

IN THE HIGH COURT OF NAMIBIA

Case Title: MARTHA SABINA MADISA V EDGARS STORES NAMIBIA LTD T/A JET STORES WALVIS BAY	Case No: HC-MD-CIV-ACT-DEL-2019/02636 Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 6 MARCH 2020 Date of order: 25 MARCH 2020 Reasons delivered on: 26 MARCH 2020
Neutral citation: <i>Madisa v Edgars Stores Namibia t/a Jet Stores Walvis Bay</i> (HC-MD-CIV-ACT-DEL-2019/02636) [2020] NAHCMD 117 (25 March 2020)	
Results on merits: Sanctions Hearing. Merits not considered.	
IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none"> 1. Plaintiff's non-compliance with the court order dated 5 September 2019 is condoned. 2. Plaintiff to pay the cost of this application including the reasonable cost for the opposition of the application. 3. Such costs to be limited to Rule 32 (11). <u>Further conduct of the matter:</u> <ol style="list-style-type: none"> 4. The case is postponed to 23/04/2020 at 15:00 for Status hearing. 5. Parties must file a joint status report setting out the further conduct of the matter and the dates for filing of documents. Said status report <u>must</u> be filed on or before <u>20 April 2020</u>. 	
Reasons for orders:	
<u>Introduction and brief background</u> [1] This matter was set down for a sanctions hearing as a result of plaintiff's failure to comply with the court order of 5 September 2019. In terms of the said order, the parties were ordered and directed to file their	

witness statements by 18 October 2019 and file their expert summaries and expert reports, if any, on 8 November 2019. In the interim parties were ordered to attend mediation to see if the issues between the parties can be narrowed. Defendant managed to file its witness statements by 10 October 2019, however the plaintiff by that time hadn't filed anything. The defendant then raised the issue of the non-filing of the witness statement(s) by the plaintiff on 4 November 2019 to which the plaintiff responded that the matter be referred for a sanctions hearing in order for the plaintiff's counsel to provide an explanation as to why there was noncompliance with the order of 5 September 2019.

Parties submissions

[2] I do not intend to go in depth with the submissions made by the parties as this is quite a straight forward matter and will summarise the submissions as far as practicable.

[3] In a nutshell the plaintiff's legal practitioner alleges in her sanctions affidavit that she consulted with the plaintiff on 15 and 16 October 2019 in order to prepare the witness statement and had prepared a draft in that respect. However, as a result of urgent applications that came up unexpectedly and other matters that needed her urgent attention she fell behind with her matters, including the current matter as well as other matters she had to deal with. Plaintiff's legal practitioner also alleged that due to the untimely death of her close friend's father in late October she had to travel to the northern part of Namibia for the funeral. The plaintiff's legal practitioner further alleges that after the news of the close friend's father's passing, a week thereafter she received further news that a close friend of hers passed away and it was a difficult period for her. She further alleges that she had fallen ill early December and this impaired her productivity. She further alleges that she at least managed to file an unsigned witness statement to show the Court and the defendant that the plaintiff was intent on proceeding with the matter.

[4] Another issue that arose was the fact that the plaintiff was scheduled to attend a medical examination set up by the defendants however the plaintiff failed to attend the said examination. It was averred in the plaintiff's legal practitioner's affidavit that the reason why she failed to attend the examination was because her personal doctor was not available on the set date to attend the examination with her. The plaintiff was apparently not comfortable to attend the examination to be done by a doctor appointed by the defendant without her own doctor's presence and she maintained that it was important to her that she was comfortable in the situation and that her right to dignity and bodily integrity be observed.

[5] Counsel submitted that the plaintiff is not to blame for the non-compliance with the court order and that

she must not be penalised for circumstances that were beyond her control. She further submitted that the non-compliance was not intentional but as a result of having to attend to other work commitments which were rather urgent and the lack of professional staff at the office to have assisted. She therefore prays that the condonation sought be granted.

[6] Defendant's counsel on the other hand submitted that plaintiff's legal practitioner's explanation for failing to file the witness statement timeously was solely based on counsel's work-load and the alleged deaths of a friend and relative of a close friend and that such allegations are not good enough reasons for not complying with the court order.

[7] Counsel submitted that the plaintiff had been served with a Notice in terms of Rule 33 (2) whereby she was required to attend a medical examination due to the nature of her claim. The said medical examination would provide an expert report for filing by the defendant. Counsel argued that the cost and payment associated with the medical examination and transport to and from the said examination had been effected by the defendant however despite timeous and sufficient notice, plaintiff failed to attend the medical examination. Defendant was only informed a day before the examination that the plaintiff was not attending the examination as she was not comfortable doing so without the presence of her own doctor. Counsel argued that plaintiff never objected to the medical examination and she was duly notified and that the presence of her doctor is not peremptory. Plaintiff's allegation that she was not comfortable attending the examination was not a valid explanation neither is her defense of 'right to bodily integrity and dignity' as it is merely an attempt to evade the medical examination.

[8] Counsel regards plaintiff and her legal representative's conduct as a deliberate non-compliance with the Rules of Court and orders, which is improper, unreasonable and careless. Counsel submits that a bulk of plaintiff's counsel allegations are excuses that are unreasonable and unacceptable and that it is unprofessional to take up more work than one can handle as this may cause prejudice to the clients. Thus, a legal practitioner cannot use the excuse of workload for her carelessness and negligence.

Discussion

[9] The principles on condonation are clear and I do not intend on repeating them.

[10] Plaintiff's explanation for the failure to comply with the court order is justifiably open to criticism by opposing counsel. But it is important to keep in mind that one can never have a perfect explanation for not complying with an order and the plaintiff is not required to give such a perfect explanation only a reasonable

one. In this matter before me I am satisfied that the plaintiff provided a full and detailed explanation for the entire period of the delay for failure to file her witness statements. 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 plaintiff. Although the explanation for the non-compliance is to be attributed solely to the plaintiff's legal practitioner, it will not serve the interest of justice to refuse condonation.

[11] Furthermore, since the defendant is the one arranging for the medical examination, there is nothing wrong in the plaintiff wanting her doctor to be present at the said examination. What I however do not agree with is the fact that plaintiff's counsel only informed defendant's counsel one day prior to the scheduled appointment that plaintiff will not be attending, which in my view was belated and the defendant should have been informed in advanced to reschedule the examination.

[12] As the plaintiff's counsel, in her replying affidavit, has agreed to pay plaintiff's cost as a result of the cancelled examination, I do not need to pronounce myself on this.

Costs

[13] The general rule in that costs follow the event is not applicable to successful application for the grant of an indulgence by the court. An application for condonation of non-compliance with the provisions of the rules of court or an order of court in the matter in casu would qualify as seeking an indulgence. The application before court for the relief from sanctions is because of the applicant's own dilatoriness and through no fault of the respondent.

[14] I am of the considered view that the respondent was justified in opposing the application and therefore the applicant must be liable for not only the application but for the cost of opposing the application.

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

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

Counsel:	
Plaintiff	Respondent
Ms R Mondo Of Nixon Marcus Public Law Office	Mr K Haraseb Of ENSafrica (Incorporated as Lorentz Angula Inc.)