

"ANNEXURE 11"

IN THE HIGH COURT OF NAMIBIA
(TO THE SUPREME COURT OF NAMIBIA)

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| Case Title: QUINTON SWARTBOOI V LYDIA EIXAS | Case No: HC-MD-CIV-ACT-CON-2018/03432 |
| | Division of Court: HIGH COURT(MAIN DIVISION) |
| Heard before: HONOURABLE LADY JUSTICE PRINSLOO, J | Date of hearing: 18 AUGUST 2020 |
| | Date of order: 3 SEPTEMBER 2020 |
| Neutral citation: <i>Swartbooi v Eixas</i> (HC-MD-CIV-ACT-CON-2018/03432) [2020] NAHCMD 393 (3 September 2020) | |
| Results on merits: Condonation and upliftment of bar Hearing. Merits not considered. | |
| The order: Having heard MR MATTI MWANDINGI , on behalf of the Defendant, standing in for Mr Bangamwabo and having read the documents filed of record: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none">1. Applicant's non-compliance with the court order dated 24 October 2019 is condoned.2. The bar operating against the Applicant for failing to file her plea and discovery affidavit in terms of the court order of 24 October 2019 is uplifted.3. No order as to costs. <u>Further conduct of the matter:</u> <ol style="list-style-type: none">4. The Applicant must file her plea and counterclaim on or before 11 September 2020.5. The Respondent must file his replication, if any, and plea to the counterclaim on or before 21 September 2020.6. The Applicant must file her replication to the plea, if any on or before 25 September 2020.7. The Applicant must file her discovery affidavit on or before 25 September 2020.8. The case is postponed to 1 October 2020 at 15h00 for Case Management Conference hearing (Reason: Parties to file joint case management conference report).9. The said case management conference report must be filed on or before 28 September 2020. | |

Reasons for orders:Introduction and brief background

[1] The matter before me relates to a condonation application and an upliftment from the bar whereby the applicant seeks an indulgence from this Court for her failure to comply with a court order of 24 October 2019.

[2] In terms of the said order, the applicant was ordered to file her plea and/or counterclaim on or before 21 November 2019 and the parties were ordered to file their discovery affidavits and exchange their bundles of discovered documents on or before 12 December 2019. Respondent managed to file his discovery affidavit by 13 December 2019, however the applicant by that time hadn't filed anything.

Parties submissions

[3] In a nutshell the applicant's legal practitioner alleges in the founding affidavit, deposed to and brought on behalf of the applicant, that the applicant's first erstwhile legal practitioner terminated their mandate on 20 January 2020 before complying with the court order of 24 October 2019, citing reasons such as failure by the Directorate of Legal Aid to place them in funds to enable their office to proceed with the matter.

[4] After the said termination the matter was then postponed on 23 January 2020 to 27 February 2020 and from 27 February 2020 to 2 April 2020 to enable the applicant to acquire legal representation, which she obtained on 4 March 2020 when her then counsel, instructed by the Directorate of Legal Aid, came on record. Counsel alleges that it was at this point that applicant was expected, through her appointed counsel, to file her plea and discovery affidavit in accordance with the court order of 24 October 2019. However, due to the State of Emergency imposed under the COVID-19 Regulations prevailing at the time, and the difficulty in securing a consultation with the applicant to obtain comprehensive instructions, the applicant's plea and discovery document remained unfiled up to the time that her second erstwhile legal practitioner withdrew from record, citing conflict of interest in the matter.

[5] It is only on 24 June 2020 that the applicant's current legal practitioner came on record. Counsel alleges that it is at this point that he expressed an urgent need to proceed with the matter at a relatively

faster pace by conducting preliminary consultations with the applicant. Counsel alleges that this was done to ensure that the applicant's plea and discovery documents would, with the leave of court, be filed without delay in resolving the real issues between the parties.

[6] Mr Mwandingi, counsel for the applicant, submits that there has been no undue delay on his part in bringing this application as he engaged opposing counsel as soon as he received instructions from Legal Aid and has since consulted with the applicant in anticipation of the court's indulgence to allow the applicant to advance her defense to the main action instituted by the respondent. He further submitted that the matter can still be speedily disposed of as it is still at the preliminary stages of litigation. Pleadings have not closed nor has trial dates been allocated.

[7] With regard to a bona fide defence, counsel argues that the respondent instituted these proceedings on the premise of a forged document purporting to convey the parties' intention to conclude a sale agreement for immovable property. The applicant disputes the existence of such a sale agreement between the parties. He argues that the respondent maliciously instituted these proceedings to merely frustrate the applicant as the respondent has also instituted criminal proceedings in the Magistrates Court in terms whereof he seeks relief arising from the same alleged contract of sale and in respect of the same subject matter.

[8] Counsel concluded his argument by stating that the circumstances which caused the applicant to fail to comply with the Court's order and from which indulgence is sought were neither intentional due to remissness or action on her part nor her current legal practitioner. Further that there will be no prejudice suffered by the parties should condonation be granted to the applicant as the matter is still at preliminary stages of litigation and there has been no undue delay from the part of the present legal practitioner to launch this application once he took over the matter. Lastly, counsel argued that applicant also has a bona fide defence against the respondent's claim.

