

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case Title: <i>Cars and Guides for Hire CC v Mineworkers Union of Namibia and Another</i>	Case No.: HC-MD-CIV-ACT-OTH-2019/02100
	Division of Court: High Court (Main Division)
Heard/tried before: Honourable Mr Justice B Usiku J	Date of hearing: 29 October 2020
	Delivered: 29 October 2020
Neutral citation: <i>Cars and Guides for Hire CC v Mineworkers Union of Namibia</i> (HC-MD-CIV-ACT-CON-2019/02100) [2020] NAHCMD 494 (29 October 2020)	
The Order: Having Mr Olivier on behalf of the plaintiff and Adv. Chibwana with him Rochelle Kandjella on behalf of the defendants and having read the pleadings and documents filed of record: IT IS ORDERED THAT: 1. The late filing of the defendants' plea is hereby condoned.	

2. The defendants are ordered to pay plaintiff's costs of opposition to the application for condonation. Such costs are to include costs of one instructing and one instructed counsel and are to be governed by the provisions of rule 32 (11).
3. The plaintiff shall file replication to the defendants' plea, if any, on or before 13 November 2020.
4. The parties shall file their respective discovery affidavits and exchange bundles of discovered documents on or before 03 December 2020.
5. The matter is postponed to 10 February 2021 at 15:15 for case management conference.
6. The parties must file a joint case management report on or before 03 February 2021.

Reasons: Practice Direction 61(9)

Introduction

[1] This is an application by the defendants for an order condoning the defendants' late filing of their plea.

[2] On 15 June 2020, this court made an order directing the defendants, amongst other things, to file plea on or before 24 June 2020. The defendants did not comply with that order. The defendants filed plea only on 14 August 2020.

[3] The defendants now seek condonation of the late filing of the plea.

Background

[4] The plaintiff instituted action against the defendants for payment of N\$ 10 780 000 allegedly being damages suffered by the plaintiff as a result of a termination of an agreement between the plaintiff and certain Rossing Uranium Limited. The plaintiff alleges that due to certain conduct on the part of the defendants, Rossing Uranium Limited was forced to terminate the agreement, resulting in the damages aforesaid.

The application

[5] The sole affidavit in support of the facts on which the defendants rely for the relief they seek, is deposed to by the legal practitioner of record for the defendants. The application for condonation is far from being a model of clarity. However, the following can be gleaned therefrom as reasons put forth by the defendants for the late filing of the plea.

[6] The second defendant resides in Swakopmund, in Erongo Region.

[7] On 1 June 2020, Proclamation 21/2020 Government Gazette (GG) No.7225/2020 was issued covering the period of 1 June 2020 to 28 June 2020, which was further amended by Proclamation 25/2020, GG No.7235/2020, returning the whole of Erongo Region, to Stage 1 of State of Emergency.

[8] Further in terms of Proclamation 26/2020, GG No.7250/2020, Erongo Region was moved from Stage 1 to Stage 3 State of Emergency, effective from 23 June 2020 to 6 July 2020.

[9] The defendants' legal practitioner contends that due to the lockdown imposed as a result of the state of emergency, she could not consult and obtain instructions from her clients for the purposes of pleading to the plaintiff's particulars of claim.

[10] As regards the issue of prospects of success, the defendants argue that the conduct complained of by the plaintiff was done in the course of the defendants' carrying out their statutory duty in terms of the Labour Act. The defendants deny that their conduct caused the cancellation of the contract. The defendants further raise issue on whether a party not being a party to a contract may, in law, be held liable for damages arising from the termination of contract, to which that party is not privy.

[11] The plaintiff, on the other hand, opposes the application for condonation. The

plaintiff contends that:

- (a) it is not competent for a legal practitioner to depose to an affidavit in a matter where she acts on behalf of the parties, especially where there is no supporting affidavit;
- (b) summons were served on the defendants in June 2019 and the legal practitioner for defendants should have consulted with her clients long before the onset of COVID-19;
- (c) the defendants have delayed in bringing the condonation application and have not furnished proper explanation for the delay;
- (d) COVID-19 pandemic was not a reason for the default and should not be blamed for the defendants' delay in filing plea; and,
- (e) the defendants have not made out a case for reasonable prospects of success on the merits of the case.

