

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING: VARIATION AND CONDONATION APPLICATION

Case No: HC-MD-CIV-ACT-DEL-2016/02394

In the matter between:

KARSLRUH NUMBER ONE FARMING CLOSE CORPORATION FIRST PLAINTIFF
NABIL BENANI SECOND PLAINTIFF
MOHAMED BOUDOUNI THIRD PLAINTIFF

and

DE WET ESTERHUIZEN FIRST DEFENDANT
QUINTON KEYS SECOND DEFENDANT

Neutral Citation: *Karslrüh Number One Farming Close Corporation v Esterhuizen* (HC-MD-CIV-ACT-DEL-2016/02394) [2020] NAHCMD 255 (16 June 2020)

CORAM: **PRINSLOO J**
Heard: 12 May 2020
Delivered: 16 June 2020
Reasons: 26 June 2020

Flynote: *Civil Practice – Judgments and Orders* – Rescission of order – Can only be granted in terms of rule 103 of Rules of High Court or under common law in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission.

Rescission – Courts do not necessarily amend their final orders unless certain identified exceptions under common law and statute exist – Common law exceptions – Not inclusive and may be extended depending on the circumstances of the particular case – Supplementing of a judgment or clarification of a judgment.

Civil Practice – Condonation application – Trite principles – Applicant must offer acceptable, bona fide and reasonable explanation for the delay and non-compliance with rules of court as well as satisfy the Court that there are reasonable prospects of success on the merits – Prospects of success an important but not decisive consideration – Flagrant and gross disregard of the Rules of Court due to non-compliance Court need not consider prospects of success.

ORDER

1. The Court hereby declines to vary the order of 21 February 2020.
2. The First Defendant's condonation is hereby denied and the said application is dismissed.
3. Cost:
 - 3.1 Each party to bear its own costs for the variation application.
 - 3.2 First Defendant to pay the Plaintiffs' costs occasioned in the opposition of the condonation application which is limited to Rule 32 (11).
4. Matter is postponed to **2 July 2020** at **15h00** for Status hearing.
5. Joint status report on the further conduct of the matter to be filed on or both 29 May 2020.

RULING

PRINSLOO J

Introduction

[1] To avoid confusion as this matter relates to two applications, the parties will be referred to as they are in the main action.

[2] The matter before me relates to a variation application as well as a condonation application. I will therefore firstly deal with the variation application and then proceed to deal with the condonation application.

Variation application

[3] The plaintiffs seek a variation of the court order dated 21 February 2020. This application is brought in terms of Rule 103(1) (c) which prescribes that:

'Variation and rescission of order or judgment generally

103. (1) In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time, rescind or vary any order or judgment -

(a) . . .;

(b) . . .;

(c) in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission;

(d) . . .

[4] This application emanates from an order of 21 February 2020 wherein the Court ordered the following:

'Ruling:

1. Applicant's non-compliance with this court's orders of 27 June 2019, 1 August 2019 and 22 August is hereby condoned.
 2. The applicant's plea, defence and claim struck on 22 August 2019 is hereby reinstated.
 3. Orders made by this court in respect of claim 1 and 2 on 27 September 2019 is hereby rescinded in terms of Rule 103 (1) (a) and all processes and steps that may have taken place in pursuance of such orders are set aside.
 4. Applicant is granted 10 days from date of this order, to file all outstanding pleadings.
 5. Each party to bear its own costs for the rescission application and the re-instatement of applicant's defence.
- ...'

[5] Based on the above order the plaintiffs seek the following:

1. 'Applicant's non-compliance with this court's orders of 27 June 2019, 1 August 2019 and 22 August 2019 is hereby condoned insofar they relate to claim 2.
 2. Orders made by this court in respect of claim 2, on 27 September 2019, based on the affidavit of Jacqueline Domange, is hereby rescinded in terms of Rule 103 (1) (a) and all processes and steps that may have taken place in pursuance of such orders are set aside.
 3. The applicant's plea, defence and claim relating to claim 2, which were struck on 22 August 2019 is hereby reinstated.
- ...'

