

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-REV-2019/00338

In the matter between:

BENEDICTUS NGAIROURE

APPLICANT

and

COUNCIL FOR THE MUNICIPALITY OF WINDHOEK	1ST RESPONDENT
CHAIRPERSON OF THE MANAGEMENT	
COMMITTEE	2ND RESPONDENT
CHIEF EXECUTIVE OFFICER OF THE	
MUNICIPALITY OF WINDHOEK	3RD RESPONDENT
LUDWIG NARIB	4TH RESPONDENT
DEE SAULS	5TH RESPONDENT
FRANK KÖPPLINGER	6TH RESPONDENT

Neutral Citation: *Ngairoure v Council for the Municipality of Windhoek* (HC-MD-CIV-MOT-REV-2019/00338) [2021] NAHCMD 273 (3 June 2021).

CORAM: MASUKU J
Heard: 5 May 2021
Delivered: 3 June 2021

Flynote – Rules of Court – Rule 55 – Condonation Application – Alternation of gender in an affidavit – authority to depose to an affidavit – the administration of an oath by legal practitioner

Summary: The Respondents having failed to comply with an order of this court brought an application for condonation for their said conduct. The application being opposed by the applicant and raising *points in limine* on the grounds of a defectively commissioned affidavit and authority to depose to the affidavit in support of the application the court held the following:

Held: that the inconsistency in the gender of the deponent in this case is of a technical nature and does not go to the root of whether the affidavit was properly commissioned or not. The error committed regarding the issue of gender is not fatal.

Held that: Legal practitioners should exercise care when acting as commissioners of oaths and not act as such where they might have acted as legal practitioners, even in the most minimal manner e.g. appearing on behalf of a colleague at case management conference hearings.

Held further that: An individual need not to be authorised to depose to an affidavit. This type of act is voluntary.

Held: the respondents in this matter, met the legal requirements for the granting of an application for condonation, in that they proffered a reasonable explanation and showed that they have reasonable prospects of success.

Held: that a party seeking condonation essentially craves an indulgence from the court and should, ordinarily pay the costs of the application.

Held that: The opposition by the applicant was not unreasonable resultant thereof the costs were ordered against the respondents.

ORDER

1. The First, Second and Third Respondents non-compliance with this Court's Order dated Thursday, 22 October 2020, in not filing its answering affidavits on or before the 20 November 2020 is hereby condoned.
 2. The First, Second and Fourth Respondents non-compliance with this Court's Order of Thursday, 21 January 2021, is hereby condoned.
 3. The Respondents are ordered to pay the costs of this application jointly and severally, the one paying, and the other being absolved, subject to the provisions of Rule 32(11).
 4. The answering affidavit is to be filed on or before 24 June 2021.
 5. The replying affidavit is to be filed on or before 8 July 2021.
 6. The matter is postponed to 22 July 2021, at 08:30 for case management.
 7. The parties are ordered to file a joint case management report on or before 19 July 2021.
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JUDGMENT

MASUKU J:

[1] Before court for consideration is an application for condonation for the non-compliance with a court order dated 22 October 2020, and in which the court ordered the following;

- '1. The applicant's supplementary affidavits are to be filed by 6 November 2020.
2. Answering affidavits are to be filed by 20 November 2020.
3. The replying affidavit, if any, is to be filed by 4 December 2020.

The joint case management report is to be filed 3 days before the case management hearing.

- 4 The case is postponed to 21 January 2021 at 08:30 for Case Management Conference hearing.'

[2] The 1st, 2nd, and 4th Respondents' (henceforth 'the respondents') failed to file their answering papers as set out in the above court. This application is to condone that non-compliance. Furthermore, the court on 21 January 2021, ordered the Respondents to file their condonation application on 28 January 2021. It was only filed on 29 January 2021.

[3] I will refer to the parties in this application as they appear in the main matter. I will refer to Mr. Ngairoure as the applicant and to the respondents as such.

[4] The respondents in their affidavit in support of the condonation application deposed that they had instructed counsel, in the matter and were in contact with him pertaining to the drafting of the answering affidavit as of 29 October 2020. When telephonic contact was made with counsel during the first week of November 2020, he indicated that he is inundated with other matters and advised the respondents' legal practitioners to seek the services of alternative counsel.

