

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-ACT-DEL- 2020/02097

In the matter between:

MARKUS MUTI

PLAINTIFF

and

NKURENKURU TOWN COUNCIL

FIRST DEFENDANT

UKWANGALUI TRADITIONAL AUTHORITY

SECOND DEFENDANT

THE MINISTER OF LAND REFORM

THIRD DEFENDANT

Neutral citation: *Muti v Nkurenkuru Town Council* (HC-MD-CIV-ACT-DEL-2020/02097) [2020] NAHCMD 561 (4 December 2020)

Coram: **PRINSLOO J**

Heard on: 20 November 2020

Delivered: **4 December 2020**

Flynote: Civil Procedure – Interlocutory application – Application for condonation – Non-compliance with court orders – Unacceptable explanation for non-compliance – Application for condonation dismissed with costs.

Summary: The Plaintiff applied for condonation for non-compliance with a court order dated 04 August 2020. It was argued on his behalf that the Plaintiff was unavailable from the period of 01 August 2020 as he went to Likorerera Area over 100km away from Nkurenkuru Town, where there is no cellphone network and as such was unable to communicate with his legal representative. He only returned on 09 September 2020 in the afternoon and as a result he could not instruct his legal representative timeously to draft his papers for the application for summary judgment, the answering affidavit to the defendant's applications to strike out his particulars of claim and application of security of cost. Explanation for the delay in filing the application does not fully cover the period of delay. Prospects of success not adequately covered.

Held:— that Application dismissed with costs.

ORDER

1. The Plaintiff's application for condonation is hereby dismissed;
2. The Plaintiff is ordered to pay the Defendant's costs of opposing the application;
3. The parties must file a joint status report on or before 25 January 2021 setting out further conduct of the matter.
4. The matter is postponed to **28 January 2021** at **15:00** for Status Hearing.

RULING

PRINSLOO J

Introduction

[1] This is an opposed interlocutory application in which the plaintiff seeks condonation for his non-compliance with a court order dated 4 August 2020 with regard to the time limits for the filing of his application for summary judgment and his answering affidavit to the defendants' application to strike out his particulars of claim and application for security of cost. The plaintiff further prays for an order uplifting the automatic bar and granting him new dates for the parties to exchange pleadings and documents.

[2] This matter has a rather long history. The facts that gave rise to the present dispute appear hereunder. But before dealing with the current facts before me, I find it necessary to briefly deal with the history of this matter. During 2018, plaintiff caused summons based on similar facts to be issued against the very same defendants under case number HC-MD-CIV-ACT-DEL-2018, which I already pronounced myself on and finalized the matter. Due to the repeated non-compliance with court orders by the plaintiff and/or non-appearances by his legal practitioner I, in terms of Rule 53 (2)(b) of the Rules of Court struck the plaintiff's claim and particulars of claim. An allocator was issued on 22 January 2020 by the taxing master in that matter, however same has not been satisfied yet by the plaintiff.

[3] The current matter serving before me is a result of the combined summons issued on 8 June 2020. Plaintiff is suing the defendants on the same cause of action and on similar facts and issues as between the same parties in case number: HC-MD-CIV-ACT-DEL-2018/02006. The plaintiff's claim is based on the first defendant expropriating the plaintiffs' piece of land and as a result the plaintiff alleges he is entitled to compensation in terms of the Compensation Policy Guideline for Communal Land. Plaintiff alleges that even though he was compensated for that piece of land, the measurements were wrong and unlawful and as a result there was a shortfall in the

payment made to him and the defendants are therefore still indebted to him in the amounts of N\$1 517 343, N\$81 822.50 and N\$11 845 all in respect of the said piece of land. The plaintiff further claimed interest on the aforesaid amounts and costs.

[4] By court order dated 4 August 2020, the parties were directed as follows:

'4.1 The parties shall comply with the following procedural steps on/before the following court day/ due dates:

(a) In respect of all the interlocutory applications the parties must comply with Rule 32 (9) and (10) on or before **20 August 2020**.

<u>Procedural Steps</u>	<u>Due dates</u>
Application for Summary Judgment	27 th day of August 2020
Answering affidavit/ Set Security: Summary Judgment	10 th day of September 2020
Application for Strike Out	27 th day of September 2020
Answering Affidavit: Strike Out	10 th day of September 2020
Replying Affidavit: Strike Out	14 th day of September 2020
Request for Security of Cost	20 th day of August 2020
Notice of Objection to Amount of Security only	28 th day of August 2020

Estimated End Date: 15th day of September 2020.

