [2] The plaintiff opposes the above application.

Background

- [3] The plaintiff instituted action against the defendants, in August 2018. In its combined summons the plaintiff alleges that the parties had on 04 November 2014 entered into a written lease agreement, in terms of which the plaintiff let to the defendants a "Crusher Plant". The lease period is for 18 years. In terms of the agreement the defendants are

required to pay rent in a specified amount, on monthly basis. In terms of the provisions of the agreement, the defendants are required to make investment in the Crusher Plant, to a value of not less than N\$ 30 million towards operational machine and equipment, brick-making plant, tipper trucks, excavator, front-end loader, dump truck etc.

[4] The plaintiff avers that the defendants breached the aforesaid agreement, in that the defendants failed to:

- (a) pay rent on due date or at all; and
- (b) invest in the Crusher Plant to the value of N\$ 30 million as agreed.

[5] The plaintiff cancelled the agreement and claims against the defendants an order in the following terms:

- (a) declaring the agreement to have been validly cancelled;
- (b) evicting the first defendant and all those who occupy through it, from the plaintiff's premises at Punyu Crusher Plant, B1 Oshivelo Road, Tsumeb;
- (c) payment of the amount of N\$ 2,328,654.87 (representing arrear rent);
- (d) payment of the amount of N\$ 30 000.000 (representing amount specified in the investment clause);
- (e) payment of the amount of N\$ 16 200,000.00 (representing lost rental for the unexpired period of the leaser period calculated from 1 July 2018 to 1 December 2032).

[6] The defendants defend the action.

[7] In terms of a case planning order dated 14 November 2018, the defendants were, among other things, ordered to deliver their plea and counterclaim, if any, on or before 11 January 2019. The defendants were further directed to file their discovery affidavits on or before 28 February 2019.

[8] The defendants did not comply with the abovestated order.

[9] The defendants have delivered an application, for an order in the following terms:

- (a) condoning the defendants' non-compliance with the Honourable Court's

direction to the defendants contained in the court order dated 14 November 2018;

(b) uplifting the automatic bar which currently operates against the filing of the defendants' plea and counterclaim;

(c) costs of this application to operate against the plaintiff in the event it chooses to oppose the relief sought in this application.

[10] As stated before, the plaintiff opposes the above application.

[11] The parties have exchanged the papers in respect of the above application. The court is now called upon to determine whether or not the defendants are entitled to the relief they seek.

Analysis

[12] The issue for determination by the court is whether the defendants have:

(a) shown good cause as to why the court should extend the time-limits within which they would file their plea and/or counterclaim. In other words, whether the defendants have given a reasonable explanation for their failure to comply with the court order in question, and

(b) indicated to the court that they have a bona fide defence to the plaintiff's claim in the action. In this regard the defendants are expected to set out, clearly, facts which, if proved, would constitute defence to plaintiff's claim.

[13] The above two requirements must be satisfied seriatim and failure to satisfy one may lead to the application being refused.¹

[14] I now turn to consider whether the defendants' condonation application meet the above requirements.

[15] In their founding affidavit, the defendants explain that the reason for non-compliance is that the fifth defendant had travelled from Namibia to China on the 6 December 2018 and only returned on 27 March 2019. Soon thereafter, he instructed the

¹ IA Bell Equipment Co Namibia (Pty) Ltd v ES Smith Concrete Industries CC (I1860/2014) [2015] NAHCMD 68 (23 March 2015 para 10).

defendants' legal practitioners to launch the present application. In support of the allegation that the fifth defendant was out of the country during the period aforesaid, the defendants filed copies of relevant pages from the fifth defendant's passport, confirming the departure date and return date.

[16] Insofar prospects of success on the merits of the case are concerned, the defendants argue to the effect that they have complied with the terms of the lease agreement. They argue that they continue to make payment to the plaintiff. The defendants maintain they did not breach the lease agreement.

