

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**  
**RULING**

**Case no: I 1845/2014**

**ESTEL NANGHAMA**

**PLAINTIFF**

and

**HELENA SHIJUKA**

**1<sup>ST</sup> DEFENDANT**

**THE MASTER OF THE HIGH COURT**

**2<sup>ND</sup> DEFENDANT**

**THE REGISTRAR OF DEEDS**

**3<sup>RD</sup> DEFENDANT**

**ELIA MATHEUS**

**4<sup>TH</sup> DEFENDANT**

**NICKEY LACKEY**

**5<sup>TH</sup> DEFENDANT**

**Neutral citation:** *Nanghama v Shijuka* (I 1845/2014) [2020] NAHCMD 88 (10 March 2020)

**Coram:** RAKOW AJ

**Heard:** 13 February 2020

**Delivered:** 10 March 2020

**Flynotes:** Practice — Condonation — Application for condonation of non-compliance with court order— Applicant must show good and sufficient cause — Application for condonation must give good reason for failure to comply with court order — Application must also set out prospects of success on the merits of the application for condonation.

**Summary:** This matter involves a sanctions hearing wherein this court was tasked to determine whether it should impose sanctions on the First Defendant's counsel in terms of rule 53 based on the non-compliance of two court orders.

The First Defendant's non-compliances were based on the fact that the client and witnesses were all based in the northern part of Namibia and caused great difficulty in obtaining instructions and arranging audience with the client and witnesses, more so due to the clients being in remote areas and further having financial constraints to pursue other methods of exchanging the required documentation for the matter at hand. This challenge was further exacerbated by the fact that counsel of record for the First Defendant had to undergo leave from office to prepare for her wedding, leaving the file with colleagues in an office thinly spread by other matters requiring their attention.

Counsel for the Plaintiff however was of the view that the First Defendant's counsel failed to explain what they did to curb the noted constraints, which seemed to be a recurring excuse proffered by the First Defendant's counsel.

Held – applications for condonation will not be had for the asking and the party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. There must be good cause shown why condonation must be granted.

Held – although the First Defendant's counsel did try to have the matter prepared before taking leave, it however does not take away the fact that this court's orders were not complied with. It must, however, be noted that striking the First Defendant's claim in this regard would not necessarily bring an end to this matter at hand.

Held – condonation is granted as the matter is almost ripe for trial, affording the parties the opportunity to have their day in court, however, the court takes displeasure in the delays caused in this matter and as a result awards costs in favour of the Plaintiff for the delays caused, especially considering the fact that the First

---

Defendant's counsel ought to have applied for an extension in terms of rule 55 as opposed to leaving matters to chance till the eleventh hour.

---

### ORDER

---

- a) The First Defendant's condonation application is granted.
- b) The First Defendant must pay the Plaintiff's cost *de bonis propis* on appearances made 17 September 2019 and 29 October 2019 respectively and preparations done in this regard, limiting such costs in terms of rule 32 (11).
- (c) The matter is postponed to **14 April 2020** at 08h30, for plaintiff and 1<sup>st</sup> defendant to file supplementary witness statements.
- (d) The parties must, file a joint status report, on or before **09 April 2020**.

---

### JUDGMENT

---

Rakow, AJ:

[1] Before me is a sanctions hearing wherein this court is tasked to determine whether it should impose sanctions on the First Defendant's counsel in terms of rule 53 based on the non-compliance of court order dated 17 September 2019 which provided as follows:

- '1. The parties must file their discovery affidavits and bundles of discovered documents on or before **04 October 2019**.
- 2. Both parties must file their witness statements and expert witness summaries, if any, no later than **18 October 2019**.
- 3. The legal practitioners who will conduct the trial on behalf of the parties, **must hold a pre-trial conference meeting** by not later than **21 October 2019** at which meeting the legal practitioners must address the matter referred to in Rule 26 (6).

4. The parties must file a joint pre-trial order, no later than **24 October 2019**.
5. The matter is postponed to **29 October 2019** at 08h30 for a pre-trial conference.'

