

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Zambezi Communal Land board v Oscar Simataa	Case No: HC-MD-CIV-ACT-CON-2019/03818
	Division of Court: High Court
Heard before: Honourable Mr Justice Ndauendapo	Delivered: 22 January 2021
Neutral citation: <i>The Zambezi Communal Land Board v Simataa</i> (HC-MD-CIV-ACT-CON-2019/03818) [2021] NAHCMD 10 (22 January 2021)	
The order: <ol style="list-style-type: none">1. The application for condonation is granted.2. The automatic bar for non-compliance with the court order dated the 23 of October 2019 is uplifted.3. The applicant (defendant) is granted leave to file his plea within 15 court days from today.4. The applicant is ordered to pay the costs of this application.5. The matter is postponed to Thursday, 18 February 2021 at 14:15 for a case management conference hearing.	
<u>Introduction</u> [1] During August 2019 the plaintiff instituted an action seeking the eviction of the defendant from a certain piece of land located at Kazelwana (commonly known as	

Cikelenge) about 3km from the Kabubwana Village, which piece of land forms part of the main land comprising of five portions measuring about 40 hectares shared by the Sankwasa family of which Sankwasa James Sankwasa's portion measures about 20 hectares. The said piece of communal land falls under the Mafwe Traditional Authority, Sikanjabuka District, and Sikanjabuka Sub-Khuta under the district Headmanship of Mukasa, Republic of Namibia.

[2] The defendant opposed the action. In terms of a case plan order dated 23 October 2019, the defendant was ordered to file his plea on or before 21 November 2019.

[3] The defendant failed to file his plea as ordered by Court and has become *ipso facto barred* from taking any further step in the proceedings. Defendant further failed to take any reasonable steps to secure the uplifting of the bar and condonation, but instead irregularly filed his discovery affidavit, while knowingly that he did not file his plea.

[4] In the Status Report dated 15 January 2020 the defendant indicated that he intended to bring a condonation application after the Plaintiff filed its case management report in terms whereof it submitted that the plaintiff intends to bring an interlocutory application in terms of rule 15(2) of the rules of Court for default judgement.

[5] In terms of the Case Management Order dated 16 January 2020 the defendant was granted leave to bring his application for condonation by 4 February 2020.

[6] On 29 January 2020 the defendant filed a defective condonation affidavit without a notice of motion as required by the rules of Court.

[7] On 8 July 2020 this Court struck the purported condonation application from the roll, for lack of compliance with the court rules.

[8] After the purported condonation application was struck from the roll, the defendant did nothing and failed to act with promptitude until the plaintiff forwarded him by email a draft Case Management Report on 7 August 2020.

[9] The defendant only sought to bring this second condonation application after being alerted by the draft case management report forwarded to him by Plaintiff. The condonation application was opposed by the respondent.

The condonation application

[10] In the founding affidavit to uplift the bar, the legal practitioner, Mr. Cupido, in summary, explained that the matter had a long history and was previously dealt with by his colleague who had left their law firm. He says that the subject of the dispute is land of exceeding complexity and the matter had previously been dealt with in various fora. He states that the defendant at all times intended to defend the matter and always considered there to be a legitimate defense. When he finally managed to consult with the defendant, it was coming towards the end of the year. He says that he in fact placed a telephone call to a lawyer of the plaintiff informing him that he would be late in filing a plea. He says that the delay was at all times the fault of the legal practitioners involved in the matter. The defendant had never indicated that he had no interest in the matter and as soon as he was informed that there had been a delay he instructed them to ask for condonation and for upliftment of the bar.

[11] The application is opposed by the respondent. A point in limine was raised to the effect that the founding affidavit was deposed to by the legal practitioner and not by the applicant himself. The legal practitioner is acting as both the witness and a legal practitioner and that is unethical and conduct frowned upon by the court. Although the court disapproves of such conduct, there are cases such as this where the applicant has no knowledge as to why the plea was not filed and the only person who can explain that is the legal practitioner and therefore in such circumstances, the court will allow that.

[12] Another criticism levelled against of the founding affidavit is that the deponent fails entirely to give a full, detailed and accurate explanation of the defendant's delay or failure to file his plea on time or at all, to enable the Court and Plaintiff to understand clearly the reasons for such delay. Failure to give a full, detailed and accurate explanation for the delay is fatal, according to counsel for the respondent.

Discussion

[13] In *Minister of Health and Social Services v Amakali Matheus*¹ the Supreme set out the requirements for condonation as follows:

'(a) He or she must provide a reasonable, acceptable and *bona fide* explanation for non-compliance with the rules; (b) The application must be lodged without delay, and must provide a

¹ *Minister of Health and Social Services v Amakali Matheus* Case no: (SA-2017/4) [2018] NASC 413 (6 December 2018).

full, detailed and accurate explanation for the entire period of the delay, including the timing of the application for condonation. Lastly, the applicant must satisfy the court that there are reasonable prospects of success on appeal.'

Did the applicant provide a reasonable explanation for the delay?

[14] The deponent explained that the matter was previously handled by another legal practitioner who left their law practice and it took time for him to familiarize himself with the matter and the defense of the applicant. He says that when he eventually consulted with the defendant it was coming towards the end of the legal year. He telephoned a lawyer at the respondent practice and informed him that the plea will be filed late. That is denied by the respondent's legal practitioner as the name of the legal practitioner is not mentioned. Although that explanation is not perfect and subject to valid criticism, it is reasonable. I must hasten to add that the blame for not filing the plea should squarely be laid at the door of the legal practitioner and not the applicant. On the prospect of success, the applicant says that he has lawful title to the land in question which land was allegedly allocated to him by the relevant tribal authority which is the legal overseer and authority with respect to the land in question. He further says that the respondent purports to act on behalf of a certain James Sankwasa, but the said Sankwasa had not been joined to the proceedings. Those allegations clearly show that the applicant has a triable case.

[15] As stated above, the failure to file the plea is attributable to the conduct of the legal practitioner. In those circumstances, is it fair and just to close the doors of justice in the face of the applicant and deny him a hearing to resolve a dispute in a fair and just manner? I do not think so. The conduct of the legal practitioner in this matter was not exemplary as evidenced by the failures to act with promptitude and diligence. That reprehensible conduct calls for censure. The applicant should bear the costs of this application. In addition I wish to caution the applicant that any further non-compliance with court orders will no longer be tolerated and the utmost sanction will be imposed.

The order

[16] I therefore propose the following order:

1. The application for condonation is granted.
2. The automatic bar for non-compliance with the court order dated the 23 of October 2019 is uplifted.
3. The applicant (defendant) is granted leave to file his plea within 15 court days from today.
4. The applicant is ordered to pay the costs of this application.

5. The matter is postponed to Thursday, 18 February 2021 at 14:15 for a case management conference hearing.	
G N NDAUENDAPO JUDGE	
Counsel for applicant: B Cupido Of Isaacks & Associates Windhoek	Counsel for respondent: S Kashindi Office of the Government Attorneys Windhoek