[6] The order made on 21 February 2020 was based on a rescission application that was brought by the first defendant in which application the first defendant was successful.¹

Plaintiffs' case

[7] To put the plaintiffs' argument in context it is necessary to quote one of the paras of the rescission judgment² that brought about the variation application. Para 34 states that:

'I therefore hold that the irregularity of authentication must stand and rescind the orders erroneously granted based on that issue alone.'

[8] The plaintiffs argue that from reading the above para of the judgment, the order in respect of claim 1³ and 2⁴ were purely rescinded based on the conclusion of the Court that the issue of the irregularity of authentication must stand and rescind the orders that were erroneously granted based on that irregularity.

[9] The plaintiffs argue that only claim 2 was reliant on the damages affidavit of Jacqueline Domange, which was commissioned in France and was the bone of contention on the issue of authentication and that claim 1 was based on affidavits commissioned in Windhoek. The issue of authentication is only in respect of claim 2 and the unaffected claim should therefore stand to be left intact and not rescinded.

[10] The plaintiffs contend that the affidavits in respect of claim 1, including the affidavit to substantiate lost items⁵, were not the subject matter of the Court's ruling on

¹ *Esterhuizen v Karslruh Number One Farming Close Corporation* (HC-MD-CIV-ACT-DEL-2016-02394) [2020] NAHCMD 64 (21 February 2020).

² *Supra*, para 34 of the judgment.

³ Claim 1 related to accrued rental in respect of Farm Vaal Gras.

⁴ Claim 2 related to damages in respect of an olive project on Farm Vaal Gras.

⁵ The Court would however like to point out that the affidavit regarding the lost items was never used in support of the default judgment granted by Court on 27 September 2016 as the Plaintiffs relied on the affidavit of John Cochran Cuff for claim 1 and the affidavit of Jacqueline Domange for claim 2.

the issue of authentication. They therefore hold the view that to rescind the default judgment in respect of claim 1 on the basis of the erroneous authentication was a patent error on the part of the Court. The plaintiffs therefore seek a variation of the order in terms of rule 103(1) (c) to limit the rescission of the default judgment to claim 2 which was based on the irregular (unauthenticated) affidavit.

First defendant's case

[11] The first defendant does not deny the contentions raised by the plaintiffs' that the order and/or judgment handed down with respect to the rescission application contains an ambiguity, patent error or omission. Neither does he deny the facts upon which the plaintiff's rely to assert their claim for a variation of the order and/or judgment.

[12] The first defendant however argues that the claim for variation, in light of the consequences to be gained by the granting of the plaintiffs' desired relief, is incompetent. He contends that the relief should be limited to the extent of the order and/or judgment containing the ambiguity, error or omission.

[13] First defendant contends that the order and/or judgment of the rescission application contains no determination or reason for the rescission of claim 1 apart from the contested para 34 of the judgment referred to earlier herein in para 7. It was argued by his counsel that the absence of a determination of the reasons for the rescission of claim 1 is not only an error but constitutes an omission and ambiguity. Due to the said ambiguity the variation of the judgment as per the relief sought by the applicant will not suffice or remedy the ambiguity. The variation sought by the plaintiffs', as per the preferred relief, does not conform with the requirements of Rule 103(1)(c) because the ambiguity and omission will remain despite the variation according to the terms proposed by the plaintiffs'. First defendant is of the view that the manner in which the order is sought to be varied fails to remedy the ambiguity caused by the omission of a determination on the rescission of claim 1.

[14] First defendant maintains that rescinding a claim that is unrelated to the determination of authentication would amount to a patent error. Counsel argues that the patent error or ambiguity lies in the reason for the rescission of both claims and not the rescission of both claims for whatever reason. Counsel for the plaintiffs however denies that an ambiguity exists with regard to the rescission of claim 1. She maintains that such is nothing but a patent error as admitted by the first defendant albeit his attempt to reclassify such patent error as an ambiguity.

[15] First defendant submits that the suitable remedy available lies in the principles of common law relating to clarification and interpretation of judgments as the intention of the judgment remains unequivocal. Counsel referred to the case of *L v L*⁶ wherein it was stated that the general rule is that Courts do not necessarily amend their final orders unless certain identified exceptions under common law and statute exist. The common law exceptions, which are not inclusive and may be extended depending on the circumstances of the particular case, are either supplementing of a judgment or clarification of a judgment.

