

IN THE HIGH COURT OF NAMIBIA

Case Title: ELIAZER KAMBONDE V SESILIA TUUTALENI MOSES	Case No: HC-MD-CIV-ACT-CON-2018/03528
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 25 MARCH 2019
	Date of order: 05 APRIL 2019
	Reasons delivered on: 10 APRIL 2019
Neutral citation: <i>Kambonde v Moses</i> (HC-MD-CIV-ACT-DEL-2018/03528) [2019] NAHCMD 92 (25 March 2019)	
Results on merits: Application for condonation. No decision on the merits	
The order: Having heard DORIS KAUMBI for the Applicant and FRANCOIS BANGAMWABO , for the Respondent, and having read the documents filed of record: IT IS HEREBY ORDERED THAT: 1. The applicant's non-compliance with the case plan dated 25 October 2018 is hereby condoned. 2. The applicant to pay the costs of the application, which is limited in terms of Rule 32 (11) of the High Court Rules. 3. The matter is postponed on the main action to 9 May 2019 at 15h00 for a further Case Planning Conference.	
Reasons for orders:	
<u>Introduction and brief background</u> [1] In the application before me the defendant ¹ is seeking an order for the upliftment of a bar operating against him in terms of rule 54 of the High Court Rules. The defendant seeks an order from court for a condonation for the non-compliance with a case plan order that was issued on 25 October 2018. In terms of the said order the defendant failed to file his plea/plea and counterclaim and he now seeks relief in terms of	

¹ Parties are referred to as they are in the Main Action.

which he will be allowed to defend the action instituted by the first and second plaintiffs.

[2] On 4 September 2018 the plaintiffs instituted summons against the defendant. Their claim was based on compensation for damages done on their fixed property, unjustified enrichment in the form of arrear rentals and unpaid municipal bills. Thereafter a case planning conference notice was issued on 4 October 2018 by court, wherein parties were ordered to attend a case planning conference on 25 October 2018. On 25 October the plaintiffs filed a one-sided case plan, which was made an order of court that very same day. In terms of the case plan order, the parties were directed and ordered to *inter alia* file their pleadings and exchange discovered documents and affidavits. The timelines indicated by the case plan order was that:

- a) The defendant is to deliver his plea and counterclaim if any on or before 9 November 2018.
- b) Defendant's discovery be delivered on or before 26 November 2018.

[3] The defendant however failed to deliver his plea and counterclaim as per the above court order.

[4] On 29 November 2018 the court issued a court order directing the defendant to file an application for condonation, which gave rise to the application *in casu*. This application, was opposed by the plaintiffs.

[5] The parties were directed to file their heads of arguments herein and on the date of hearing the parties indicated that they will abide by their heads of argument. No further oral arguments were advanced herein.

Parties' submissions

Defendant

[6] Ms Kaumbi, counsel for the defendant, submitted that the court should determine whether the explanation tendered by the defendant's legal representative by way of the founding affidavit should be accepted by the court or not. She referred the court to the case of *Donastus v Muhamederahimuo & Others*² and *Minister of Health and Social Services v Amakali Matheus*³ wherein the court sets out the approach to be adopted when considering the imposition of sanctions under rule 53 and 54.

[7] Ms Kaumbi, submitted that the plea/plea and counterclaim was not filed due to an administrative error in her office and she was not alerted by the system that a unilateral case plan or document was filed.

² 2016 (2) NR 532 (HC).

³ (SA 4 – 2017) NASC (6 December 2018) para 48 – 50.

She further submitted that she did not receive an email and as such was unaware that the plaintiffs filed a unilateral case plan and same was issued out of chambers without her input. Ms Kaumbi further states that her candidate legal practitioner failed to brief her on the case plan dates and she was under the impression that the matter had not reached pleading stages.

[8] On the averment on behalf of the plaintiffs that this explanation is an afterthought or manoeuvre to mislead the court Ms Kaumbi submitted that the plaintiff is not in the position to dispute what had occurred in her office in failing to file the plea/plea and counterclaim, and to say that the defendant refused to cooperate in the preparation and signing of the case plan is without merit. She submitted that the allegation is vague as it does not disclose the manner in which the defendant's legal practitioner was engaged, the manner by which her cooperation was sought and the date and person who was engaged.

[9] Finally, Ms Kaumbi submitted that it is undisputed that the defendant's legal practitioners were contacted a few days before the court appearance of 29 November 2018 by the plaintiff's legal practitioner insisting on the parties to go for mediation, which in turn confirms the belief held at that time by the defendant's legal practitioners that they were not barred from pleading. She therefore submitted that explanation as to the default should be accepted by court.