[2] On 29 October 2019 when the matter came back to court, the First Defendant's legal practitioner was given the opportunity to file a sanctions affidavit for non-compliance with court order dated 17 September 2019 on or before 07 November 2019 and the matter was postponed to 29 October 2019 for sanctions hearing. As fate would have it, the First Defendant's legal practitioner failed to file sanctions affidavit as ordered and the court was lenient enough to grant the First Defendant a second opportunity to file the sanctions affidavit on or before 09 December 2019, with the matter being postponed to 21 January 2020 for sanctions hearing. From thereon, the parties were given the opportunity to file heads of arguments, bringing the matter to the ruling at hand.

[3] In essence, the First Defendant's legal practitioner seeks condonation for failure to comply with court orders dated 17 September 2019 and 29 October 2019 respectively. I will now proceed to deal with the submissions by counsel, firstly with those of the First Defendant.

#### First Defendant's submissions

[4] The gist of the First Defendant's submissions are based on the fact that the client and witnesses are all based in the northern part of Namibia and that this has caused great difficulty in obtaining instructions and arranging audience with the client and witnesses, more so due to the clients being in remote areas and further having financial constraints to pursue other methods of exchanging the required documentation for the matter at hand. This challenge was further exacerbated by the fact that counsel of record for the First Defendant had to undergo leave from office to prepare for her wedding, leaving the file with colleagues in an office thinly spread by other matters requiring their attention.

[5] Regarding the witness statements as per the order dated 17 September 2019, the legal practitioner for the First Defendant managed to finally complete the First Defendant's witness statement, however, two more are required which remain

crucial to the First Defendant's case and same would be obtained during the week of 10 to 14 February 2020.<sup>1</sup>

[6] Regarding the pre-trial, Ms. Namene, who primarily deals with criminal litigation in the First Defendant's counsel's office, attended to the pre-trial draft sent by the Plaintiff's legal practitioner on 23 October 2019, which was due to be filed on 24 October 2019. However, counsel submitted that the Plaintiff's counsel rather suggested that he requests a postponement as it wouldn't be prudent to rush over the pre-trial draft as same required a meaningful contribution before being filed as a joint pre-trial report. On this score, counsel submitted that the blame for not filing this draft on time should be shared between counsel for the parties in the matter and not squarely place it on the shoulders of the First Defendant's counsel.

[7] Further on the issue of non-appearance and failure to file the sanctions affidavit as depicted above, counsel submitted that due to the communication that a postponement would be requested, Ms. Namene communicated the stance in the firm that it would not be necessary to attend to court as a postponement was on the cards. Therefore, the non-appearance was not one of complete disregard but on the assumption that the postponement would be granted.

[8] Regarding the prospects of success in the matter, counsel forms the view that the First Defendant has reasonable prospects of success considering the number of material contradictions in the Plaintiff's version and the fact that the Plaintiff has no other proof but her own say-so, strengthens the First Defendant's prospects of success in the matter. On this score, counsel prayed that the First Defendant's application for condonation be upheld with costs capped by the provisions of rule 32 (11).

#### Plaintiff's submissions

[9] In essence, counsel for the Plaintiff submitted that when looking at the First Defendant's sanctions affidavit, counsel for the First Defendant had already been aware of the constraints regarding the client and witness's challenge on 27 August

---

<sup>1</sup> At the writing of this ruling, it is yet unclear whether same has been obtained or not.

2019 and used that as a ground for the matter to be postponed before providing and establishing dates to file discoveries and witness statements. As a result, the matter was postponed to 17 September 2019 (three weeks) for a case management conference and the court ordered that witness statements be filed on 18 October 2019, more than a month later from 27 August 2019. On this score, counsel submitted that the First Defendant's counsel failed to explain what they did to curb the noted constraints, which seemed to be a recurring excuse proffered by the First Defendant's counsel.

[10] With the recurring problem, counsel further submitted that the First Defendant's counsel merely had to apply for an extension of time and failed to do so. This behavior, counsel submitted, demonstrated that priority the First Defendant's counsel afforded to the matter, appearing that they clearly have better and/more important things to do.

[11] Counsel further formed the view that coming to the aspect of prospects of success, the First Defendant has little prospects with the Plaintiff having in its possession a legal document vesting ownership on the property in her name, which is the subject matter of this case and which has not been declared invalid or set aside by any court. Further on the aspect of prejudice, counsel submitted that the Plaintiff has suffered great prejudice by the sheer duration of the matter alone, which has been delayed by the unjustifiable actions of the First Defendant. This prejudice, counsel submitted, cannot be simply cured by a costs order, as same can only be done by the finality of this matter.

