

IN THE HIGH COURT OF NAMIBIA

Case Title: SOPHIA NDESHIPANDA AMADHILA v HAROLD NDEVAMONA AKWENYE	Case No: HC-MD-CIV-ACT-CON-2017/02946
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 11 MARCH 2019
	Date of order: 29 MARCH 2019
	Reasons delivered on: 04 APRIL 2019
Neutral citation: <i>Amadhila v Akwenye</i> (HC-MD-CIV-ACT-CON-2017/02946) [2019] NAHCMD 81 (29 March 2019)	
Results on merits: Application for condonation	
The order: Having heard ANKIA DELPORT for the Applicant and HENRY SHIMUTWIKENI , for the Respondent, and having read the documents filed of record: IT IS HEREBY ORDERED THAT: 1. Plaintiff/Respondent's non-compliance with the <i>dies</i> afforded for the filing of the answering affidavit in the Defendant/Applicant's application for rescission of judgment is hereby condoned. 2. Costs to follow the event. Further Conduct of the Matter: 3. The case is postponed to 11/04/2019 at 15:00 for Status hearing (Reason: For further directions from the Managing Judge regarding the application for rescission). 4. Joint status report must be filed on or before <u>08/04/2019</u> .	
Reasons for orders:	
<u>Introduction and brief background</u> [1] The matter before me has a long and troubled history consisting of a number of applications and the	

latest in the long line of applications is an application for rescission of judgment which judgment was granted on 23 August 2018 by default under the current case number. Because of the history of the matter and in order to avoid any confusion when there is reference to the parties I will refer to them as they are in the rescission application. The rescission application was brought on 27 September 2018, in terms of which the respondent was required to file his notice to oppose on or before 05 October 2018 and answering affidavit on or before 26 October 2018. The respondent filed his notice of opposition on 01 October 2018. The applicant however filed a further Notice of Motion on 10 October 2018 praying for similar relief but on an urgent basis as it would appear that execution of the writ of execution was eminent. The latter application did not proceed as it would appear that the respondent, through his legal practitioner at the time, Mrs Celliers, agreed to keep the execution of the writ in abeyance pending the outcome of the application for rescission.

[2] The legal practitioner of the respondent withdrew as counsel of record as she closed her practice with effect from 18 October 2018. Her formal withdrawal as legal practitioner of record was filed with the assistance of the Law Society of Namibia on 25 October 2018. Mrs. Delport then came on record on the same date as the new legal practitioner on behalf of the respondent. She also filed a status report on even date requesting a chamber meeting and also set out the fact that the respondent is unable to comply with the timeline as set in the Notice of Motion.

[3] The status report did not come to the attention of the managing judge and the chamber meeting was not scheduled as requested by Mrs. Delport. However, on 16 November 2018 an application for condonation was filed on behalf of the respondent. This application for condonation was opposed by the applicant.

[4] The matter was enrolled for 29 November 2018, according to the Notice of Motion, on the judicial case management roll on which date Mrs. Delport indicated that she will withdraw the application due to non-compliance with rule 32(9) and (10) she thereafter proceeded to file a fresh application that complied with rule 32(9) and (10).

[5] In his Notice of Motion the respondent prayed for the following relief:

- '1. Condoning the respondent's non-compliance with the dies afforded for the filing of the answering affidavit in the applicants application for rescission of judgment.
2. Extending the time-limits imposed by the said notice of motion to answer thereto on or before 16 November 2018.
3. Cost of suit (if opposed);

4. Further and/or alternative relief.'

The issues

- [6] On behalf of the applicant three points of law were raised, i.e.:
- a. Incompetent relief sought:
 - b. Absence of *locus standi* and authority to institute application:
 - c. No case made out entitling the grant of the relief sought:
- [7] The issue raised in respect of incompetency was however not persisted with by the applicant

Parties' submissions

Respondent

[8] On the second point raised it was argued on behalf of the respondent (applicant in the condonation application) that it is not necessary for the respondent to file an affidavit as a Notice of Motion can be supported by any person who is in a position to provide the necessary material to support the claim. In this regard it was argued that the delay and the cause for the delay is factual in nature and the respondent is unable to verify or confirm same as it does not fall within his knowledge what transpired prior to the withdrawal of his erstwhile legal practitioner neither could he attest to the steps taken by the newly appointed legal representative.

[9] It was further submitted that anything falling outside this scope amounts to a challenge of the legal representative's mandate to act on behalf of his or her client, with the severe consequences this might entail.

[10] On the third issue raised by applicant that no case was made out entitling the granting of the relief sought in the Notice of Motion Mrs. Delport argued that the anticipatory steps taken were fully set out in the founding affidavit and the requirements as set out in Rule 56 were answered to the point. She argued that a detailed exposition of the time lines were incorporated in the founding affidavit and clear account was given as to the period subsequent to the notice of withdrawal by the erstwhile legal practitioner.