[17] In regard to the claim for damages for breach to invest in the Crusher Plant, the defendants assert that the plaintiff's claim is not true. The Defendants argues that they have installed 20 concrete houses, staff living houses, office buildings, 4 sets of new brick-making machines, 30 heavy trucks, 2 excavators and 2 front loaders. The defendants claim that they have invested in the Crusher Plant in excess of N\$ 20 000 000.

[18] In regard to the plaintiff's claim for N\$ 16 200 000 in respect of loss rental for the unexpired period of lease from 1 July 2018 to 1 December 2032, the defendants simply deny liability as they did not breach the agreement.

[19] I proceed to consider whether the defendants have furnished a reasonable explanation for their failure to comply with the court order in question. The deponent to defendants' founding affidavit asserts that the failure to comply with the court order was due to the fact that he travelled outside of the country, on 6 December 2018 and only returned 27 March 2019.

[20] The plaintiff argues that the fifth defendant was reckless and remissful to travel out of the country on an extended trip without giving his legal practitioners the required instructions. The fifth defendant knew, the plaintiff contends, that he would not be able to communicate with his legal practitioners whilst in China but nonetheless proceeded to undertake the trip without giving instructions.

[21] I am of the opinion that the explanation given by the defendants gives a picture of

how the delay came about and is reasonable and stands to be accepted in the circumstances.

[22] On the issue of bona fide defence or reasonable prospects of success in the main action, in regard to alleged default on rent payment, the defendants merely assert that they have '*continued to make payments*' to the plaintiff. The defendants do not indicate when such payments were made; how much was paid; how was such payment effected; whether or not proof of such payment is available etc. Bare denial is not sufficient for the purposes of showing reasonable prospects of success on the merits of the matter. The defendants are required to make certain factual averments, which if proved, would constitute good defence to the plaintiff's claim.

[23] The plaintiff, at para 16 of its answering affidavit, makes reference to the "defendants" having '*received payment from November 2018 to February 2019 in the monthly amounts of N\$ 200 000....which are stated to be rent and arrears....*' This aspect was not cleared up by the parties in argument. However, the reference to the "defendants" having received payments as "rent" could only make sense if it was meant to refer to *the plaintiff*, as the recipient. In any event the plaintiff has alleged in its particulars of claim that no rent was received up to the time when the action was instituted.

[24] On the aspect of investment towards acquisition of operational machinery and equipment, the defendants assert that they have installed concrete houses, staff living houses, office buildings, 4 sets of brick-making machines, 30 heavy trucks, 2 excavators and 2 front loaders; which amount to over N\$ 20 million in value.

[25] In its answering affidavit, the plaintiff avers that the defendants have not furnished evidence of the investment they claim to have made in the Crusher Plant. The plaintiff does not go as far as refuting the claims of investment alleged by defendants as false.

[26] I am of the view that the defendants here have at least raised some factual allegations which, if proved, would constitute a defence to the plaintiff's claim in respect of damages allegedly suffered regarding breach of the agreement relating to the investment

clause.

[27] I therefore find that the factual allegations on this aspect are sufficient to constitute good defence to the claim relating to the investment clause and I am of the opinion that the application for condonation stands to be granted.

[28] As regards the issue of costs, the general rule that costs follow the event, is not applicable to successful applications for the grant of an indulgence by the court. An applicant pays the costs in such an application.²

[29] In any event, I am further of the view that even though the defendants are successful, they are not entitled to costs. The plaintiff was perfectly justified in opposing the application and for these reasons I am of the opinion that the plaintiff should be granted costs of opposing the condonation application.

[30] In the result I make the following order as more fully set out at the beginning of this ruling.

Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Applicant	Defendant
Adv G. Narib Instructed by Shikale & Associates Windhoek	N. Mhata Instructed by Sisa Namandje and Co Inc. Windhoek

² Town Council of Healo Nafidi v Northland Development Project Ltd I2725/2014 [2015] NAHCMD 73 (27 March 2015 at para 22.