

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, WINDHOEK, MAIN DIVISION

RULING

Case Title: Am-Chagas & Gilhos LDA vs Feist Investments Number Seventy-Two CC and Another	Case No: HC-MD-CIV-ACT-CON-2019/04676
	Division of Court: High Court
Heard Before: Honourable Justice Shafimana Ueitele	Date of Hearing: 13 October 2020
	Delivered on: 10 November 2020
Neutral Citation: <i>Am-Chagas & Gilhos Lda v Feist Investments Number Seventy-Two CC</i> (HC-MD-CIV-ACT-CON-2019/ 04676) [2020] NAHCMD 555 (10 November 2020)	
Result on Merits: Condonation grated.	
The Order: Having heard SARAFINE PAULUS, on behalf of the Plaintiff and GILROY LEONARD KASPER, on behalf of the Defendant, on 10 November 2020: IT IS ORDERED THAT: 1. The Defendants' non-compliance with the Court Order of 25 February 2020 is condoned. 2. The Defendants must file their plea and counterclaim if necessary on or before 20	

November 2020.

3. The Plaintiff must replicate and plead to the counterclaim, if any, on or before 03 December 2020.

4. The Defendants must, if so inclined, replicate to the Plaintiff's plea to the Defendant's counterclaim, if any, on or before 14 December 2020.

5. The parties must file a joint case management report on or before 22 January 2021.

6. The case is postponed to 26 January 2021 at 08:30 for Case Management Conference Hearing (Reason: Parties to file case management conference report).

7. The Defendants must pay the Plaintiff's cost of opposing the application but the costs are limited as contemplated in Rule 32(11).

Reasons for Orders:

Introduction and Background

[1] The Plaintiff in this matter is Am-Chagas & Gilhos LDA, a close corporation with registration number 5000004545, registered and incorporated in terms of the applicable laws of the Republic of Angola. The Plaintiff is the Respondent in the application which is the subject of this ruling. I will, however, for ease of reference refer to the Respondent as the Plaintiff in this ruling.

[2] The First Defendant is Feist Investments Number Seventy-Two CC, a Close Corporation duly registered and incorporated in terms of The Close Corporations Act, 1986 of the Republic of Namibia. The Second Defendant is Ali Fadli Ayoub, a major male businessman and who is the sole and managing member of the First Defendant. I will for the sake of convenience refer to the First and Second Defendants as the Defendants.

[3] The question for determination in this application arose in the following context: The Plaintiff, during October 2019 issued out a combined summons from the office of the Registrar of this court, claiming payment of an amount of N\$ 1 627 500 from the

Defendants. The amount claimed is in respect of alleged breach of an oral agreement by the Defendants.

[4] The Defendants gave notice that they will defend the Plaintiff's claim and the matter, after it was docket allocated to a managing judge, was, as contemplated by Rule 38 read with rule 39 of the Rules of Court and Practice Directive 19, referred to Court connected mediation. Mediation failed and this Court at a Case Planning Conference held on 25 February 2020 made the following Order:

1. The Defendant is to file its plea and/or counterclaim, if any, on or before 10 March 2020.

2. The Plaintiff to file its replication to the plea and/or plea to the counterclaim, if any, on or before 18 March 2020.

3. The Defendant to file its replication to the plea on the counterclaim, if any, on or before 27 March 2020.

4. The parties are to file their respective discovery affidavits on or before 7 April 2020.

5. The parties to file a joint case management conference report on or before 10 April 2020.

6. The case is postponed to 14 April 2020 at 09:00 for Case Management Conference hearing (Reason: Parties to file case management conference report).'

[5] It is now common cause that the outbreak of the Covid-9 pandemic disrupted many activities including the sitting of Court. It thus so happened that the Case Management Conference that was scheduled in respect of this matter for 14 April 2020 did not take place and that Case Management Conference was postponed to 05 May 2020. The Plaintiff's legal practitioners had earlier, on 08 April 2020, filed a report with Court in which report the Plaintiff alerts the Court to the fact that the Defendants' have failed to comply with the Court Order of 25 February 2020. The Plaintiff further informed the Court that they intend to apply to Court for the Defendants' defence to be struck and for judgement to be entered in favour of the Plaintiff.

[6] On 05 May 2020, when the matter was called at the Case Management Conference Hearing, the Defendants or their legal practitioners were not in attendance at Court and had also not filed their pleas as ordered by the Court on 25 February 2020. Despite the failure to comply with the Court Order of 25 February 2020 and their absence from Court on 05 May 2020, the Court postponed the matter to 02 June 2020 for a sanctions hearing (so as to enable the Defendants to give reasons why they did not comply with the previous court order, i.e. the Order of 25 February 2020).

