

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

<b>Case Title:</b> <i>First Wall Property Investment (Proprietary) Limited v Woerman Brock Company Windhoek (Proprietary) Limited</i>	<b>Case No.:</b> HC-MD-CIV-ACT-CON-2017/00013
	<b>Division of Court:</b> High Court (Main Division)
<b>Heard/tried before:</b> Honourable Mr Justice B Usiku J	<b>Date of hearing:</b> 15 October 2020
	<b>Delivered on:</b> <b>15 October 2020</b>
<b>Neutral citation:</b> <i>First Wall Property Investment (Proprietary) Limited v Woerman Brock Company Windhoek (Proprietary) Limited</i> (HC-MD-CIV-ACT-CON-2017/00013) [2020] NAHCMD 470 (15 October 2020)	
<b>The Order:</b> Having heard <b>Adv Muhongo</b> with him <b>Mrs Vermeulen</b> , on behalf of the plaintiff and <b>Adv Barnard</b> with him <b>Mr du Pisani</b> , on behalf of the defendant and having read pleadings and other the documents filed of record:  <b>IT IS ORDERED THAT:</b>  1. The plaintiff's application for condonation for the late filing of the application for vacation	

of trial dates,

and the application for vacation of trial dates, are dismissed.

2. The plaintiff is ordered to pay defendant's costs occasioned by the aforesaid applications, such costs to include costs of one instructing and one instructed legal practitioner.
3. The defendant's application for condonation of the late filing of its confirmatory affidavit, is granted. The defendant shall pay the costs its condonation application.
4. The matter stands set down for trial for the 19-23 October at 10h00 and the parties are to attend roll call on 16 October 2020 at 8h30.

**Reasons: Practice Direction 61(9)**

Introduction

[1] Presently before the court are two applications by the plaintiff, namely application for:

- (a) condonation of plaintiff's late filing of the application for vacation of the trial dates, and for,
- (b) vacation of the trial dates.

In addition to those applications, there is also an application by the defendant for condonation of the late filing of its confirmatory affidavit in answer to plaintiff's application for vacation of trial dates.

[2] On 26 June 2020, this court set the matter down for trial for the 19-23 October 2020. The pre-trial order was granted on 15 April 2019 and the matter was ready for trial since then. However trial dates could not be allocated immediately as there were no dates suitable to both parties jointly, for the purpose of trial. The matter was therefore postponed on numerous occasions for the purpose of finding dates suitable to both parties and their legal practitioners. Trial dates were then allocated on 26 June 2020, as aforesaid.

[3] On 30 September 2020, the plaintiff filed an application for directions in respect of

its intention to apply for the vacation of the trial dates.

[4] On 02 October 2020 the court issued directions in terms of which the court directed the:

- (a) plaintiff to comply with rule 32(9) and (10) on or before 07 October 2020;
- (b) plaintiff to file its application for vacation of trial date on or before 08 October 2020;
- (c) defendant to file its answering affidavit, if any, on or before 12 October 2020;
- (d) parties to file respective heads of argument on or before 13 October 2020.

The court then set the matter down for the hearing of the application for 15 October 2020.

[5] The plaintiff filed an '*application*' for vacation of trial dates on 08 October 2020, however, such '*application*' was not accompanied by a signed and commissioned affidavit. A signed and commissioned affidavit was only filed on 09 October 2020. On 13 October 2020 the plaintiff filed an application for condonation in respect of that failure.

[6] The defendant filed its answering affidavit timeously. The answering affidavit refers to an accompanying confirmatory affidavit. However, this confirmatory affidavit was not filed together with the answering affidavit. The confirmatory affidavit was only filed at 17:04 the next day, the 13 October 2020. The defendant therefore applies for condonation in respect of that non-compliance.

#### Plaintiff's application for condonation

[7] The deponent to the plaintiff's affidavit in support of the application for condonation, in summary, deposed that the reason why the duly signed and commissioned affidavit was not filed on 08 October 2020 was that she received the draft affidavit from plaintiff's legal practitioners on 07 October 2020 at 14h54. At that time, she was not in office. The next day, 08 October 2020, she was in meetings and could only attend to the commissioning and signing of the affidavit late in the afternoon of 8 October 2020 and had it sent to the legal practitioners at 18h00 the same day.

Plaintiff's application for vacation of trial dates

[8] In its application for vacation of the trial dates, the plaintiff advances two main reasons why it wishes to have trial dates vacated, namely:

(a) firstly, that the dispute between the parties, should be adjudicated upon by an arbitrator and need not take up the court's time. The issue of reference of the matter to arbitration was abandoned by the plaintiff during oral argument;

(b) secondly, the plaintiff avers that it is not ready for trial. Based on this reason, the plaintiff states that it intends to:

(i) make further discovery and file an expert report and summary, in respect to the defendant's counterclaim;

(ii) add two further claims to its particulars of claim, which only arose after the pre-trial order was already made.

[9] The plaintiff further states that it only realised that it was not ready for trial on 22 September 2020 after its instructed counsel informed it that the case was not ready for trial for reasons referred to above. The plaintiff, thus, submits that the trial dates be vacated and that in order to ameliorate prejudice that the defendant may suffer due to vacation of trial dates, the plaintiff offers to pay defendant's costs occasioned by the vacation and offers to consent to a proposal that *mora interest* be suspended as from the date on which trial is presently set down to start until the date on which the trial actually starts.

[10] The defendant opposes the above applications.

Defendant's application for condonation

[11] The deponent to the defendant's affidavit in support of the condonation application states that the reason for the late filing of the confirmatory affidavit is oversight on his part, having been at the office the whole weekend till evening time.

