

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

<b>Case Title:</b> First National Bank of Namibia Limited vs Buffalo Investments (PTY) LTD & 2 others	<b>Case No:</b> HC-MD-CIV-ACT-CON-2019/00388
	<b>Division of Court:</b> HIGH COURT(MAIN DIVISION)
<b>Heard before:</b> Honourable Lady Justice Tommasi, Judge	<b>Date of hearing:</b> 13 August 2020
	<b>Date of order:</b> 03 September 2020 <b>Reasons delivered on:</b> 09 September 2019
<b>Neutral citation:</b> <i>First National Bank Namibia Limited v Buffalo Investments</i> (HC-MD-CIV-ACT-CON-2019/00388) [2020] NAHCMD 402 (3 September 2020)	
<b>Results on merits:</b> No decision on the merits	
<p><b>The order:</b></p> <p>Having heard <b>MS ANGULA</b>, on behalf of the Plaintiff(s) and <b>MS LARDELI</b>, on behalf of the Defendant(s) and having read the Application for HC-MD-CIV-ACT-CON-2019/00388 and other documents filed of record:</p> <p><b>IT IS HEREBY ORDERED THAT:</b></p> <ol style="list-style-type: none"><li>1. The plaintiff's application for condonation for the late filing of the witness statement and upliftment of the bar, is granted;</li><li>2. Cost of the application is to be cost in the cause;</li><li>3. The parties are to file joint pre-trial report in WORD format on or before 16 October 2020.</li><li>4. The case is postponed to 21 October 2020 at 14h15 for Pre Trial Conference</li></ol>	

**Reasons for orders:**Introduction

[1] The plaintiff herein filed a witness statement 11 court days late and brought an application for condonation and upliftment of bar. The court granted the application and ordered that cost be cost in the cause, What follows are the reasons for the aforesaid order.

Brief background

[2] The Plaintiff instituted action against the defendant for, inter alia, payment in the sum of N\$5 631 148.07 (Claim 1), payment in the sum of N\$ 1 918 623.27 (Claim 2), and declaring the immovable property situate at erf 2295, Extension 3, Khomasdal executable.

[3] On 22 January 2020, the court ordered plaintiff to file its witness statement on or before 11 February 2020. The plaintiff filed an application for condonation and its witness's statement on 26 February 2020. The plaintiff filed a report in terms of Rule 32 (9) after the application for condonation on 05 March 2020. On 11 March 2020 the defendant's counsel pointed out that there has been non-compliance with Rule 32 (9) and (10) and proposed that the plaintiff be allowed to bring a rule compliant application for condonation. The court ordered the plaintiff to file a Rule 32 (10) report on or before 20 March 2020, its application for condonation on or before 27 March 2020; and defendant to file its opposing papers on or before 03 April 2020. Both parties complied with the latter court order and plaintiff, in addition hereto, filed a replying affidavit.

Plaintiff's application for condonation

[4] The explanation by Ms Angola, counsel for the plaintiff, is that she gave a progress report to plaintiff on 30 January 2020 whilst she had already gone on maternity leave on 28 January 2020. She received no response from the plaintiff between 30 January and 1 February 2020 when she gave birth. Thereafter she did not check her e-mail. The progress report to the plaintiff was attached to the legal practitioner's affidavit. The report reads that witness statements would be required but a subsequent communication will be addressed to the relevant correspondent to prepare a witness statement. Plaintiff was therefore expecting further communication and in the absence thereof Ms Angola could not have expected any response from Plaintiff.

[5] Ms Angola further explained that her files were distributed to the other legal practitioners at the firm on 11 February 2020, the day the plaintiff was ordered to file its witness statement. No explanation was given

why this was not done on the 1<sup>st</sup> of February 2020. Ms Husselman, having first acquainted herself with the file, started preparing a witness statement on 17 February 2020 and forwarded a draft statement to the plaintiff on 24 February 2020. The plaintiff returned the draft statement with amendments on 26 February 2020. It is common cause that the witness statement was filed on 26 February 2020 together with an application for condonation for the late filing of the witness statement.

[6] Mr Katjivena avers that Ms Angola addressed an e-mail to defendant's legal practitioner, Mr Karsten, in terms of rule 32 (9) to determine whether an application for condonation would be opposed or not. The e-mail of Ms Angola to Mr Karsten and his reply were attached to her affidavit.