[7] On 02 June 2020, the Defendants and their legal practitioners again failed to appear in Court and had still not complied with the Court Order of 25 February 2020. The Court accordingly postponed the matter to 16 June 2020 for the Defendants to show cause why their defence must not be struck. It is only after the Order of 2 June 2020 that the Defendants on 09 June 2020, filed an application for the condonation of their failure to comply with the Court Orders dated 25 February 2020 and 5 May 2020, for the non-appearance of the Defendants' Legal Practitioner at Court on 5 May 2020 and 2 June 2020 and for the upliftment of the bar to enable the Defendants to deliver their plea/counterclaim to the Plaintiff's particulars of claim and discovery affidavits.

[8] The Plaintiff opposed the application filed by the Defendants. After the parties exchanged pleadings, I set down the Defendants' application for condonation for hearing on 27 July 2020. On that day, the Plaintiff took the point that Defendants did not comply with Rule 32(9) and (10). The point taken by the Plaintiff was upheld and the application was struck from the roll for want of compliance with Rule 32(9) and (10). The parties thereafter engaged each other as contemplated in rule 32(9) and filed a report in terms of rule 32(10). In that report, the parties stated that they failed to amicably resolve the matter and the Defendants thus applied for the setting down of the matter for hearing.

[9] In view of the Defendants' non-compliance with the court order, the Plaintiff has implored this court to impose sanctions on the Defendant in terms of the provisions of Rule 53. In particular, the Plaintiff prayed that the court strike the Defendant's defence in the circumstances. Rule 53(1) reads as follows:

'(1) If a party or his or her legal practitioner, if represented, without reasonable

explanation fails to —

- (a) attend a case planning conference, case management conference, a status hearing, an additional case management conference or a pre-trial conference;
- (b) participate in the creation of a case plan, a joint case management report or parties' proposed pre-trial order;
- (c) comply with a case plan order, case management order, a status hearing order or the managing judge's pre-trial order;
- (d) participate in good faith in a case planning, case management or pre-trial process;
- (e) comply with a case plan order or any direction issued by the managing judge; or
- (f) comply with deadlines set by any order of court,

the managing judge may enter any order that is just and fair in the matter including any of the orders set out in subrule (2).'

[10] Subrule (2), states as follows:

'(2) Without derogating from any power of the court under these rules the court may issue an order —

- (a) refusing to allow the non-compliant party to support or oppose any claims or defences;
- (b) striking out pleadings or part thereof, including any defence, exception or special plea;
- (c) dismissing a claim or entering a final judgment; or
- (d) directing the non-compliant party or his legal practitioner to pay the opposing party's costs caused by the non-compliance.'

[11] It is the application by the Defendants and the request by the Plaintiff that I now proceed to consider the mentioned matters as stated above, but before I do so, I will briefly outline the legal principles that are applicable to applications for condonation under Part 6 of the rules.

The legal principles

[12] Rule 55(1) of the Rules of Court¹ reads as follows:

'(1) The court or the managing judge may, on application on notice to every party and on good cause shown, make an order extending or shortening a time prescribed by these rules or by an order of court for doing an act or taking a step in connection with proceedings of any nature whatsoever, on such terms as the court or managing judge considers suitable or appropriate.'

[13] Rule 56 reads as follows:

'(1) On application for relief from a sanction imposed or an adverse consequence arising from a failure to comply with a rule, practice direction or court order, the court will consider all the circumstances, including –

- (a) whether the application for relief has been made promptly;
- (b) whether the failure to comply is intentional;
- (c) whether there is sufficient explanation for the failure;
- (d) the extent to which the party in default has complied with other rules, practice directions or court orders;
- (e) whether the failure to comply is caused by the party or by his or her legal practitioner;
- (f) whether the trial date or the likely trial date can still be met if relief is granted;
- (g) the effect which the failure to comply has or is likely to have on each party; and
- (h) the effect which the granting of relief would have on each party and the interests of the administration of justice.

(2) An application for relief must be supported by evidence.

(3) The managing judge may, on good cause shown, condone a non-compliance with these rules, practice direction or court order'

[14] What is clear from the above quoted rules is that the Court, when it applies sanctions

¹ Rules of the High Court of Namibia: High Court Act, 1990 promulgated by the Judge President in the *Government Gazette* No. 5392 of 17 January 2014 but which came into operation on 16 April 2014.

to an errant party, or considers an application for condonation it exercises a discretion, and as it has been said many a times in this Court, the exercise of this discretion must be done judiciously, in other words, not capriciously but in accordance with established legal principles.