4.1.1 The case is postponed to 17/09/2020 at 15:00 for Status Hearing (reason: Interlocutory (To Bring)).

4.1.2. Joint Status report **must** be filed on or before 14 September 2020 regarding the further conduct of the matter.

4.1.3 In the event that both parties settle the interlocutory application the Managing Judge must be informed without delay to give further directions.'

[5] The plaintiff failed to comply with the timelines in respect of the application for summary judgment nor did he comply with the timelines in respect of the application to strike out.

[6] On 10 September 2020, the plaintiff's legal representative issued a letter to the defendant's legal representative of record indicating that the plaintiff will not pursue the intended application for summary judgment.

[7] On 14 September 2020, the plaintiff then filed his answering affidavit to the defendants' application to strike out his particulars of claim and application for security of cost. The plaintiff did so without complying with Rule 32 (9) and (10). On the same day the defendant's legal representative of record addressed a letter to the plaintiff's legal representative, which was filed on the e-justice system. The letter informed the plaintiff that he had filed his answering affidavit out of the prescribed timelines and he failed to comply with Rule 32 (9) and (10), as such the plaintiff's filing his answering affidavit without compliance of the aforementioned rule amounts to irregular proceedings

[8] On 17 September 2020, this court ordered the following:

- '1. The Parties' must comply with the following procedural steps:
 - 1.1 The parties to comply with Rule 32 (9) and (10) on/before 24 September 2020;
 - 1.2 Application for Condonation must be filed on or before 02 October 2020;
 - 1.3 Opposing papers must be filed on or before 09 October 2020;
 - 1.5 Replying papers must be filed on or before 16 October 2020.

The case is postponed to **22/10/2020** at **15:00** for Status hearing (Reason: Interlocutory (To Bring) and setting of hearing dates).'

[9] On 23 September 2020 the plaintiff addressed what appears to be a Rule 32 (9) notice to the defendants seeking indulgence and that the condonation application be

heard without opposition; to which the defendants replied on 24 September 2020 as to having instructions to oppose the application.

The application

[10] The application presently serving before this court filed on 2 October 2020, seeks the following order:

‘(a) The Plaintiff’s failure to comply with the court order of 4th August 2020 is hereby condoned and bar is uplifted;

(b) New dates are hereby granted for the parties to exchange pleadings and documents as directed by the Court.’

[11] The plaintiff, Markus Muti (hereinafter ‘the plaintiff’), deposed to the affidavit in support of the application, as to why the application for summary judgment and the opposing affidavits were not filed timeously. The plaintiff explained that, on 1 August 2020 he went to Likorerera Area over 100km away from Nkurenkuru Town to attend to his herd of cattle and mahangu crop as well as to prepare the field for the next rainy season. He only returned to Nkurenkuru on 9 September 2020 in the afternoon. He further explained that Likorerera Area has no cellphone network and as such he was unable to communicate or instruct his legal representative the entire duration he was there. On 10 September 2020 at around 16h00 he attended to the offices of Mukonda & Co Inc. in Rundu to finalize his answering affidavit to the application to strike out for commissioning. He stated that he was informed that his legal representative had gone to Oshakati High Court to attend a pre-trial conference which took place on 9 September 2020.

[12] The plaintiff further explained that due to the Covid-19 curfew he could not travel at night, he therefore returned from Rundu to Nkurenkuru with the answering affidavit to be commissioned there. His affidavit was only commissioned on 11 September 2020 and filed on 13 September 2020.

[13] On the issue of whether or not the plaintiff has probability of success in the main action, Mr Mukonda, legal representative for the plaintiff, contends that the probability is high as can be seen that the plaintiff intends to apply for summary judgment against the defendants. Further, that the plaintiff maintained that the cause of delay is reasonable and sufficient. He furthermore submitted that it will be in the best interest of the administration of justice that the matter be heard as it may have an impact on the other people who find themselves in the same position as the plaintiff.