[16] Counsel on behalf of the plaintiffs however argue that the fact that the first defendant admitted that this application is brought on account of a patent error, the application should be granted, and that based on the admitted patent error the remedy of clarification and or interpretation of the judgment is not applicable nor appropriate in respect of the said admitted error. Counsel also argued that the said remedy is also not applicable as there is no application or counter application brought by the first defendant in this regard.

Legal principles and application of the law to the facts

Rule 103(1)(c)

⁶ (26758/2014) [2019] ZAGPPHC 352 (3 July 2019).

[17] Interestingly the counsel for the plaintiffs argue that the mere fact that the parties are in agreement that there is an omission or ambiguity in the reasons advanced by this court for her order , it would be sufficient to entitle the plaintiffs to the variation sought in their papers.

[18] This cannot be so as one must keep in mind that the guiding principle is that once a court pronounces itself in a judgment or order, it is *functus officio* and the court may not ordinarily vary or rescind its own judgment. There are however exceptions to this general principle and rule 103 is in place to allow a judge the discretion to vary or rescind an order but this discretion must be exercised judicially.

[19] Rule 103, in terms of which the application before me was brought, caters for variation or rescission of a judgment or order but such rescission or variation does not follow automatically, even once a mistake has been proven, as not every mistake or irregularity may be corrected in terms of this rule.

[20] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape*⁷ the court, in its discussion of the common law before the introduction of the Uniform Rules of Court and more specifically regarding the rescission or variation of court orders erroneously sought or erroneously granted in the absence of any party affected thereby, stated that:

'[4] As I shall try to explain in due course, the common law before the introduction of Rules to regulate the practice of superior Courts in South Africa is the proper context for the interpretation of the Rule. The guiding principle of the common-law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the Judge who delivered it. He becomes *functus officio* and may not ordinarily vary or rescind his own judgment (*Firestone SA (Pty) Ltd v Genticuro AG*⁸). That is the function of a Court of appeal. There are exceptions. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, *justus error*. . . There are also, thirdly, exceptions which do not relate to rescission

⁷ (127/2002) [2003] ZASCA 36; [2003] 2 All SA 113 (SCA) (31 March 2003).

⁸ 1977 (4) SA 298 (A).

but to the correction, alteration and supplementation of a judgment or order. These are for the most part conveniently summarised in the headnote of *Firestone SA (Pty) Ltd v Genticuro AG (supra)* as follows:

”1. The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, that the court overlooked or inadvertently omitted to grant.

2. The court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order.

3. The court may correct a clerical, arithmetical, or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance.

4. Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order.”⁹

[21] From my understanding rule 103 was introduced to cater for errors in a judgment which are obviously wrong and which are procedurally based¹⁰. It does not allow a judge to review his or her own work and correct it. This much is clear from the *Firestone* matter¹¹ wherein the Court held that a Court ‘may not alter the order to correct something which the Court intended even though the Court may have been wrong. To do this it would be necessary to appeal.’

[22] Due to an unfortunate oversight the reasons for the rescission of the first claim was omitted but if one has regard to the judgment as a whole the intention of the court is clear, and so is the order.

⁹ Position confirmed by the Supreme Court in *Ngede v Davey's Micro Construction CC (SA 51/2014)* [2016] NASC 4 (27 October 2016).

¹⁰ *DA Weelson v Waterlinx Pool and Spa (Pty) Ltd* [2013] ZAGJHC 47 para 5.

¹¹ *Supra*, note 8.

[23] In *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*¹² a 'patent error or omission' is described as an error or omission as a result of which the judgment or order granted does not reflect the intention of the judicial officer pronouncing it.

[24] Counsel for the first defendant correctly pointed out that no error can be found in the order itself and what stands to be criticized can be found in the body of the judgment, ie. in the reason for the rescission of both claims and not the rescission of both claims for whatever reason. Counsel is also correct in submitting that even if the order is varied it does not address the omission.

[25] This court cannot sit in a judgement of itself and anything that relates to the work of a judge properly considered and conclusively decided lies in the domain of a review or an appeal. The fact that there was an oversight in discussing the factors in respect of the rescission of the first claim cannot automatically result in the variation of the court order.