#### Applicable principles and conclusion

[12] In *Telecom Namibia Limited v Michael Nangolo and Others*,<sup>2</sup> Damaseb JP identified the following as principles guiding applications for condonation:

<sup>1</sup> It is not mere formality and will not be had for the asking. The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.

<sup>2</sup> *Telecom Namibia Ltd v Nangolo and Others* (case No LC 33/2009, Damaseb JP, 28 May 2012).

2. There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.
3. It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.
4. The degree of delay is a relevant consideration.
5. The entire period during which the delay had occurred and continued must be fully explained.
6. There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented. (Legal practitioners are expected to familiarize themselves with the rules of court.)
7. The applicant for condonation must demonstrate good prospects of success on the merits. But where the non-compliance with the rules of court is flagrant and gross, prospects of success are not decisive.
8. The applicant's prospect of success is in general an important though not a decisive consideration. In the case of *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*, Hoexter JA pointed out at 789I-J that the factor of prospects of success on appeal in an application for condonation for the late notice of appeal can never, standing alone, be conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with rules, should be considered.
9. If there are no prospects of success, there is no point in granting condonation.'

[13] As indicated above, applications for condonation are mere formality and will not be had for the asking and the party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. There must be good cause shown why condonation must be granted. The term

“good cause” was considered in *Balzer v Vries*<sup>3</sup> where the Supreme Court pronounced itself on this matter as follows:

[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).

[14] With the above in mind, it is clear that the First Defendant’s counsel had issues from the get go in obtaining instructions from the clients and this court accepts the fact that the counsel is for all intents and purposes tasked with overseeing the civil department with the firm. This court further takes cognizance of the fact that it indeed tried to have this file in its firm as prepared as can be before taking the leave as mentioned to attend to her private matters. However, that does not take away the fact that this court’s orders were not complied with and gave the impression that this matter was the least of the firm’s priority.

[15] I further agree with the counsel for the Plaintiff that a simple cost order would not mitigate the prejudice experienced by the Plaintiff, considering the delay this matter has experienced during its litigation and the only cure is to have this matter brought to its finality. It must, however, be noted that striking the First Defendant’s claim in this regard would not necessarily bring an end to this matter at hand.

[16] Considering that the First Defendant’s statement is signed and handed in and only two witness statements are outstanding before the pre-trial draft can be prepared and handed in as a joint pre-trial draft, gives this court the encouragement that the parties in this matter will finally have their day in court and put their versions properly before this court in order for this court to make a ruling in relation to the evidence. This would be, at the end of the day, a better course to take to bring the matter to its close. This court therefore grants the First Defendant’s condonation in respect of the non-compliance to court orders dated 17 September 2019 and 29 October 2019 respectively.

---

<sup>3</sup> 2015 (2) NR 547 (SC) at 661 J – 552 F.



[17] With the condonation granted, there is still the issue of costs. It is common cause that the awarding of costs lies within the discretion of the court. It must be said that the court takes displeasure in the delays caused in this matter, especially considering the fact that the First Defendant's counsel ought to have applied for an extension in terms of rule 55 as opposed to leaving matters to chance till the eleventh hour. Indeed, the First Defendant's counsel relied on colleagues to get the file in order and have it ready for the further conduct in this matter, however, circumstances turned for the worse when clients were still not reachable to finalise the witness statements required to have the matter properly proceed to the pre-trial stage.

[18] Consequently, this court awards costs in respect of appearances made specifically for 17 September 2019 and 29 October 2019 respectively and preparations done in this regard, limiting such costs in terms of rule 32 (11).

[19] In the result, the following order is made:

- a) The First Defendant's condonation application is granted.
- b) The First Defendant must pay the Plaintiff's cost de bonis propis on appearances made 17 September 2019 and 29 October 2019 respectively and preparations done in this regard, limiting such costs in terms of rule 32 (11).
- c) The matter is postponed to **14 April 2020** at 08h30, for plaintiff and 1<sup>st</sup> defendant to file supplementary witness statements.
- d) The parties must, file a joint status report, on or before **09 April 2020**.

---

E RAKOW

Acting Judge

APPEARANCES:

PLAINTIFF:

R Beukes  
Of Henry Shimutwikeneni & Co Inc.

FIRST DEFENDANT:

N Ndilula-Ndeshimona  
Kadhila Amoomo Legal Practitioners