[14] In opposition, the legal representative for the defendants, Mr Kashindi, deposed to an affidavit on behalf of the defendants. From the onset he contends that from the explanation given on behalf of the plaintiff, the plaintiff fails to provide a full, accurate and detailed explanation of his delay or his non-compliance with the court order. The plaintiff further does not in any way indicate when the court order was brought to his attention and what steps his legal representative took in respect of the court order. He further submitted that the plaintiff makes reference to his legal representative in his founding affidavit however the said legal representative did not depose to a confirmatory affidavit to confirm the allegations therein. On the allegation by the plaintiff that his legal representative was attending to a pre-trial conference at the Oshakati High Court on the 9th of September 2020 and the court order attached in support of such allegations, Mr Kashindi submitted that upon proper construction of the annexed court order, the said order is dated 22 July 2020 and as such it is an insufficient justification. The Plaintiff was supposed to annex the court order of the proceedings of 9 September 2020 as evidence that his legal representative indeed appeared in the Oshakati High Court.

[15] Mr Kashindi further submitted that the plaintiff's legal representative on 10 September 2020 issued a letter to defendant's legal representative of record wherein he indicated that the Plaintiff will no longer pursue the intended application for summary judgment. As a result, the plaintiff not only waived his right to bring the application for summary judgment but is equally estopped from doing so. On the issue of Rule 32 (9) engagement, Mr Kashindi submitted that the procedure followed by the plaintiff is

inappropriate in that it falls outside the good scope of rule 32 (9). He contends that the rule requires a party to provide the other party sufficient time to consider the issues being raised in the rule 32 (9) notice and that was not the case as the letter was sent to him on the same day the defendants' answering affidavit was due for filing in terms of the court order. As such the plaintiff's condonation can only be in relation to the filing of the answering affidavit in respect of the application to strike out and nothing else.

[16] Mr. Kashindi further submitted that there is no proof before this Court from any telecommunications institution confirming that the Likorerera Area has no network reception. He also submitted that by his own concession the plaintiff concedes to the extent of delay being 40 days, a month of unreasonable delay, placing the defendants in further unnecessary expenses; and further that the plaintiff failed to bring the condonation application with promptitude which caused undue delay in the finalisation of the matter.

The legal principles

Condonation

[17] Applications for condonation are common in our jurisdiction. The requirements are thus trite. In the *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others*¹ Langa AJA stipulated the principles applicable to applications for condonation even under the new rules. In dealing with condonation, the learned Judge of Appeal stated the following:²

'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

¹ (SA 10-2006) [2010] NASC 14 (5 November 2010).

² Para 12 and 13 of the judgment.

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.'

[18] Not only is it expected of legal practitioners to comply with procedural and substantive legal requirements but to diligently comply with the rules of court.³ In this regard, the Supreme Court in *Arangies t/a Auto Tech v Quick Build*⁴, expressed its displeasure with sluggish compliance with court rules.

'The absence of any sense of diligence or attention to compliance with the court's rules renders the explanation for the delay in filing the court record weak and unpersuasive.'

[19] 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.⁵ In *Balzer v Vries*⁶ the Supreme Court pronounced itself on this matter. The court said:

'[20] It is well settled that an application for condonation is required to meet the two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal.' (Emphasis added).

Rule 32 (9) and (10)

[20] Rule 32 regulates interlocutory matters and its compliance is peremptory⁷. The provisions of sub-rule 9 and 10 are set out as follows:

'(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

³ *Zaire v Van Biljon* (HC-MD-CIV-ACT-OTH-2019/00180) [2019] NAHCMD 253 (25 July 2019).

⁴ *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC).

⁵ *Quenet Capital (Pty) Ltd v Transnamib Holdings Limited* (I 2679/2015) [2016] NAHCMD 104 (8 April 2016).

⁶ 2015 (2) NR 547 (SC) at 661 J – 552 F.

⁷ *Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (12 March 2015).

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 proceeding, file with the registrar details of the steps taken to have the matter amicably resolved as contemplated in sub-rule (9) without disclosing privileged information.’

[21] In the *Bank Windhoek* matter⁸ Masuku J held as follows, in summary:

‘(a) That the writing of a letter, calling upon the other party to say ‘how you intend to resolve the matter amicably’ cannot, even with the widest stretch of the imagination amount to compliance with the rule;

(b) That the rule 32 process is initiated by the party seeking to deliver the interlocutory application, and must necessarily involve the full and undivided attention and participation of both parties to the *lis*;

(c) Having failed to reach common ground, it is then opportune for the plaintiff to record and inform the registrar of the actual steps taken by the parties to attempt to resolve the matter amicably in terms of sub-rule (10). This should include not just the writing of a letter by the initiator, but that the parties met at a certain place on a named date to discuss the matter and regrettably did not manage to resolve it;

(d) Rule 32(9) and (10) is not merely incidental rules. They actually go to the core of the edifice that should keep judicial case management standing tall and strong;

(e) Legal practitioners should take the peremptory provisions in question seriously and make every effort to fully and deliberately engage in the process of attempting to resolve matters amicably; and

(f) The parties will not be allowed to merely go through the motions.’