[26] The order of court must undoubtedly be read as part of the entire judgment and not as a separate document, but the court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment¹³.

[27] I am of the considered view that the order of this court pronounced on 21 February 2020 is clear and concise and there is no ambiguity contained therein and as a result rule 103(1)(c) does not find application to the order. If the court is to address the principal judgment and reconsider the reasons advanced it will amount to varying the intended sense of substance of the judgment and that would not fall within the ambit of Rule 103 and can therefore not be done.

¹² 5th ed vol 1 at 934

¹³ *Administrator, Cape, v Ntshwaqela* 1990 (1) SA 705 (A) at 716B-C.

The common law approach

[28] The counsel for the first defendant argued that in order to remedy the concern of the plaintiffs the appropriate approach can be found in the common law principles of clarification of the judgment. It is indeed correct that a court may in certain circumstance under the common law clarify its judgment.

[29] If I understand the *Firestone* matter and the *Colyn* matter correct then it appears that under the common law a principal judgment could be supplemented if an accessory had been inadvertently omitted. Such accessory or consequential matters would be for example, costs or interest of the judgment debt that the Court overlooked or inadvertently omitted to 'grant' or 'clarify' it 'if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention.' However, insofar as a court may have a general discretion to correct, alter or supplement its judgment or order in appropriate cases such discretion should be used sparingly.

[30] The issue complained of by the plaintiff' cannot be qualified as an accessory or consequential matter and therefore the judgment cannot be supplemented.

[31] The court may also clarify its judgment or order if, on proper interpretation the meaning thereof remains obscure, ambiguous or otherwise unsure, in so far as to give effect to the court's true intention provided that it does not thereby alter the 'sense and substance' of the judgment or order. By advancing further reasons in an attempt to clarify the judgment this would result in altering the sense and the substance of the judgment, which cannot be done.

[32] Therefore, whether the application is in terms of the Rules of Court or in terms of the common law the Court cannot supplement, clarify or vary its order without affecting the sense and substance of the judgment.

[33] This court must therefore decline to vary the order and as a result the application for variation of the order is refused.

Condonation application

[34] The present application comes after the court's ruling on 21 February 2020 wherein the first defendant's rescission application was successful and the court ordered that he file all outstanding pleadings, including his witness statement, 10 days from date of the order. If one computes the court days from 21 February 2020, the outstanding pleadings were to be filed by 5 March 2020. The first defendant seeks condonation for his non-compliance with the said court order of 21 February 2020 in that he failed to file his expert report and statement within 10 days from date of the said order.

[35] To put the reasoning and findings of the Court that will follow hereinafter in context, it is necessary to point out first defendant's previous non-compliances with court orders and applications brought at the instance of the first defendant. As one can grasp from the case number, this matter stems from 2016 and it has a troubled past consisting of a number of non-compliances and interlocutory applications.

[36] On 19 July 2017 the court ordered that witness statements, including expert reports and summaries be filed as per the parties' joint case management report. The plaintiffs complied with the court order however the first defendant didn't comply with the order. First defendant only managed to file his own witness statement on 4 October 2017 after condonation and postponement was sought.

[37] The matter was subsequently postponed for trial to 14 – 18 May 2018. An application for postponement of the trial to allow the first defendant to file its expert reports and statements was then brought by the first defendant on 25 April 2018 which

was argued on the first day of the trial and which was granted. First defendant was then ordered to file his expert statements and summaries on 28 June 2018 as well as the condonation application for the late filing of the said reports and summaries. First defendant complied with the order. The condonation application was opposed but subsequently withdrawn by the plaintiffs.

[38] The first defendant then brought an application for consolidation on 16 August 2018 which was opposed by the plaintiffs' and which was consequently granted. The matter was then referred for mediation which was unsuccessful.

[39] Parties then appeared in Court on 28 March 2019 wherein the matter was postponed to 16 May 2019 to afford the parties an opportunity to file any outstanding expert statements on or before 7 May 2019. Parties filed a joint case management report on 16 May 2019 wherein it was indicated that the plaintiffs had already filed all their expert statements and that first defendant failed to file its expert statement and will bring a condonation application. When the matter appeared on 19 May 2019 the erstwhile legal practitioner for the plaintiffs indicated that they will not oppose the condonation application for the late filing of the expert statement. The court then granted the condonation and the matter was postponed to 27 June 2019 to afford the first defendant an opportunity to file its expert statement by 17 June 2019, which he once again failed to do.