[10] In respect of the second leg in satisfying the court that the applicant has a *bona fide* defence it was submitted that the issues canvassed in the particulars of claim in the main matter were settled in court-connected mediation in another matter which was before court. She submitted that the plaintiffs' conduct in instituting the present action is contrary to the settlement agreement reached between the parties at mediation, which resulted in a court order of 25 September 2018. She therefore submits that on a *prima facie* level, she has demonstrated a triable issue that existed.

[11] Counsel further submitted that the crux of the defendant's defence is that the proceedings brought by the plaintiffs are *res judicata* with reference to the settlement agreement that was signed by the parties. In this regard she referred the court to the case of *Gollach & Gomperts (1967) (Pty) v Universal Mills & Produce Co (Pty) Ltd*⁴ and submitted that should it be proven during trial that the settlement agreement entered into between the parties had settled the present matter then the principle of *res judicata* applies and provides a full defence to the present action.

[12] To further substantiate her argument that the applicant has a *bona fide* defence Ms Kaumbi submitted that any claims relating to rentals prior to 2 September 2015 are prescribed and this issue of prescription will be canvassed should the court find that the principle of *res judicata* does not apply in the

⁴ 1978 (1) SA 914 A.

present matter.

[13] As to the issue of prejudice, counsel submits that it is the defendants that has been prejudiced as the plaintiffs have ignored the court order of 24 September 2018 and has instead instituted fresh proceedings on the basis of the very same facts as the previous matter before this court.

Plaintiffs

[14] Counsel for the plaintiffs, Mr Bamgwambo, submitted that the defendant's legal representative never approached the court to seek any extension of time or explain the reason for her non-compliance in failing to file further pleadings as per court order of 25 October 2018. He submitted that the explanation advanced by the defendant's legal practitioner that she was unaware of the case plan is simply not true. He further submitted that according to court records parties were aware that they had to file a case plan by 22 October 2018 and that since the defendant refused to cooperate in preparing and signing the case plan, plaintiffs proceeded to file a one-sided case plan. He further stated that the defendant also failed to attend the case planning conference that was scheduled for 25 October 2018.

[15] Mr Bangamwabo disputed defendant's allegation that the case plan order was issued in chambers and referred the court to the case plan order that was issued in open court on that very same day, in the absence of the defendant and without the defendant extending an apology. He submits that defendant's conduct was contemptuous and amounts to a wilful disregard of orders and rules of court.

[16] Counsel further submits that the explanation that the candidate legal practitioner employed by defendant's legal representative failed to brief her on the case plan dates cannot assist the defendant's case in that the defendant's legal representative is directly accountable to the court for the compliance with court orders. He argues that such a duty cannot be delegated to a candidate legal practitioner or administrative staff.

[17] Counsel further submits that it is not convincing for the defendant's legal representative to state that she was unaware of the case plan order and only became aware of it on 29 November 2018 when she appeared in court, because the legal representative is a registered user of the e-justice system, which would have alerted her that a one-sided case plan was filed, which was subsequently made an order of court.

[18] With regard to defendant's *bona fide defence*, Mr Bangamwambo submitted that the claim for the previous matter referred to by Ms Kaumbi and the current action are completely different. The previous one

dealt with evictions and compensation for improvements and renovations made on the property, while the current action deals with unjustified enrichment, compensation for damages done on the property and municipal outstanding bills. He submitted that applicant's argument of *res judicata* cannot be a defence to the respondents' claim, it is invalid and that the respondents' have no prospects of success on merits, and in any event the court will not take cognisance of the prospect of success when there is a flagrant disregard of court orders and rules of court and there is a glaring and unexplainable disregard of the process of court. With regard to the above statement counsel referred the court to the explanation given on 29 November 2018 and those proffered in the founding and replying affidavit.

[19] As to prejudice, counsel submitted that the plaintiffs have suffered immense prejudice as a result of legal costs incurred and the unreasonable delay in finalising the matter.

[20] In conclusion, counsel submits that no acceptable and reasonable explanation is tendered by the defendant to justify his non-compliance with the court order of 25 October 2018 and that defendant has no prospects of success to the plaintiffs' claim.