[22] The above principles apply to the present matter with equal force.

⁸ *Bank Windhoek Limited v Benlin Investment CC* [2017] NAHMD 78 (15 March 2017).

Application of the legal principles to the present facts

[23] The first issue for determination by this court is whether the plaintiff has given a satisfactory explanation for his non-compliance with the court order dated 4 August 2020. The explanation advanced by the plaintiff is that he had traveled to the Likorerera Area, an area that has no cellphone and as a result he was unable to communicate with his legal representative, and consequently the application for summary judgment was not filed or the opposing affidavits.

[24] The plaintiff conceded in his heads of arguments⁹ that the delay is 40 days. The plaintiff's founding affidavit does not state the steps that his legal representative took to get hold of him or to approach the court for an extension when they could not get hold of him during that period. There is no confirmatory affidavit filed by the plaintiff's legal representative or anyone from their office confirming the averments made by the plaintiff or an explanation why such affidavits were not obtained. Such a confirmatory affidavit is crucial in determining whether or not the explanation given for the non-compliance with the court order is a reasonable explanation. In that regard, the plaintiff has not fully explained the entire period of the delay. The explanation covering the entire period of the delay is necessary for the court to determine whether the delay was reasonable in the circumstances.¹⁰

[25] On the prospects of success, the plaintiff in his heads of arguments simply says 'the probability of success in the main action is as high as can be seen that the plaintiff intends to apply for summary judgment against the defendants'.¹¹ However, initially the summary judgment application was abandoned in the plaintiff's letter dated 10 September 2020 addressed to the defendant's legal representative, attached to the founding affidavit of the defendant's legal representative founding affidavit marked as annexure 'MSK1'. There is no explanation at all as to why the legal representative

⁹ See para 2 at p. 3 of the plaintiffs heads of argument.

¹⁰ *Autovermietung Savanna CC v Nangolo* (HC-MD-CIV-ACT-DEL- 2017/03952) [2018] NAHCMD 351 (16 October 2018).

¹¹ See para 3 at p.3 of plaintiffs heads of argument.

informed the defendant's legal representative why he indicated that the plaintiff would no longer pursue the application for summary judgment only to come change his mind in applying for application for condonation. In any event there is no prospects of success addressed at all by the plaintiff in his papers.

[26] The Rules of the High Court make provision in terms of Rule 55 for a party to approach the managing judge on application on notice to every party and on good cause shown for an order extending or shortening a time prescribed by the rules or by an order of court. Yet, with this at his disposal the plaintiff's legal representative failed to utilise the provisions of Rule 55 once he realised he will not be meeting the timelines as set by the Court Order due to the unavailability of the plaintiff.

[27] In light of the above I am of the opinion that the explanation put forward by the plaintiff for his non-compliance with the court order dated 4 August 2020 is not an acceptable explanation, taking into account the period of non-compliance. The court therefore declines to accept the explanation advanced.

[28] The letter penned by the plaintiff to the defendants on 23 September 2020 falls short of compliance with rule 32 (9). The letter did not seek or suggest an amicable way of resolving the dispute. The notice filed in terms of rule 32 (10) further does not inform this court of the actual steps taken by the parties to resolve the matter amicably. I am therefore of the opinion that the provision of rule 32(9) and (10) were not fully complied with. Regrettably, the disregard of the simple rules and procedures draws a fatal blow to the plaintiff's case.

Conclusions

[29] In the result, I am of the opinion that the plaintiff has not made out a case for the relief he seeks, and his application accordingly stands to be dismissed with costs.

[30] I accordingly make an order in the following terms:

1. The Plaintiffs' application for condonation is hereby dismissed.
2. The Plaintiff is ordered to pay the Defendants costs of opposing the application.
3. The parties must file a joint status report on or before 25 January 2021 setting out further conduct of the matter.
4. The matter is postponed to **28 January 2021** at **15:00** for Status Hearing.

JS PRINSLOO

Judge

APPEARANCES:

PLAINTIFF

R. Mukonda
Of Mukonda & Co. Inc.
Windhoek

DEFENDANT

M. Kashindi
Of the Office of the Government Attorneys
Windhoek