[40] First defendant's erstwhile legal practitioner then withdrew due to lack of instructions from the first defendant. First defendant was subsequently ordered to appear in Court personally or duly represented which he failed to do. His defence was then struck which led to default judgment being granted in favor of the plaintiffs.

[41] As indicated above an application for rescission was then brought on his behalf to rescind the order striking his defence and any subsequent orders. First defendant was successful with this rescission application and he was ordered to file all outstanding

pleadings, including the expert statements within 10 days of the order but he failed to comply with the order which led to this application.

First defendant's' case

[42] As regards his explanation for the non-compliance with the court of 21 February 2020, first defendant contends that he was advised in early December 2019 and late January 2020 of the date of the rescission application and was told to place the legal practitioners in funds, however he was unable to do so before the hearing of the application. He was then advised on 21 February 2020 that the application was granted in his favour and that he needed to file all his outstanding pleadings within 10 days from date of order. On his own admission, he was also advised before the application was heard that he had to secure the services of a suitable expert should the application be in his favour. On 2 March 2020 he was contacted with regard to the preparation and filing of the expert report. He then got in touch with the expert and on 4 March 2020 he and the said expert had a consultation at his legal practitioner's offices pursuant to the preparation of the expert statements. It had then become apparent during the consultation that although the statements would be completed in time for filing before the due date, the expert might have difficulty in signing the report prior to the due date as he was to travel to South Africa.

[43] First defendant further contends that it was also agreed at the consultation that the expert will endeavor to obtain printing and scanning facilities so that he will be able to sign the report and same can be filed on 6 March 2020. Unfortunately the signing of the expert report did not materialize on or before 6 March 2020. As a result and upon advise from his legal practitioner, he gave instructions that the unsigned report and summary be filed in an effort to mitigate the prejudice that may be caused by his non-compliance while in the meantime he tries to contact his expert who he lost contact with since his travel to South Africa.

[44] It is the first defendant's version that between 6 March 2020 and 15 March 2020 he has made attempts to contact the expert in order to obtain his signature on the expert report. He also alleges that during this period he could not advise his legal practitioners as to when the expert will provide a signed expert report and as a result a condonation and extension application could not be brought timeously as the first defendant still had no contact with the expert. He only managed to get in contact with the expert on 16 March 2020 and that is when he was informed that the expert had remained in South Africa longer than expected and was unable to sign the report. As a result of the above, first defendant could only lodge his condonation application on 20 March 2020.

[45] As to his defence on the main action, first defendant alleges that he has a claim for payment in the amount of N\$ 3 million, through an acknowledgment of debt, against the plaintiff. He further maintains that with regard to the eviction order that was granted by the Magistrates Court in 2017 he was in lawful occupation of the first plaintiff's property and such occupation was as a result of an agreement between himself and second and third plaintiff. He disputes that he was in unlawful occupation. As to the damages claim in respect of the olive orchard, first defendant argues that plaintiffs' claim cannot stand as the alleged damages are incomprehensible as he did not occupy the farm at a time when there was a viable olive orchard plantation and did not interfere with any activities that related to the care and management of an olive orchard. Neither was there, in any event, such a plantation during or prior to his occupation of the property. He argues that the plaintiffs claim in any event cannot stand in a court of law as their claim is for gross profit that would have been made based on the olive orchard plantation. The plaintiffs cannot claim gross profit without deducting reasonable expenditure associated with running such an orchard.

[46] First defendant further argues that he did not occupy the whole of plaintiffs' farm but only a portion that he had found dormant. He alleges that no lease agreement was in any event in place with any prospective tenant for the portion of the plaintiffs' property that he occupied and that the amount he is charged for reasonable 'rental' does not

correspond with amounts paid by neighboring tenants that occupied other and similar portions of the property. In addition the plaintiffs failed to allege that if it was not for the first defendant's unlawful occupation, the plaintiffs' would have leased the property out and would have received the amount which they claim for damages.