[5] This being the position, the respondents' instructing legal practitioner took it upon herself to search for new counsel to no avail. This was because there was no counsel available to take on the instructions on such a short notice. Having considered the time constraints and the fast approaching date for filing, counsel for the respondents proceeded to then draft the answering affidavit with the view of having instructed counsel to merely settle it.

[6] The respondents' legal practitioner however failed to timeously complete the answering affidavit due to the complexity of the matter and because of her medical problems that she had been experiencing at the time. It was only on 18 November 2021, a mere two days before the date of filing, where instructed counsel telephoned the respondents' instructing legal practitioner and informed her finally that he is not able to attend to draft the answering affidavit or settle it. He accordingly returned the brief on 23 November 2020.

[7] It is the respondents' further case that their legal practitioner's law firm was closed during the period of 18 December 2020 and reopened 13 January 2021. The respondents depose that their instructing legal practitioner has indicated that she has now obtained counsel to deal with the matter should the application for condonation be successful.

[8] Mr. Kasper, counsel for the applicant, opposing this application raised a *point in limine*, namely, that the founding affidavit filed by the Respondents is marred by several issues. The applicant contends that the commissioner of oaths was confused as to the identity of the party appearing before him. This is because the oath administered alternates between 'he' and 'her', whereas it is common cause that the deponent is male.

[9] The respondents, in response to this attack, relied on *Dregading Africa (Pty) Ltd v Master Chemicals South Africa (Pty) Ltd*¹ where Miller, J held that;

'[15] The complaint in this case is of a technical nature and does not go to whether the affidavit was commissioned or not. If there is a failure to comply with the regulation, then this was not in respect of the administration of the oath but simply in respect of the compliance with the regulation once the oath had been administered. The purpose of the regulation is so that the commissioner of oaths can be identified and located if necessary.'

[10] The applicant further contends that the respondents' deponent to the founding affidavit in respect of the condonation application alleges that he is duly authorised to depose to the affidavit but has not attached the authorization so

¹ *Dregading Africa (Pty) Ltd v Master Chemicals South Africa (Pty) Ltd* 1980 (2) SA 362

referred to. On this basis, alone the application stands to be dismissed, contends the applicant.

[11] The applicant also took the point that the commissioner of oaths, Mr. Katjivena, a legal practitioner of this court administered the oath, yet he had at some stage been in the employ of the respondents' legal practitioner. This point was however, abandoned by Mr. Kasper during argument. It just bears mentioning that legal practitioners should exercise especial care in serving as commissioners of oath and should completely eschew the possibility that they serve as commissioners of oath in cases where they may have acted as a legal practitioner.

[12] In this regard, they need not have presented argument or even filed papers on behalf of the client. The mere attendance of a case management conference or the postponement of a matter may be enough to disqualify them from acting as a commissioner of oath at a later stage. This admonition must be taken seriously.

[13] The applicant further argued that there was no *bona fide* explanation proffered to the court by the respondents for the non-compliance. The applicant contends further that the application for condonation was not brought timeously in that the respondents waited until 21 January 2021, when the matter was back in court to communicate their intention of bringing the said application. When the court granted the respondents the indulgence to bring the application, they failed to do this within the time frame given to them by court.

Determination

[14] It is common cause that the respondents' founding affidavit has been properly commissioned. The only objection raised relates to the alternation between 'he' and 'she' in the affidavit. The applicant commenced his founding affidavit with the following:

'[1.1] . . . a major male person with full legal capacity, currently employed by the first respondent...'

[15] From the onset, the gender of the individual deposing to the affidavit is established. The error under the deponent's signature, referring to the deponent as a female whereas in fact he is male cannot render the affidavit a nullity.

[16] The Respondents submitted that this defect could be cured with an amendment from the bar. How the respondents' counsel intends to go about the amendment I cannot comprehend. I do not see how she would be able to amend a document not deposed by her and in the absence of the commissioner of oaths that commissioned the affidavit, this cannot be cured in this manner.