Analysis

[12] The issue for the determination by the court is whether the defendants have:

- (a) given a reasonable explanation for their failure to comply with the court order in question and,
- (b) indicated to the court that they have a bona fide defence to the plaintiff's claim in the action. In this regard, the defendants are expected to set out facts or arguments which, if proved, would constitute defence to the plaintiff's claim.

[13] There is some interplay between the foregoing requirements. Reasonable prospects of success may lead to the granting of a condonation application even if the explanation for the default 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 for condonation 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 merit.¹

[14] The deponent to the defendants' affidavit states broadly to the effect that, during the period within which the defendants were required to file plea, i.e. 15 June 2020 to 24 June 2020 the State of Emergency Regulations were applicable to Erongo Region. The legal practitioner for the defendants needed certain documents, such as correspondence between the defendants and Rossing Uranium, Recognition Agreement etc. to be furnished by the defendants before plea is settled. The State of Emergency Regulations affected the abilities of the defendants to furnish the documents in question.

[15] However, the deponent to the defendants' affidavit does not clearly state the type of Regulations that were effective during the period of 15 June 2020 to 24 June 2020 and how such Regulations affected the ability of the defendants to furnish the documents in question. The affidavit is also silent on where the documents were or when the documents were requested and how the deponent got knowledge that it was the State of Emergency Regulations which made it impossible for the documents to be furnished.

[16] As regards prospects of success, the deponent to the defendants' affidavit contends that the conduct complained by the plaintiff was performed by defendants while carrying out their duties and functions in terms of the Labour Act. The defendants deny that they caused Rossing Uranium to cancel the contract between Rossing Uranium and the plaintiff. The defendants also raise legal issue on whether a party, not being a party to a contract, may be held liable for damages consequent upon termination of the contract by a party to the contract.

[17] Although I am not satisfied that the defendants have furnished a reasonable

¹ Sun Square Hotel Pty Ltd v Southern Sun Africa and Another Case No. SA 26/2018, Para 13.

explanation for the delay; I am satisfied that the defendants have raised some factual and legal allegations sufficient to constitute good defence to the plaintiff's claim. I am, therefore, of the opinion that this a proper case to grant the condonation, on the basis that the defendants have shown prospects of success on the merits of the matter.

[18] As far as costs are concerned, the general rule appears to be that an applicant for condonation craves an indulgence from the court and as such should pay the costs of the application which can be said to be wasted costs because of that application.² Such costs include costs of opposition where opposition appears to be reasonable and not vexatious or frivolous.³ In the present matter, I am of the view that the plaintiff was entitled to oppose the defendants' application. Even though the defendants have been successful in their application, they should pay the costs, for reasons aforesaid.

[19] In the result I make the following order:

1. The late filing of the defendants' plea is hereby condoned.
2. The defendants are ordered to pay plaintiff's costs of opposition to the application for condonation. Such costs are to include costs of one instructing and one instructed counsel and are to be governed by the provisions of rule 32 (11).
3. The plaintiff shall file replication to the defendants' plea, if any, on or before 13 November 2020.
4. The parties shall file their respective discovery affidavits and exchange bundles of discovered documents on or before 03 December 2020.
5. The matter is postponed to 10 February 2021 at 15:15 for case management conference.
6. The parties must file a joint case management report on or before 03 February 2021.

Judge's signature	Note to the parties:
	Not applicable

² IA Bell Equipment Co. Namibia (Pty) Ltd v ES Smith Concrete Industries CC I 1860/2014 [2015] NAHCMD 68 (23 March 2015) para 36.

³ Ibid.

Counsel:	
Plaintiff	Defendant
J Olivier Instructed by Ellis Shilengudwa Inc Windhoek	Adv. Chibwana with him R Kandjella Instructed by AngulaCo Inc Windhoek