

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case Title: Jack's Trading Pty Ltd and Jinhao Investment Close Corporation t/a Super Foods	Plaintiff Defendant	Case No: HC-MD-CIV-ACT-CON-2018/03013 Division of Court: Main Division Heard on: 20 July 2021
Heard before: Honourable Mr. Justice Usiku, J		Delivered on: 20 July 2021

Neutral citation: *Jack's Trading (PTY) LTD v Jinhao Investment Close Corporation t/a Super Foods* (HC-MD-CIV-ACT-CON-2018/03013) [2021] NAHCMD 339 (20 July 2021)

Order:

1. The defendant's non-compliance with the court order dated 31 March 2021, is condoned.
2. The defendant is ordered to pay plaintiff's costs occasioned by this application.
3. The defendant is ordered to pay the plaintiff's wasted costs for the 21 May 2021 court appearance.

Application for costs in terms of rule 97(3)

4. The defendant shall comply with rule 32(9) and (10) on or before 13 August 2021.
5. The defendant shall file application for an order of costs on or before 20 August 2021.
6. The plaintiff shall file notice of intention to oppose, if any, and answering affidavit on

or before 3 September 2021.

7. The defendant shall file a reply, if any, on or before 17 September 2021.
8. The matter is postponed to 29 September 2021 at 15h15 for status hearing.
9. The parties shall file a joint status report on or before 22 September 2021.

Reasons for order:

USIKU, J

Introduction

[1] This is an application by the defendant for condonation of its non-compliance with a court order dated 31 March 2021.

[2] On 31 March 2021 the court directed the defendant to comply with rule 32(9) and (10) in respect of its intended application for an order of costs in terms of rule 97(3), on or before 9 April 2021. The defendant was further directed to file the intended application on or before 16 April 2021. The defendant did not comply with the aforesaid court order.

Background

[3] The background to the aforesaid facts is that, on 11 November 2020, the main matter was set down for trial for the 23-26 March 2021. However, on 15 March 2021, the plaintiff delivered notice of withdrawal of the action against the defendant. The plaintiff did not include in the notice a consent to pay costs. The defendant indicated that it intended to apply for costs and on 31 March 2021 the court granted the directions referred to earlier.

The application for condonation

[4] In the application for condonation, the plaintiff's attorney, Mr Amoomo, who deposed to the founding affidavit, states that the 31 March 2021 court order was not complied with, because he was under the "impression" that the parties were still engaged in settlement talks.

[5] Mr Amoomo does not explain the basis for the "impression". Nor does he state authority

for the proposition that a party is entitled to ignore or disregard a court order when such party got engaged in settlement talks with the opposing party.

[6] The plaintiff opposes the application for condonation, on the basis, among other things, that the application does not make out a case justifying the granting thereof.

Analysis

[7] An applicant for condonation is required to:

- (a) satisfy the court that he/she has a reasonable and acceptable explanation for the default, and,
- (b) show that he/she has reasonable prospects of success on the merits of the case.

[8] In the present matter, the explanation furnished for the default is that, the plaintiff was under the impression that the parties were engaged in settlement negotiations. It appears, the plaintiff contends, that it decided not to comply with the court order because it believed that the parties would talk and reach a settlement agreement. The plaintiff did not set out a full and detailed explanation of the basis of its 'impression'.

[9] In any event, a party who is engaged (or about to engage) in settlement negotiations is not justified to simply disregard the provisions of a court order, in the hope that settlement negotiations will be successful. Settlement negotiations are not an excuse for a failure to comply with a court order, in the present circumstances.

[10] For the foregoing reasons, I am of the opinion that the explanation furnished by the defendant for the default is neither reasonable nor acceptable.

[11] As for the requirement of reasonable prospects of success on the merits, the defendant argues that it has good prospects of success, because it is trite law that when an action is withdrawn, costs follow the result.

[12] The argument advanced by the defendant on this aspect is, in my opinion, correct. It is trite law that a litigant who withdraws an action is in a similar position as an unsuccessful litigant. In such circumstances, the opposing party, unless there are sound reasons to the contrary, is entitled to the costs associated with the withdrawn action.

[13] In the circumstances, I am of the view that the defendant has shown that it has reasonable prospects of success on the merits. Furthermore, I am of the opinion that the prospects of success on the merits are sufficient to tip the scales of the application in the defendant's favour. I would therefore grant the application for condonation in favour of the defendant.

[14] As for the issue of costs, the general rule is that an applicant for condonation craves indulgence from the court and as such should pay the costs of the application. Therefore, even if the defendant is successful in its application, it would still have to pay the plaintiff's costs in respect of the application (and the related costs).

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

1. The defendant's non-compliance with the court order dated 31 March 2021, is condoned.
2. The defendant is ordered to pay plaintiff's costs occasioned by this application.
3. The defendant is ordered to pay the plaintiff's wasted costs for the 21 May 2021 court appearance.

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Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:

Appolos Shimakeleni Of Appolos Shimakeleni Lawyers Windhoek	Kadhila Amomo Of Kadhila Amomo Legal Practitioners Windhoek