Applicable law

[21] The principles on condonation have been, time and again, considered by this court on numerous occasions. These principles are very clear and were summarized in a recent Supreme Court judgment of the *Minister of Health and Social Services v Amakali Matheus*⁵ wherein Damaseb DCJ (Smuts JA and Chomba AJA concurring) said the following:

'[17] An applicant seeking condonation must satisfy the following requirements.⁶ He or she must provide a reasonable, acceptable and bona fide explanation for non-compliance with the rules. The application must be lodged 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.⁷ Lastly, the applicant must satisfy the court that there are reasonable prospects of success on appeal.'

Application of the law to the facts

⁵ (SA 4 – 2017) [NASC (6 December 2018) para [48] – [50].

⁶ *Balzer v Vries* 2015 (2) NR 547 (SC) at 551J-552F and *Jossop v The State* (SA 44/2016) NASC (30 August 2017).

⁷ 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).

Whether the applicant provided a reasonable explanation for the delay

[22] Ms Kaumbi's explanation for the failure to comply with the court order, is justifiably open to criticism by opposing counsel. However, the defendant is not required to give a perfect explanation for the non-compliance but must provide a reasonable explanation for said non-compliance. It is quite clear that the defendant's legal practitioners failed to comply with court order dated 25 October 2018 and that the said non-compliance is to be attributed to the maladministration at her office. However, this court cannot find that the plaintiff's non-compliance was blatant, reckless or intentional. Should the court refuse the application for condonation it will effectively close the doors of court to the defendant for reasons that he had no control over.

[23] In the *Minister of Health and Social Services* case, referred to above, the Supreme Court made the following findings:

'[48] . . . The court noted that although non-compliance with court orders may be serious, the striking of a defence is a grave matter and the court must consider each case in light of its peculiar facts and circumstances.

'[49] Masuku J noted at para 20 that:

“. . . the order for the striking of a defence is very serious as it has the potential, if granted, to show to the errant party, what in footballing parlance, is akin to a red card. This card effectively excludes that party from further participation in the trial. For that reason, the dictates of justice and fairness would in my view require that this application should not merely be made orally or only in heads of argument. Good practice, propriety and fairness would suggest that it must on account of its gravity be on notice, preferably on application, and to which the defaulting party may have an opportunity to deal with it. Furthermore, it will always assist the court, before issuing such a drastic order, to have had the benefit of argument by both parties where they both still have their hands on the plough so to speak.”

(emphasize provided)

[24] In the same vein in *Hilifilwa v Mweshixwa*⁸ this Court had to determine whether it would be just to impose sanctions for non-compliance of a lay litigant who had no notice to jointly formulate the joint pre-trial order. Masuku J pointed out the effect of rule 53 by stating that:

“[14] It must be pointed out that the refrain, in the sanctions enquiry, is for the court, at the end of the day, to issue an order that is in all the circumstances of the case just and fair. This means that there can be no one size-fits-all order. The court should, in fashioning an appropriate order in a case, have regard to all the pertinent factors and

⁸ (I 3418/2013) [2016] NAHCMD 166 (10 June 2016).

circumstances. Having done so, it will then be properly placed to issue a sanctions order, if called for, which meets the justice of the case.”

[25] Therefore, although the explanation for the default is wanting in certain respects it lies at the door of the defendant's legal practitioner and it will not serve the interest of justice to refuse condonation.

[26] However, this court must again in this regard remark that Rule 19 clearly set out the obligations of parties and legal practitioners in relation to judicial case management and I do not wish to repeat same but will highlight sub-rule (f) which reads as follows:

‘(f) to comply with deadlines provided for the taking of any steps under these rules, the practice directions and any applicable law with diligence and promptitude;’

[27] In considering the point of prospect of success Ms Kaumbi alleges that the main application had already been heard and finalised by this court before another Judge and that the applicant intends to raise a special plea of *res judicata* as a settlement agreement, which was reached between the parties, brought the matter to finality, which settlement agreement was also acknowledged by the court in a court order of 24 September 2018. She further alleges that that the averments made in the particulars of claim were facts that emanate from a settlement agreement between the parties and that the applicant wished to advance an important principle of bad faith in mediation proceedings.

[28] This court is of the view that in giving an appropriate order, this court must make an order that meets the justice of the case and having regard to the submissions made by Ms Kaumbi on the issue of *res judicata* and a triable issue on bad faith, the court is of the view that this is a case where the court will not over-emphasize the non-compliance with the court order but that the court must have regard to the prospects of success of the applicant. The court is therefore satisfied that triable issues have been advanced by the applicant and therefore the court will not consider striking applicants defence.

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

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	

Applicant	Respondent
Ms A Kaumbi Of Ueitele & Hans Inc.	Mr F Bangamwabo Of FB Law Chambers