[15] In *Donatus v Ministry of Health and Social Welfare*,² Masuku J remarked that when applying sanctions to an errant party, the Court exercises a discretion and has at its disposal a panoply of alternatives in terms of punishing a party that is in default of a court order or direction. The learned judge proceeded and said:

‘In this regard, it would seem to me that the court should enter an order that is just, appropriate and fair in all the circumstances. It would seem to me that the court has to consider the case at hand; its nuances; the nature of the non-compliance; its extent; its effect on the further conduct on the proceedings; the attitude or behavior of the party or its legal representative, to mention some of the considerations, and thereafter make a value judgment that will at the end meet the justice of the case’³.

[16] As regards applications for condonation, the Supreme Court in *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others*,⁴ Langa AJA stated the following:

‘An application for condonation is not a mere formality. The trigger for it is non-compliance with the Rules of Court. Accordingly, once there has been non-compliance, the applicant should, without delay, apply for condonation and comply with the Rules ... In seeking condonation, the applicants have to make out their cases on the papers submitted to explain the delay and the failure to comply with the Rules. The explanation must be full, detailed and accurate in order to enable the Court to understand clearly the reasons for it.’

[17] Rule 56(3) in no uncertain terms states that a managing judge may, on good cause shown, condone the non-compliance with a Rule of Court or a Court Order. As regards the meaning of the phrase ‘good cause’, the Supreme Court in *Leweis v Sampoio*⁵, per Strydom CJ stated that:

² *Donatus v Ministry of Health and Social Welfare* 2016 (2) NR 532 (HC).

³ *Supra* at para [32], Also see *CVW v RVW* (I 926/2016) [2017] NAHCMD 234 (10 August 2017).

⁴ *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others* (SA 10-2006) [2010] NASC 14 (5 November 2010).

⁵ *Leweis v Sampoio* 2000 NR 186 (SC).

'Although the Courts have studiously refrained from attempting an exhaustive definition of the words *'good cause'* they have laid down what an applicant should do to comply with such requirement. In this regard it was stated that an applicant:

- (a) must give a reasonable explanation for his default;
- (b) the application must be made *bona fide*; and
- (c) applicant must show that he has a *bona fide* defence to the plaintiff's claim.'

[18] The learned Judge further stated that:

'As to a Court's approach in regard to such an application it was stated in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 711E that –

“An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it willful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence and hence that the application for rescission is not *bona fide*.”

A reading of the above cases shows that although the fact that the default may be due to gross negligence it cannot be accepted that the presence of such negligence would *per se* lead to the dismissal of an application for rescission. It remains however a factor to be considered in the overall determination whether good cause has been shown, and would weigh heavily against an applicant for relief.'

[19] Masuku J in *Quenet Capital (Pty) Ltd v Transnamib Holding Limited*⁶ stated that:

'It therefore appears that for an application for condonation to succeed, it is important for the applicant to address the twin elements of a reasonable explanation for the delay or non-compliance together with the issue of prospects of success. If there should be any doubt about this, the Supreme Court spoke unequivocally on this issue in *Petrus v Roman Catholic Archdiocese* wherein O'Regan AJA spoke in the following terms: “in determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant's prospects of success on the

⁶ *Quenet Capital (Pty) Ltd v Transnamib Holding Limited* (I 2679/2015)[2016] NAHCMD 104 (8 April 2016) paragraph 15.

merits, save in cases of “flagrant non-compliance with the rules which demonstrate a glaring and inexplicable disregard” for the process of court”.”

Discussion

[20] The Second Defendant, Mr Ayoub, deposed to the affidavit in support of the Defendants’ application. According to Mr Ayoub, the reason why the plea and counterclaim was not filed on 10 March 2020 as ordered by the Court is that the Defendants’ legal practitioner of record’s uncle fell seriously ill on 09 March 2020 and as such, the legal practitioner had as of necessity, travelled to Oshakati on 09 March 2020. The uncle passed on 14 March 2020, necessitating that the legal practitioner stay longer than what he had planned. The uncle was buried on 27 March 2020 in Walvisbay. Mr Ayoub further states that as from 12 March 2020 to approximately 26 March 2020, he had travelled on business to Botswana and Angola. Mr Ayoub continued and stated that as from 28 March 2020, the regulations limiting peoples’ movements (lock down) came into operation and as such, he could not travel to consult with his legal practitioners.

