

Practice Directive 61

“ANNEXURE 11”

IN THE HIGH COURT OF NAMIBIA

Case Title: TRANSNAMIB HOLDINGS LIMITED v DELUX TRADING ENTERPRISES CC	Case No: HC-MD-CIV-ACT-CON-2019/04250
	Division of Court: MAIN DIVISION
Heard before HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 12 June 2020
	Delivered: 2 July 2020 Reasons: 3 July 2020
Neutral citation: <i>TransNamib Holdings Limited v Delux Trading Enterprises CC</i> (HC-MD-CIV-ACT- CON-2019/04250) [2020] NAHCMD 268 (2 July 2020)	
Results on merits: Not on the merits.	
The order: Having noted the non-appearance on behalf of the Plaintiff and having heard MICHELLE SAIMAN , on behalf of the Defendant and having read the documents filed of record: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none"> 1. The application for condonation is struck from the roll for failure to comply with Rule 32(9) and (10). 2. The defendant is ordered to pay the costs limited in terms of the provisions of Rule 32(11). 3. The parties must comply with the following procedural steps: <ol style="list-style-type: none"> 3.1 The defendant must comply with Rule 32(9) on or before 9 July 2020; 3.2 The defendant must file the report in terms of Rule 32(10) on or before 13 July 2020; 3.3 The defendant must file a fresh application for condonation on or before 17 July 2020; 3.4 The plaintiff must file amplified answering papers on or before 23 July 2020, if any. 4. The case is postponed to 30/07/2020 at 15:00 for Status hearing (Reason: Interlocutory (To Bring)). 	
Reasons for orders:	
PRINSLOO J	

The parties

[1] The plaintiff¹ is TransNamib Holdings Limited, who issued summons against the defendant, Delux Trading CC on 9 September 2019 for breach of a written lease agreement entered into between the parties on 27 October 2017. In terms of its particulars of claim the plaintiff is seeking an order for cancellation of the said lease agreement and an order ejecting the defendant from the property in question.

Brief background

[2] The defendant defended the action on 18 October 2019 and the parties were issued with a notice for a case planning conference to be held on 7 November 2019.

[3] In its unilateral case plan the plaintiff indicated that it wishes to move for an application for summary judgment against the defendant. On 6 November 2020 this court issued a case planning order in terms of which the parties were ordered to comply with the following procedural steps:

- a) The plaintiff had to comply with rule 32(9) on or before 13 November 2019;
- b) The plaintiff had to file the report in terms of rule 32(10) on or before 22 November 2019;
- c) The plaintiff had to file its summary judgment application on or before 17 January 2020, and
- d) The defendant had to file its answering affidavit on or before 27 January 2020.

[4] The plaintiff, having complied with court order dated 6 November 2019, indicated during the court appearance on 30 January 2020 that the plaintiff wishes to move its application for summary judgment as the defendant failed to file any opposing papers and the matter was duly postponed to 5 March 2020.

[5] Apart from the notice of its intention to defend the action the defendant failed to take part in the judicial case management procedure, however on 6 February 2020 the defendant filed a notice of intention to oppose through his erstwhile legal practitioner. Presumably the opposition was aimed at the intended summary judgment application. On 3 March 2020 the said legal practitioner proceeded to file a notice of motion supported by a founding affidavit deposed to by one Mr Charles M Ochurub.

[6] In its application the defendant prayed for the following relief:

¹ The parties will be referred to as they are in the main action.

1. Condoning the Applicant's non-compliance with the Rules of Court relating to failure to file an answering paper by the Respondent in the above matter;
2. An order rescinding a Court order and/or default judgment granted by this Honourable Court on 30th January 2020 attached to the Respondent's founding affidavit and marked as Annexure "DTE1" Under case Number HC-MD-CIV-ACT-CON-2019/04250.
3. Granting the respondent leave to file answering papers as per court order dated 06 November 2019;
4. Further and/or Alternative Relief.
5. Costs of suit against Applicant if application is opposed.'

[7] The plaintiff in response to the defendant's notice of motion proceeded to file a notice to oppose the defendant's application on 5 March 2020.

[8] Unfortunately the counsel of record at the time withdrew the very next day after filing the notice of motion and the current counsel came on record belatedly and made her appearance on 5 March 2020, which was the date scheduled for the hearing of the summary judgment application. For obvious reasons the matter was then postponed.

[9] There was a substantial delay in hearing this matter due to the National Lockdown period and once the court business resumed as usual the parties agreed to file their heads of arguments and abide by them in terms of para 2.7.3.3.3.1 of the Revised Roadmap of the High Court of Namibia, dated 4 May 2020.

Discussion

[10] The applications before me are two-fold. On the one hand it is the condonation application filed on behalf of the Defendant and on the other hand it is the summary judgment application filed on behalf of the plaintiff. The application for condonation must however be determined first as it will dictate the further conduct of the matter.

[11] The plaintiff raised a number of legal points with regards to the application for condonation but the main issue raised is the non-compliance with rule 32(9) and (10) of the Rules of Court. Mr Ochurub, who deposed to the founding affidavit on behalf of the defendant, stated that his erstwhile legal practitioner approached the opposing counsel to engage in terms of rule 32(9) but was informed by the plaintiff's legal practitioner that as the plaintiff does not know the defendant's reason for its non-compliance with the court order they will not engage in terms of rule 32(9). This might not be factually correct as the gist of the letter by

the erstwhile legal practitioner filed of record was that the defendant is seeking an agreement from the plaintiff to condone the defendant's non-compliance. Nothing happened following the said correspondence as the said counsel withdrew as counsel of record. There was thus no engagement in terms of rule 32(9) and no report filed in compliance with rule 32(10).

[12] The application by the defendant is unfortunately by no means an example of clarity. An example of how muddled the application is, is the prayer for rescission of the court order/default judgment. There is no order or judgment to be rescinded and such the relief sought is incompetent. I would however not dwell on the deficiencies of the application as it is not necessary but wish to remark that with such glaring issues in the defendant's application I am surprised that the current counsel did not opt to rather tender costs and withdraw the current application and file a fresh one before the matter went as far as it did. Such course of action would have been much more cost effective for the parties.

[13] The main issue in respect of the defendant's application in my considered view is the failure to comply the rule 32(9) and (10). There are many cases wherein this court ruled that the application for condonation is an interlocutory application and the parties thus have to comply with the mandatory provisions of Rule 32 (9) and 32 (10)². This remains the position until such time that the rules of court in this regard is reviewed or amended.

[14] I agree with the arguments advanced regarding the application of rule 32(9) and (10) and see no reason why the decisions relating to this particular subject matter should not find application in the matter in casu. As the main focus of this ruling is on the issue of rule 32(9) and (10) I do not deem it necessary to discuss the remainder of the legal points raised by the plaintiff.

[15] In view of the above, the application for condonation, without dealing with the merits of the application, must be struck for lack of compliance with rule 32 (9) and (10). As a result of my ruling the summary judgment application will be deferred pending the outcome of fresh condonation application and the parties are directed to comply with the directions as set out in my order above.

Judge's signature:

Note to the parties:

² *South African Airways Soc Limited v Camm and Others* (HC-MD-CIV-ACT-DEL-2016/02479) [2019] NAHCMD 14 (31 January 2019).

	Not applicable.
Counsel:	
Plaintiff	Defendant
Ms Mombeyarara From Adv SS Makando Chambers Windhoek	Ms Saaiman from GVS Law Namibia Windhoek