Plaintiff's case

[47] Plaintiffs raised a point in limine in that the first defendant solely relies on the expert witness as a reason for his late filing of the expert report, however he failed to provide a confirmatory affidavit of the expert to confirm the content of the founding affidavit filed by the first defendant. Plaintiffs therefore argue that facts which are not deposed to under oath constitute hearsay evidence, which evidence is inadmissible under law. As a result the Court should disregard all and any averments by the first defendant which rely or refer to the expert as the expert failed to file a confirmatory affidavit indicating that he has read the affidavit of the first defendant and the facts contained therein are to the best of his knowledge true and correct in so far as they refer or relate to him.

[48] First defendant however argues that the reason and purpose of including the statements of the expert in his founding affidavit is to indicate that the statements were indeed made by the expert and does not hold the intention to have the statements regarded as being truthful, as a result thereof the evidence cannot therefore be regarded as inadmissible. Counsel referred the Court to the cases of *Subramaniam v Public Prosecutor*¹⁴ and *Aupindi v Shilemba and Others*¹⁵ wherein it was held in the latter case that 'the hearsay evidence is admissible and relevant where the state of mind of a person has to be proved is only first hand hearsay evidence'. Counsel therefore submits that first defendant's reliance on hearsay evidence came about as a result of the communication between the first defendant and his expert witness and that plaintiffs fail to provide arguments as to what the reason is for adducing the hearsay evidence. Counsel further submits that it is not first defendant's contention that the

¹⁴ (1956) 1 WLR 965 (PC).

¹⁵ (SA 7/2016) [2017] NASC 24 (14 July 2017).

expert was indeed in South Africa or indisposed at the time of filing the report. What the first defendant intends to demonstrate is merely the facts that resulted in the non-compliance.

[49] Plaintiffs submit that this application is amongst many applications for condonation brought by the first defendant occasioned by his non-compliances with court orders and referred the Court to the history of non-compliances set out in the answering affidavit of the plaintiffs in the recession application, which the Court has summarized more fully as set out in paras 36 to 40 above. The Plaintiff further submits that this application demonstrates first defendant's lackadaisical approach to litigate this matter by unnecessarily prolonging the finalization of this matter given the previous favourable exercise of the Court's discretion to grant condonation to the first defendant.

[50] Plaintiffs argue that more than a week passed from 21 February 2020 until 2 March 2020 when the first defendant placed his legal practitioner with funds however no explanation is given why the first defendant did not contact his legal practitioner timeously. First defendant also failed to attend to his legal practitioner's office on 2 March 2020 when he placed them in fund and only approached their office on 4 March 2020 without giving any explanation as to why the consultation could not be arranged earlier.

[51] Plaintiffs argue that the first defendant failed to explain the nature of the alleged difficulty for the expert to sign the report on time before 6 March 2020 or before he could travel other than the fact that the expert had to travel to South Africa, without also indicating the exact date which the expert had to travel and also failing to allege whether the expert was alerted to the deadline for filing the report before his supposed departure. First defendant also failed to indicate the date of the expert's satisfaction with the content of the report. Further, no explanation is given as to why the expert could not sign the report physically or dispatch it via fax or email.

[52] Plaintiffs further argue that the unsigned report that was filed on 20 March 2020 indicates that it wouldn't have taken more than a few hours at the most to prepare it given the nature of its content and the number of pages, five (5) in total. This clearly shows that had the first defendant timeously attended to the preparation of the report, it would have been filed on time.

[53] With regard to first defendant's defence and merits on the main action, plaintiffs maintain that the Magistrates Court made a ruling on the issue of unlawful occupation, which ruling remains unchallenged. Therefore this defence does not hold water and remains to be dismissed. Plaintiffs maintain that the first defendant was indeed in full occupation of the entire property for the duration of his stay and enjoyed the benefits of the property to the full extent at the exclusion of the plaintiffs. Plaintiffs further deny being indebted to the plaintiff in the amount of N\$ 3 million and submit that such a claim has in any event since prescribed. Plaintiff therefore submit that the first defendant has no bona fide defence to the plaintiffs claim and his application stands to be dismissed.

[54] In conclusion, plaintiffs assert that they have suffered the utmost prejudice as this matter has been delayed for such a long time and has been on the court roll for over four years.