[7] The e-mail does not make any mention of rule 32 but Ms Angola merely enquired whether Mr Karsten would object to the late filing of the witness statement. Mr Karsten's response hereto was that the managing judge should be approached as it is ultimately the managing judge who has to decide whether to take issue with the plaintiff's non-compliance. Mr Karsten further proposed that they should schedule a chamber meeting with the Managing Judge to discuss the late filing of the witness statement. Ms Angola held the view that a chamber meeting would only delay the matter further and once again requested a response to her question whether Mr Karsten would have an issue with the application for condonation before filing same. The reply hereto was not filed. The parties however met on 04 March 2020 for a pre-trial conference. At this meeting the defendant's counsel informed Plaintiff's Counsel that Defendant will oppose the application for condonation. A Rule 32 (10) report was filed on 05 March 2020 reflecting the above correspondence and the confirmation by defendants that they would oppose the application on the ground that there was non-compliance with Rule 32.

[8] After the parties appeared on 11 March 2020 and the court ordered the plaintiff to file a report in terms of rule 32 (10). Mr Katjivena once again addressed a letter to Mr Karsten enquiring whether the defendants intend to oppose the application for condonation. In response hereto Mr Karsten once again took issue with the plaintiff's failure to comply with Rule 32 (9) and the prejudice suffered by the defendant due to the plaintiff's failure to comply with the court order dated 22 January 2020. Mr Karsten indicated that it would not have any alternative but to oppose the application for condonation.

[9] Mr Katjivena furthermore stated in his affidavit that the plaintiff has reasonable prospects of success as the plaintiff has a valid claim in terms of the agreement entered into between the parties. The plaintiff agreed to advance the defendants a personal loan and the defendants agreed that the property situated at erf 2295, Khomasdal, Extension 3, would be used as security for the loan. He stated that the plaintiff complied with its

obligations but the defendants failed to pay the installments as and when they became due.

### Defendant's Opposition

[10] The gist of the defendant's opposition is that

- (a) the plaintiff ought to have applied for condonation before it filed the witness statement;
- (b) the plaintiff did not comply with the provisions of Rule 32(9) by seeking an amicable solution before filing the application;
- (c) applicant failed to show good cause as is required in terms of rule 55 by:
  - failing to give a good explanation;
  - filing the witness statement prematurely
  - failure to submit that the plaintiff has prospect of success by disregarding the settlement proposals and failure to give facts and evidence regarding its prospects of success;

[11] The opposing papers reflect that the third defendant offered to settle by paying the 2<sup>nd</sup> loan agreement and has given an undertaking to settle the payment in terms of claim 1 in instalments until the property which has been given as security has been sold.

[12] Rule 32 (9) & (10) provides as follow:

' (9) In relation to any proceeding referred to in this rule, a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication by the court."

(10) The party bringing any proceeding contemplated in this rule must, before instituting the proceedings, file with the registrar details of the steps taken to have the matter resolved amicably as contemplated in sub rule (9), without disclosing privileged information.'

[13] This court has been clear on the importance of compliance with Rule 32 (9) and (10) and that practitioners must do more than pay lip service to the provisions thereof.<sup>1</sup> The applicant has however been canvassing this matter with the defendant since 26 February 2020 and I am satisfied that there has been compliance with Rule 32 (9). The plaintiff furthermore complied with Rule 32 (10) in that it filed the Rule 32 (10) report before it instituted the application for condonation as per the court order of 11 March 2020. The plaintiff's witness statement is for all intents and purposes not before this court until such time as the application for condonation is granted and the bar uplifted.

<sup>1</sup> See Bank Windhoek LTD v Benlin Investment CC 2017 (2) NR 403 (HC).

[14] The defendant submitted that there is no reasonable explanation advanced for non-compliance by the Legal Practitioner of the Plaintiff. This is not entirely without merit. The maternity leave of Ms Angula was not an unexpected event. There was no succession plan in place for the taking over of files prior to her going on leave. The plaintiff however responded within 2 days after receiving the draft statement and no tardiness can be ascribed to the plaintiff herein. The bulk of the delay was occasioned by poor planning of the legal practitioner but the delay in bringing the application was not inordinate.

[15] The defendants herein do not dispute the indebtedness to the plaintiff. This strengthens the plaintiff's averment that it has good prospects of success herein.

[16] When this court considers the above factors it applies its discretion in favour of the plaintiff.

[17] The plaintiff, whilst being successful in its application, has been the one in default of compliance with this court's order. The defendant had every right to oppose the application and in light hereof I am not amenable to grant a cost order in favour of the plaintiff. In the circumstances I am of the view that the cost hereof should be cost in the cause.

[18] In the result the court made the following order:

1. The plaintiff's application for condonation for the late filing of the witness statement and upliftment of the bar, is granted;
2. Cost of the application is to be cost in the cause;
3. The parties are to file joint pre-trial report in WORD format on or before 16 October 2020.
4. The case is postponed to 21 October 2020 at 14h15 for Pre Trial Conference.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondent</b>
K ANGULA Of Angula Co Inc Windhoek	L KARSTEN Of Louis Karsten Legal Practitioner Windhoek