[11] In conclusion it was argued that the prospects of success is dealt with in the founding affidavit and Mrs. Delport submitted that the relief prayed for by the applicant in the main application is incompetent and

therefor the element of the prospects of success becomes moot.

Applicant

[12] Mr Shimutwikeneni argued on behalf of the applicant that *ex facie* the founding papers, the institution of the present application has fatally not been authorised by the applicant. In this regard the court was referred to *JB Cooling and Refrigeration CC v Dean Jaques Willemse t/a Windhoek Armature Winding and Others*¹ wherein the court found that the minimum requirement for deponent of founding affidavit is to state authority.

[13] Mr Shimutwikeneni submitted that in applying the aforementioned principles, that manner of pleading adopted in the founding affidavit renders the same liable to be dismissed.

[14] On the argument that the respondent failed to make out a case it was argued that condonation is not just for the asking but that the party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. The courts attention was drawn to *Telecom Namibia Ltd v Nangolo and Others*² and the principles set out therein.

[15] In conclusion it was argued that the basis for the present application, being the closure of the firm of the erstwhile legal practitioner and the schedule of the new legal practitioner are insufficient basis for the granting of condonation.

Applicable law and application of the law to the facts

[16] First and foremost I must remark that I am fully in agreement with the legal principles that this court was referred to by Mr Shimutwikeneni, however one must not lose sight of the fact that each application of this nature will be considered on its own merits.

[17] The principles of condonation were restated by the Supreme Court in *Minister of Health and Social Services v Amakali Matheus*³ as follows:

‘[17] An applicant seeking condonation must satisfy the following requirements.⁴ He or she must provide a reasonable, acceptable and bona fide explanation for non-compliance with the rules. The application must be lodged

¹ (A 76/2015) [2016] NAHCMD 8 (20 January 2016)

² (LC 33/2009) [2012] NALC 15 (28 May 2012)

³ (SA 4 - 2017) [2018] NASC (6 December 2018).

⁴ *Balzer v Vries* 2015 (2) NR 547 (SC) at 551J-552F and *Jossop v The State* (SA 44/2016) NASC (30 August 2017).

without delay, and must provide a full, detailed and accurate explanation for the entire period of the delay, including the timing of the application for condonation.⁵ Lastly, the applicant must satisfy the court that there are reasonable prospects of success on appeal.

[18] There are a range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted.⁶ These include 'the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits, the importance of the case, the respondent's (and where applicable, the public's interest in the finality of the judgment), the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice'.

[18] *On the issue of absence of locus standi:* This court accepts that the law generally is that a legal practitioner must not enter the litigation arena as a witness for his client. The legal practitioner in the matter *in casu* was the deponent to the founding affidavit, wherein she stated the details in support of this application which cannot be within the knowledge of the respondent and where she was privy to the facts which, in this instance, occurred in her professional domain. The respondent could not and would not have been able to depose to such an affidavit. In my considered view this is the type of exceptional circumstances which will dictate that a legal practitioner can depose to an affidavit on behalf of her client, and this would be primarily in an interlocutory application. Only in that very limited nature can a legal practitioner depose to an affidavit in such an application.

[19] It is clear from the answering affidavit filed in respect of the main application that the current legal practitioners for the respondent are appointed to act on his behalf in the current proceedings.

[20] *No case made out entitling respondent the grant of relief sought:* From having considered the founding affidavit filed read with the status report filed prior to the expiring of the *dies* as set out in the Notice of Motion, it is exceedingly clear that the circumstances surrounding the withdrawal as legal practitioner by the erstwhile legal representative of the respondent is not the usual day to day withdrawal by a legal practitioner. There clearly appears to be extra-ordinary situation that gave rise to this withdrawal and the new legal practitioner coming on record.

[21] It is also clear that this event was not in the control of the respondent. Steps were immediately taken by the respondent's current legal practitioner to bring the extra-ordinary circumstance surrounding this matter

⁵ See *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5; *Primedia Outdoor Namibia (Pty) Ltd v Kauluma* (LCA 95-2011) [2014] NALCMD 41 (17 October 2014).

⁶ *Gomes v Meyer* (SA 33/2014) NASC (12 April 2017).

to the attention of the court by virtue of a status report. In addition thereto the founding affidavit dealt with rule 56 to the point to the satisfaction of this court. I am satisfied that the respondent provided a full, detailed and accurate explanation for the entire period of the delay, including the timing of the application for condonation.

[22] On the prospect of success the issue was raised that the relief prayed for by the applicant in the main application is incompetent. I agree with Mrs Delport that in the event that the court find that the relief prayed for in the main application is incompetent then the issue of success is moot.

[23] My order is therefor set out as above.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
Ms A Delport Of Delport Legal Practitioners	Mr H Shimutwiken Of Henry Shimutwiken & Co Inc