[12] The plaintiff does not oppose the defendant's condonation application.

### Defendant's opposition to plaintiff's applications

[13] The defendant, in summary, contends that the reason for plaintiff's seeking to have trial dates vacated is that the plaintiff is not ready for trial. The additional claims that the plaintiff says it wishes to add to the particulars of claim have nothing to do with, and do not affect the matter presently before court. The defendant therefore submits that the application for vacation of trial dates be dismissed with costs.

### Analysis

[14] In regard to an application for condonation, it is trite law that an applicant for condonation is required to:

- (a) satisfy the court that he has a reasonable and acceptable explanation for his default, and,
- (b) show that he has reasonable prospects of success on the merits of the case.

[15] There is some reciprocal relationship between the foregoing requirements. A reasonable prospect of success may lead to the granting of a condonation application even if the explanation is not entirely satisfactory. While the two requirements are generally considered together, that is not always the case. For example, where there is no reasonable explanation for a glaring non-compliance with a court order, an application may be dismissed without consideration of the prospects of success. Conversely an entirely satisfactory explanation will not save an application where there are no prospects of success on the merits.<sup>1</sup>

[16] The delay in filing the signed and commissioned affidavit is not inordinate, and I am of the view that the explanation given by the plaintiff for the delay is satisfactory. However, that is not the end of the matter. The plaintiff is required to show prospects of success on the

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<sup>1</sup> Sun Square Hotel (Pty) Ltd v Southern Sun Africa and Another Case No. SA 26/2018.

merits of the issue that led to condonation being sought. The plaintiff has not touched directly on the issue of prospects of success on the merits, in its application for condonation. I shall briefly return to the issue of the merits later.

[17] Similarly, in regard to the defendant's condonation application, the delay in filing the confirmatory affidavit is not inordinate. The non-compliance was attended to soon after it came to the attention of the defendant's attorney. In the circumstances of this case I am of the opinion that the explanation given for the non-compliance, is satisfactory and the defendant's application stands to be granted.

[18] In regard to the application for vacation of trial dates, it is trite law that a party who wishes to have set down dates vacated must show good cause why the set down dates should be vacated.<sup>2</sup>

[19] In his treatise on Civil Procedure, the Hon Petrus Damaseb has the following to say on the subject of postponements:

*'The overriding objective emphasizes finalization of matters speedily and at minimum cost. In an environment where the parties themselves determine the time they need to exchange pleadings; where discovery takes place at an early stage and the parties, through witness statements, are fully informed of each party's case, the occasion must be rare where a party is caught by surprise and need more time to prepare.*

*Equally important is the fact the new rules emphasise early preparation and narrowing of the areas of dispute. Postponement must therefore be frowned upon and should be granted only exceptionally.'*<sup>3</sup>

[20] The learned author further observes:

*'In practice, the reason for seeking a postponement is often the unavailability of instructed counsel, especially where counsel from outside Namibia is engaged. Since Ecker v Dean in 1939, Namibian courts have been reluctant to accept that a litigant is entitled to insist pm being represented by a particular counsel. Therefore, it will*

<sup>2</sup> Rule 96 (3)

<sup>3</sup> Petrus T. Damaseb: Court Managed Civil Procedure of the High Court of Namibia, P.244, para 9-127.

his rarely avail a litigant to seek a postponement of a matter solely on the ground that or her chosen counsel, especially instructed counsel was unavailable to conduct the trial or hearing.<sup>4</sup>

[21] Moreover, practice direction 62(5) provides as follows:

*'The High Court pursues a 100% clearance rate policy, and in pursuit of the policy, the court must, unless there are compelling reasons to adjourn or vacate, apply a strict non-adjournment or non-vacation policy on matters set down for trial or hearing.'*

[22] As alluded to earlier, this matter has been ready for trial since 15 April 2019. In their joint proposed pre-trial order, which was made an order of court, the parties have set out, among other things, the issues of law and fact, to be resolved at trial in regard to both the main claim and the counterclaim, as well as having set out facts not in dispute. I see no good reason why, the plaintiff who was ready for trial at pre-trial stage, is no longer ready when the trial is just a few days from commencing. From the grounds put forth by the plaintiff, as the basis for seeking the vacation of the trial dates, I see no compelling reasons warranting the granting of the application for vacation of the set down dates. There being no satisfactory reasons for granting vacation of trial dates, vacation of the dates cannot be given even on the terms proposed by the plaintiff regarding *wasted costs* and *mora interest*.

[23] Insofar the application for condonation is concerned, I am of the opinion that the plaintiff has no prospects of success on the merits and therefore the application for condonation stands to be dismissed. As regards the application for vacation of set down dates, I am of the view that the plaintiff has not shown good cause for the vacation of the set down dates and the application stands to be dismissed with costs.

[24] In the result, I make the following order:

1. The plaintiff's application for condonation for the late filing of the application for vacation of trial dates,

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<sup>4</sup> Op Cit p.245, para 9-128 (footnotes omitted).

and the application for vacation of trial dates, are dismissed.

2. The plaintiff is ordered to pay defendant's costs occasioned by the aforesaid applications, such costs to include costs of one instructing and one instructed legal practitioner.

3. The defendant's application for condonation of the late filing of its confirmatory affidavit, is granted. The defendant shall pay the costs its condonation application.

4 The matter stands set down for trial for the 19-23 October at 10h00 and the parties are to attend roll call on 16 October 2020 at 8h30.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendants</b>
Adv T Muhongo with him (MJ Vermeulen) Instructed by ESI Incorporated Windhoek	Adv. PCI Barnard with him (LH du Pisani) Instructed by Du Pisani Legal Practitioners Windhoek