Legal principles and application of the law to the facts

[55] On the issue of inadmissible hearsay evidence, in the case of *S v Chanda*¹⁶ hearsay evidence has been defined as:

'Oral and written statements by persons who are not a party to the proceedings or who are not witnesses in the proceedings, and who are not called, cannot be tendered as evidence for the truth of what those oral or written statements say'.¹⁷

¹⁶ (CA9/05) [2005] NAHC 17 (23 June 2005).

¹⁷ Ibid at 10.

[56] However in the case of *Subramaniam v Public Prosecutor*¹⁸ the exception to the above principle was held as follows:

'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.'

[57] This position was cemented in our jurisdiction in the case of *Rally for Democracy and Progress and Others v Electoral Commission of Namibia*,¹⁹ which referred to the case of *R v Miller*,²⁰ as follows:

'But statements made by non-witnesses are not always hearsay. Whether or not they are hearsay depends upon the purpose for which they are tendered as evidence. If they are tendered for their testimonial value (ie, as evidence of the truth of what they assert), they are hearsay and are excluded because their truth depends upon the credit of the asserter which can only be tested by his appearance in the witness box. If, on the other hand, they are tendered for their circumstantial value to prove something other than the truth of what is asserted, then they are admissible if what they are tendered to prove is relevant to the enquiry.'

[58] With the above exception in mind it is quite clear from reading the first defendant's founding affidavit that the evidence was placed before Court for the mere purpose of indicating the reason for the non-compliance and to indicate the first defendant's state of mind in his non-compliance with the court order of 21 February 2020. If first defendant contends that the purpose of the statements of the expert in his founding affidavit was not to show the truth that he was indeed in South Africa and/or was unable to sign the report on time, then I fully agree with his submissions. The statements are what they purport to be and, as such, admissible to confirm the non-compliance. If that is the case I believe the intention of the first defendant was to merely

¹⁸ *Supra*, note 14.

¹⁹ (SA 12/2011 [2012] NASC 21 (25 October 2012) para 62.

²⁰ 1939 AD 106 at 119.

demonstrate the facts which resulted in his non-compliance. For establishing that the statements were made to the first defendant concerned, the evidence is admissible, but it is not admissible to prove the truthfulness of the statements. In light of the above, the Court holds that first defendant's hearsay evidence is admissible and stands to be accepted. Plaintiffs point in limine is therefore dismissed.

[59] On the issue of the non-compliance with the court order it is undisputed that were an applicant seeks condonation from Court, he or she must offer an acceptable, bona fide and reasonable explanation for the delay and non-compliance with the rules of court as well as satisfy the court that there are reasonable prospects of success on the merits.

[60] In the case of *Minister of Health and Social Services v Amakali Matheus*²¹ it was held that:

[17] An applicant seeking condonation must satisfy the following requirements. 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. 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. 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.'

²¹ (SA 4 -2017) [2018] NASC (6 December 2018).

[61] It is clear from the founding affidavit filed by the first defendant that he relies for his non-compliance of the court order on the expert. He indicated that due to the fact that the expert had to travel to South Africa he could not file his rule compliant expert report on time. If one looks at the first defendant's affidavit the following will suffice:

- a) More than a week passed from 21 February 2020 until 2 March 2020 when the first defendant placed his legal practitioner with funds. No explanation is advanced as to what happened between that period.
- b) First defendant placed his legal practitioners with funds on 2 March 2020 but failed to attend to their offices.
- c) First defendant only approached his legal practitioner's office on 4 March 2020 without giving any explanation as to why the consultation could not be arranged earlier.
- d) Difficulty of the expert in signing the report before 6 March 2020 and before he could travel was not explained.
- e) Failure to indicate the exact date which the expert had to travel.
- f) Failure to allege whether the expert was alerted to the deadline for filing the report before his supposed departure.
- g) Failure to indicate the date of the expert's satisfaction with the content of the report.
- h) No explanation is advanced as to why the expert could not sign the report physically or dispatch it via fax or email.
- i) The nature of the content and the number of pages, five (5) in total, of the expert report indicates that it wouldn't have taken more than a few hours at the most to prepare. Clearly showing that if first defendant had timeously attended to the preparation of the report, it would have been filed on time.