[21] The Court Order was issued on 25 February 2020 and directed the Defendants to file their pleas or counterclaims if any by not later than 10 March 2020. Mr Ayoub fails to inform this Court what prevented him and his legal practitioner to consult between 26 February 2020 and 08 March 2020 so as to prepare a plea and file it by 10 March 2020. There is a stone wall of silence in respect of this period (i.e. 26 February to 08 March 2020). What is even more disturbing about Mr Ayoub’s explanation is the fact that on 08 April 2020, the Plaintiff’s legal practitioner of record uploaded a report in which report she informed Court that the Defendants have failed to comply with the Court Order of 25 February 2020.

[22] Mr Ayoub furthermore is totally evasive as to why they did not seek immediate condonation when they were alerted (on 08 April 2020) that they have not complied with the Court Order of 25 February 2020. The application for condonation was only filed approximately two months later (i.e. on 10 June 2020). Furthermore, the applicant’s legal practitioner failed to attend court on 05 May 2020 and 02 June 2020. The reason advanced by the legal practitioner for his failure to attend Court is that he anticipated that an order will be issued out of chambers, but he does not inform the Court on what factual

basis the 'anticipation' was based. His failure to attend on 02 June 2020 was because the legal practitioner failed to diarize the matter.

[23] I must confess that I find the Defendants and their legal practitioner's explanation unsatisfactory, incomplete and inadequate, bordering on gross negligence, but cannot be classified as a flagrant non-compliance with the Order of Court which demonstrates a "*glaring and inexplicable disregard*" for the process of Court. As regards the prospects of success, I am satisfied that the Defendants have put a *bona fide* defence.

[24] I have indicated earlier that in this matter, the Plaintiff's legal practitioners have, in their heads of argument, prayed for an order striking out the Defendants' defence as being the appropriate censure in the circumstances. This argument is not without foundation, considering the absence of a plausible explanation for the Defendants' inaction and that the inaction has undoubtedly resulted in the loss of time and unnecessary escalation of costs. The Court must, and will mark its disapproval of this type of conduct.

[25] It would seem to me that although the non-compliance by the Defendants is serious and being tantamount to gross negligence, I keep in mind what Strydom has said in the *Lewis v Sampoio* matter.⁷ I am of the view that an application for condonation must also not simply be regarded as an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts or Court Orders. The question must rather be, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it willful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence and hence that the application for condonation is not *bona fide*.

[26] Although in my view the Defendants' inaction borders, as I have said, on gross negligence, I am of the view that the application for condonation is not made in bad faith but out of a genuine and honest desire to pursue that defence. I am therefore of the further view that the striking of the Defendants' defence is rather grave and too serious a sanction as it has the potential, if granted, to effectively exclude the Defendants from further participation in the trial and thus effectively shut the doors of justice in the face of

⁷ *Supra* footnote 5.

the Defendants. For that reason, the dictates of justice and fairness would in my view require that the Defendants' inaction be condoned.

[27] This must not, however, as Justice Masuku has warned,⁸ be regarded as a cue by the Court to litigants that it will always treat non-compliance with Court Orders by a party in this fashion. Each case, as indicated, will have to be treated in the light of its own peculiar facts and circumstances.

[28] I am furthermore of the view, regard being had to all the circumstances of this case, that the proper order to issue in the circumstances is to mulct the defendant with an order for costs as a result of the non-compliance with the Court Order of 25 February 2020.

[29] In the result, I issue the following order:

29.1 The Defendants' non-compliance with the Court Order of 25 February 2020 is condoned.

29.2 The Defendants must file their plea and counterclaim if necessary on or before 20 November 2020.

29.3 The Plaintiff must replicate and plead to the counterclaim, if any, on or before 03 December 2020.

29.4 The Defendants must, if so inclined, replicate to the Plaintiff's plea to the Defendant's counterclaim, if any, on or before 14 December 2020.

29.5 The parties must file a joint case management report on or before 22 January 2021.

29.6 The case is postponed to 26 January 2021 at 08:30 for Case Management Conference hearing (Reason: Parties to file case management conference report).

29.7 The Defendants must pay the Plaintiff's cost of opposing the application but the costs are limited as contemplated in Rule 32(11).

⁸ *Donatus v Ministry of Health and Social Welfare* 2016 (2) NR 532 (HC).

Judge's Signature:	Note to the parties:
Counsel:	
Plaintiff	Defendant
S Paulus Dr Weder, Kauta & Hoveka Inc. Windhoek	G L Kasper Murorua Kurtz Kasper Incorporated Windhoek