[9] Mr Bangamwabo, counsel for the respondent, however argues that even before the applicant's first erstwhile legal practitioner withdrew from the matter, the court order of 24 October 2019 was not complied with and no single explanation was given to this Court for the applicant's disregard of the said court order. By the time the then legal practitioners withdrew their mandate the prescribed time for filing pleadings had already lapsed by more than a month.

[10] Counsel argues that when the second erstwhile legal practitioner came on record she failed to

explain the delay for the period of 4 March 2020 to 27 March 2020 before the State of Emergency was declared. Counsel submits that no acceptable explanation and reasonable explanation is therefore tendered by the applicant to justify her non-compliance.

[11] Counsel also submitted that the respondent suffered immense prejudice as a period of more than 8 months has passed since the case plan order was issued. The delay has negative repercussions on the respondent, both in terms of legal costs as well as the unreasonable delay in finalizing the matter. Respondent therefore prays for the dismissal of the condonation application and the matter to proceed on an unopposed basis as he argues that this is a good case where a litigant cannot escape the consequences of her attorney's lack of diligence and remissness and insufficiency of the explanation tendered for the disregard of the court order.

[12] On the issue of bona fide defence, counsel submits that the applicant did not make any attempt to produce evidence to the effect that the proceedings instituted are based on a forged document purporting to convey the parties' intention to conclude a sale agreement for the property. Apart from the unbacked allegation of forgery, no single evidence is adduced to show that indeed the applicant has a valid defence against the respondent's claim and thus enjoys good prospects of success.

Discussion

[13] The principles on condonation are clear and I do not intend on repeating them, however it is noteworthy that it is trite law that an application for condonation is not had for the mere asking. A party must give a detailed and reasonable explanation for the delay and must show that, on the merits, he or she has reasonable prospects of success in the main action. If it however appears that a party's default was wilful or that it was due to gross negligence, the court will not come to the assistance of that party.

[14] One must keep in mind that one can never have a perfect explanation for not complying with an order of court and the applicant is not required to give a perfect explanation but merely a reasonable one. Furthermore, if it is the legal practitioner that had no due diligence in ensuring that their client's interest are best served by complying with court orders, surely fault cannot be bestowed on a party.

[15] When applying sanctions to an errant party the court must consider what is just and fair in the matter. In the current matter before me the court cannot find that the applicant's non-compliance was reckless, blatant and a disregard of the rules of court. The applicant explained that due to the failure of the Directorate of Legal Aid to place the first erstwhile legal practitioner in funds to enable their office to proceed with the

matter, they failed to comply with the court order. Surely such a unilateral decision on the part of the legal practitioner cannot be attributed to the party.

[16] Applicant also explained that when the first erstwhile legal practitioner withdrew, her second counsel, also instructed by the Directorate of Legal Aid, came on record on 4 March 2020. However, due to the State of Emergency imposed under the COVID-19 Regulations prevailing at the time and the complete Lockdown and the difficulty in securing a consultation with the applicant to obtain comprehensive instructions, the applicant's plea and discovery document could not be filed timeously and until the second erstwhile legal practitioner withdrew from record.

[17] Having regard to the explanation advanced on behalf of the applicant the court is of the opinion that the said explanation is reasonable and justifiable in the circumstances. It will be too drastic to impose a sanction of striking out the defendant's defence under the circumstances. That will effectively close the doors of court to the applicant. The explanation for the non-compliance is to be attributed solely to the applicant's erstwhile legal practitioners and it will therefore not serve the interest of justice to refuse condonation.

[18] The withdrawal of the legal practitioners acting on behalf of the applicant was the cause of the applicant's failure to comply with the court order, giving rise to the application for condonation. It can be seen from the court file that the applicant promptly complied with court orders in securing the services of legal representation from the Directorate of Legal Aid.

[19] As with regard to the issue of a bona fide defence, it is sufficient if the applicant makes out a prima facie defence in setting out averments which, if established at trial, would entitle her defence to succeed. Applicant does not need to fully deal with the merits of the case and produce evidence that the probabilities are actual in her favour. Applicant alleges that the document relied upon by the respondent purporting to be a sale agreement is a forged document, which she never signed. She explained that no sale agreement ever existed between herself and the respondent, but a lease agreement was in force between the parties as the respondent lived on the property in question since September 2017 and that the money she received from the respondent was money received as payment for the rental of the property. She further explained that the forged sale agreement, on which reliance is placed by the respondent, bears a signature of another person and is not congruent with the signature affixed to applicant's national document.

[20] Based on the averments made by the applicant, the Court is of the view that the applicant has good prospects of success should the matter proceed to trial. There is no doubt that there is a triable defence to

the claim instituted by the respondent against the applicant.

Costs

[21] From the applicant's status report dated 24 June 2020 it is clear that the applicant has been granted legal aid. Section 18 of the Legal Aid Act¹ prohibits the making of a costs order in proceedings in respect of which legal aid has been granted. In the circumstances, no order as to costs will be made.

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

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| Judge's signature | Note to the parties: |
| | Not applicable. |
| Counsel: | |
| Applicant | Respondent |
| Mr M Mwandingi Of Mwandingi Attorneys Windhoek | Mr F Bangamwabo Of FB Law Chambers Windhoek |

¹ 29 of 1990.