[62] Taking into account the above facts, the Court is not satisfied that an acceptable and reasonable explanation has been advanced. Further the first defendant fails to give a full and detailed explanation for the entire period of the delay, including the filing of the condonation application. No explanation is advanced as to what the position of the first

defendant was between the period of 21 February 2020 and 4 March 2020 when he eventually approached his legal practitioner for a consultation together with his expert. Although first defendant alleges that between the period 6 March 2020 and 15 March 2020 he was unable to determine the exact whereabouts of the expert or attempted to get hold of the expert and hence he couldn't give instructions to his legal practitioners to lodge a condonation application, the Court is of the view that that explanation is not good enough. The rules are very clear that if a party foresees that he or she will not meet a deadline, he or she can apply to court for an extension (Rule 55(1)) and if a party is in default he or she must bring a condonation application without any delay, which in this instance did not happen.

[63] Parties should be punctilious in ensuring that applications for condonation are filed promptly and timeously without any delay and in accordance with the rules. The explanations therefore advanced are scant and unpersuasive. The founding affidavit therefore did not, to the satisfaction of the Court, deal with the requirements of rule 56.

[64] In the case of *Maestro Design t/a Maestro Operations CC v The Microlending Association of Namibia*²² that was recently handed down by my learned brother Masuku, J, he held that:

[49] . . . There should come a time when a party that displays a lackadaisical approach to litigation and a sorry pattern of non-compliance with court orders, to the detriment of the overriding objectives of judicial case management, to meet its comeuppance, regardless of the pain that accompanies that spectacle in particular.'

[65] The Court was called upon to take judicial notice of the previous non-compliances with the Rules of Court and Court orders, more so on the score that the Rules provide such a factor to be taken into consideration when considering an application for condonation (Rule 56(1)(d)). Defendant's previous non-compliances with court orders, coupled with the non-compliances that brought about this application, shows a disregard of the Court rules and has immensely delayed this matter, which

²² HC-MD-CIV-MOT-GEN-2018/00414 NAHCMD 140 (7 May 2020).

would have been finalized by now. First defendant's non-compliance has certainly not only frustrated the Court but more so the plaintiffs in seeing this matter come to finality. The prejudice to the plaintiffs' can be gathered from the legal costs that Court can only assume was spent on litigating numerous interlocutory applications occasioned solely by the first defendant. The court has previously indulged the defendants but it has come to a point where such indulgence will no longer be granted. His application for condonation is meritless and therefore should be dismissed with costs.

[66] Prospects of success is generally an important but not decisive consideration. Where there is a flagrant and gross disregard of the Rules of Court due to non-compliances the Court need not consider prospects of success. Prospects of success can never stand alone, other factors such as the explanation tendered for the non-compliance should be considered. Due to the insufficient explanation tendered for the non-compliance and having taken into account the various previous non-compliances and disregard of the court orders, the Court is not inclined to consider this issue.

Costs

[67] Cost is ultimately the discretion of the court. The Court's finding on costs for the variation application is that since none of the parties were successful, none would be entitled to costs.

[68] The general rule is that cost follows the event and that the successful party should be awarded his or her costs. The rule of cost to follow the event is normally only departed from when there are good grounds for doing so. First defendant's approach with this matter lacks seriousness, and this is evident by the various non-compliances with court orders. Such conduct is a blatant disregard of the rules of court and frustrates and curtails the adjudication of this matter to the detriment of the other party and administration of justice. I therefore see no reason why the court should not order costs against the first defendant limited to Rule 3 (11).

[69] My order is therefore as follows:

1. The Court hereby declines to vary the order of 21 February 2020.
2. The First Defendant's condonation is hereby denied and the said application is dismissed.
3. Cost:
 - 3.1 Each party to bear its own costs for the variation application.
 - 3.2 First Defendant to pay the Plaintiffs' costs occasioned in the opposition of the condonation application which is limited to Rule 32 (11).
4. Matter is postponed to **2 July 2020** at **15h00** for Status hearing.
5. Joint status report on the further conduct of the matter to be filed on or both 29 May 2020.

JS PRINSLOO

Judge

APPEARANCES:

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