[17] I am of the considered view that the authority cited by the respondents, namely, the *Dregading Africa* case, quoted above, establishes that the defect in the commissioning of the affidavit, if it be one, is not fatal. The attack on the affidavit is highly technical and should not be allowed to stand in the way of the matter proceeding and being dealt with on the merits.

[18] I am of the considered view that the above quotation provides a full answer to the complaint. I however agree that the respondents could have done more to address the complaint further by obtaining an affidavit from the commissioner of oaths, as it does appear that the vacillation between 'he' and 'she' was a result of an error. It is plain that it was how the affidavit had been drafted by the respondents' legal practitioners rather than a mistake that was committed by the Commissioner of Oaths when he administered the oath.

[19] I now turn to deal with the issue of authority raised by the applicant. When one deals with the issue of authority, it should be borne in mind that a deponent need not be authorised in order to depose to an affidavit. The authorisation of such a deponent should not be confused with the authorisation of the institution, defending and prosecution of proceedings on behalf of another party.²

² *Standard Bank of South Africa Ltd v Standard Bank of South Africa Ltd and another* 833/2014.

[20] Satchwell. J, in the matter of *Firststrand Bank Ltd. v Carl Beck Estates (Pty) Ltd*³ stated that where;

‘[26] . . . facts contained in the affidavit fall within his personal knowledge and are based on records and documents available to him. He is indeed pre-eminently the person who would have knowledge of the relevant facts.’

[21] The applicant takes issue with authority for the Acting CEO to depose to the affidavit. Such authority is not necessary as the act of deposing to an affidavit, like adducing oral evidence, is a voluntary act of the witness or deponent. As such, there is no frontal attack by the applicant on the authority of the Acting CEO to bring the condonation application. There was no need for the respondents to have provided that authority as it was never required. The attack on the question of authority to depose to the affidavit lacks merit and cannot be upheld.

[22] Whereas the explanation of the entire period of delay is not fully covered, I am prepared to accept that the explanation given for the delay is reasonable and fairly acceptable. The requirements for condonation are trite in law and for that purpose shall not be reiterated in this judgment. These requirements may be found in *Telecom Namibia Ltd v Nangolo*⁴.

[23] The prospects of success have been dealt with in paragraph 4.3.15 in the founding affidavit. What stands therefrom is the allegation that internal disciplinary procedures have not been exhausted and that parties should be given an opportunity to exhaust internal remedies before approaching this court for relief.⁵ It is the respondents’ case that the matter has been brought to court prematurely.

[24] There is authority to the effect that bodies, like the 3rd respondent should be allowed to deal with matters before them and as has been said before, not every

³ *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* (56174/2007) [2008] ZAGPHC 423 (25 September 2008)

⁴ *Telecom Namibia Ltd v Nangolo* (LC 33/2009) Delivered on 28 May 2009.

⁵ Para 4.3.16.7 of the Founding Affidavit

decision made has a direct, external legal effect such as to be the basis for invoking the court's review powers.

[25] I am satisfied that a case has been made out for condonation. A reasonable explanation and one that is acceptable, in the circumstances, has been proffered. I say so acknowledging that the respondents could have done better in mounting their case for condonation. I am also satisfied that the respondents have demonstrated that they do have prospects of success in the main application. I would thus not begrudge the respondents by refusing them the relief sought.

Costs

[26] It is trite that a party seeking condonation is essentially praying for an indulgence from the court. I am of the considered view that the opposition by the applicant was not unreasonable. The respondents are accordingly ordered to pay the costs of this application subject to the provisions of rule 32(11).

In the result, I make the following order:

1. The First, Second and Third Respondents non-compliance with this Court's Order dated Thursday, 22 October 2020, in not filing its answering affidavits on or before the 20 November 2020 is hereby condoned.
2. The First, Second and Fourth Respondents non-compliance with this Court's Order of Thursday, 21 January 2021, is hereby condoned.
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T. S. MASUKU
Judge

APPEARANCES:

APPLICANT:

G. Kasper

Of Murorua Kurtz Kasper Inc. (Windhoek)

RESPONDENT:

M. Angula

Of AngulaCo. Incorporated (Windhoek)