

“ANNEXURE 11”

Practice Direction 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Kalipa Paulus Marungu v Eufrasia Tjangano Maghoma</i>	Case No.: HC-MD-CIV-ACT-MAT-2018/01927
	Division of Court: High Court (Main Division)
Heard/tried before: Honourable Mr Justice B Usiku J	Date of hearing: 06 March 2020
	Delivered on: 06 March 2020
Neutral citation: <i>Marungu v Maghoma</i> (HC-MD-CIV-ACT- MAT-2018/01927) [2020] NAHCMD 85 (06 March 2020)	
The Order: Having heard Mr Cupido , on behalf of the Plaintiff and there being no appearance on the part of the Defendant and having read documents filed of record: IT IS ORDERED THAT: 1. The defendant’s application for condonation of the late filing of a counterclaim is dismissed in terms of rule 68(a). 2. The defendant is ordered to pay the plaintiff’s costs occasioned by plaintiff’s opposition to the condonation application.	

3. The matter is postponed to 22 April 2020 at 15:15 for case management conference.
4. The parties are directed to file a joint case management report on or before 15 April 2020.
5. Should the defendant opt not to take part in the creation of the joint case management report or opt not to appear before court on 22 April 2020 at 15:15, the defendant is directed to file a sanctions affidavit on or before the 15 April 2020 showing cause why the sanctions contemplated in terms of rule 53(2) should not be imposed on the defendant.

Reasons: Practice Direction 61(9)

Introduction

[1] In this matter the defendant applies for condonation of the late filing of a counterclaim.

[2] On 5 July 2018 the defendant filed her plea. Thereafter, the matter was referred to mediation. The mediation was not successful. In a joint case plan filed by the parties, the defendant indicated her intention to file a counterclaim. By court order dated 05 August 2019 the defendant was directed to file her counterclaim on or before 23 August 2019. The defendant did not file a counterclaim by due date. Instead, the defendant filed the counterclaim on 22 October 2019. Together with the counterclaim, the defendant filed an application for condonation of the late filing of the counterclaim. The defendant did not comply with the provisions of rule 32(9) and (10) prior to the filing of the condonation application.

[3] The application for condonation is opposed by the plaintiff.

[4] By court order dated 3 December 2019 the defendant was directed to file her heads of argument on or before 13 February 2020. The defendant did not do so, nor has the defendant filed any application for condonation in that respect. On 06 March 2020, the date of the hearing of the application, the defendant and her legal practitioner did not appear in

court.

The condonation application

[5] In the condonation application, the deponent to the defendant's application affirms that she is the secretary the defendant's legal practitioner of record. The deponent states that the reason for the late filing of the defendant's counterclaim is due to her having 'wrongly noted down,' in the office diary, the due date for filing of the counterclaim. She submits she did that due to an unfortunate human error. As a result thereof, she relates, Mr Mbaeva, the legal practitioner for the defendant, was not able to consult and draft the counterclaim on time.

[6] In his opposition to the application, the plaintiff raises a point in limine regarding the defendant's non-compliance with rule 32(9) and (10) and submits that the defendant's application be dismissed for that reason. Furthermore, the plaintiff submits that the defendant has not furnished a reasonable explanation for the delay in filling the counterclaim. The plaintiff contends further that the defendant has not touched at all her prospects of success on the merits, in her condonation application.

Analysis

[7] It is common cause that the defendant has not complied with the provisions of rule 32 (9) and (10) prior to her launching of the condonation application. The established legal position is that compliance with rule 32 (9) (10) is mandatory. The non-compliance with the rule almost invariably leads to the matter being struck from the roll. The defendant has not furnished any explanation why the rule was not complied with.

[8] In any event the defendant has not furnished a reasonable explanation for the delay in filing the counterclaim timeously. In her explanation for the delay, the deponent to the defendant's affidavit does not state:

(a) which date she had wrongly noted down in the office diary,

- (b) when did the defendant (or defendant's legal practitioner) discover the error,
- (c) what steps did the defendant take, upon the discovery of the error, aimed at complying with the relevant court order timeously, and,
- (d) why was the counterclaim only filed on 22 October 2019.

[9] It is trite legal position that an applicant in a condonation application is required to satisfy the court that he/she has reasonable prospects of success on the merits in the main matter. The defendant has not touched the subject of prospects of success in her application. In fact defendant's legal practitioner submits that the defendant is not required to address the prospects of success in the application for condonation. The argument put forth by the defendant's legal practitioner on that respect is untenable. Prospects of success on the merits must be addressed in an application for condonation. If authority is required for this contention, authority is to be found in *Quenet Capital Pty Ltd v Transnamib Holdings Limited* 12679/2015 NAHCMD 104 (8 April 2016) para 16; *Balzer v Vries* 2015 (2) NR 547 (SC) at 661, and *IA Bell Equipment Co Namibia Pty Ltd v ES Smith Concrete Industries CC I* (1860/2014) [2015] NAHCMD 68 (23 March 2015) para 10.

[10] All in all, even if the defendant had complied with the provisions of rule 32(9) and (10), the defendant would not have succeeded in her condonation application, as she has not furnished a reasonable explanation for the delay.

[11] In terms of rule 54(3), where a party fails to deliver a pleading within the time stated in a case plan order, the party in default, is by that very fact barred. In the present case, the implication of rule 54(3) is that there is no counterclaim before the court filed by the defendant.

[12] In conclusion, the defendant has not complied with the provisions of rule 32 (9) and (10). Compliance with rule 32(9) and (10) is compulsory in respect of all interlocutory applications.

[13] As there is no appearance in court on the part of the defendant as well as her

legal practitioner, the legal practitioner for the plaintiff submitted that the defendant's application be dismissed with costs.

[14] Rule 68 (a) provides that if an applicant does not appear before court on the date of set down for the hearing, the court 'must' grant an order dismissing the application.

[15] In the present matter, there is no reason why the provisions of rule 68 (a) should not find application. For that reason the defendant's condonation application stands to be dismissed with costs.

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

1. The defendant's application for condonation of the late filing of a counterclaim is dismissed in terms of rule 68(a).
2. The defendant is ordered to pay the plaintiff's costs occasioned by plaintiff's opposition to the condonation application.
3. The matter is postponed to 22 April 2020 at 15:15 for case management conference.
4. The parties are directed to file a joint case management report on or before 15 April 2020.
5. Should the defendant opt not to take part in the creation of the joint case management report or opt not to appear before court on 22 April 2020 at 15:15, the defendant is directed to file a sanctions affidavit on or before the 15 April 2020 showing cause why the sanctions contemplated in terms of rule 53(2) should not be imposed on the defendant.

Judge's signature	Note to the parties:
	Not applicable
Counsel:	

Plaintiff	Defendant
B.O Cupido Instructed by Isaacks and Associates Windhoek	TN. Mbaeva Instructed by Mbaeva and Associates Windhoek