

REPUBLIC OF NAMIBIA



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

<b>Case Title:</b>  Punyu Crusher (Pty) Ltd  and  Salamis Island Investments (Pty) Ltd I-Chuan Kuo Xing Zhoa Yongsheng Sun Yiming Xie	Plaintiff  1 <sup>st</sup> Defendant 2 <sup>nd</sup> Defendant 3 <sup>rd</sup> Defendant 4 <sup>th</sup> Defendant 5 <sup>th</sup> Defendant	<b>Case No:</b> HC-MD-CIV-ACT-CON-2018/02998  <b>Division of Court:</b> Main Division  <b>Heard on:</b> 01 July 2021
<b>Heard before:</b> Honourable Mr. Justice Usiku, J	<b>Delivered on:</b> 22 July 2021  <b>Reasons released on:</b> 03 August 2021	
<b>Neutral citation:</b> <i>Punyu Crusher (Pty) Ltd v Salamis Island Investments (Pty) Ltd &amp; 4 Others</i> (HC-MD-CIV-ACT-CON-2018/02998) [2021] NAHCMD 353 (03 August 2021)		
<b>Order:</b>		
<ol style="list-style-type: none"><li>1. The application filed by the first, third and fifth defendants, for condonation of the late filing of their heads of argument is refused.</li><li>2. The following sanction is hereby imposed in terms of rule 53(2)(d), in respect of the Defendants' non-compliance with the court order dated 25 January 2021 (ie failure to file witness statements):<ol style="list-style-type: none"><li>2.1 The defendants are directed to pay, jointly and severally, the one paying the other to be absolved, the costs of the Plaintiff caused by the non-compliance.</li></ol></li></ol>		

3. The Defendants are ordered to pay, jointly and severally, the one paying the other to be absolved, the costs of the plaintiff occasioned by the filing of defendants' sanctions affidavit, the condonation application in respect of the late filing of the sanctions affidavit and the condonation application in respect of the late filing of the heads of argument. The costs include costs of one instructing and one instructed counsel.
4. The matter is postponed to 8 September 2021 at 15h15 for a status hearing.
5. The parties are directed to file a joint status report on or before 1 September 2021.

**Reasons for order:****USIKU, J**Introduction

[1] In this matter, there are three issues that presently stand for determination, namely:

- (a) application for condonation of the late filing of the defendants' heads of argument;
  - (b) application for condonation for the late filing of the defendants' sanction affidavit;
- and
- (c) consideration of the defendants' sanctions affidavit.

[2] The plaintiff opposes all the above applications.

[3] When the matter came up for hearing, the court directed that the parties address the court on all the three above issues and that it shall rule on them at once, where necessary. I am of the opinion that if the court declines to grant condonation of the late filing of the heads of argument, then the matter would end there.

Background

[4] The plaintiff instituted action against the defendants on 10<sup>th</sup> August 2018. In its combined summons, the plaintiff alleges that the parties had on 4<sup>th</sup> November 2014, entered into a written lease agreement, in terms of which the plaintiff let to the defendants a "Crusher Plant". The lease period was for 18 years. The defendants were required to pay rent in a specified amount, on monthly basis. The defendants were further required to make investment in the Crush Plant, to a

value of not less than N\$30 million towards operational machine and equipment.

[5] The plaintiff alleges that the defendants breached the aforesaid agreement, in that the defendants failed to:

- (a) pay rent on due date or at all, and
- (b) invest in the Crusher Plant to the value of N\$30 million as agreed.

[6] The plaintiff cancelled the agreement and claims against the defendants an order in the following terms:

- (a) declaring the agreement to have been validly cancelled;
- (b) evicting the first defendant and all those who occupy through it, from the premises at the Crusher Plant;
- (c) payment in the amount of N\$2 328 654.87 (representing arrear rent);
- (d) payment of the N\$30 000 000 (representing amount specified in the investment clause);
- (e) payment in the amount of N\$16 200 000 (representing lost rental for the unexpired period of the lease calculated from 1 July 2018 to 1 December 2032).

[7] The defendants defend the action.

[8] In terms of the court order dated 26 September 2020 the plaintiff was directed to file its witness statements on or before 27 November 2020, and the defendants were directed to file their witness statements on or before 4 December 2020. The plaintiff filed its witness statements on 3 and 9 December 2020 and delivered application for condonation. The defendants did not file any witness statement, nor did they file any application for condonation or extension of time.

[9] In terms of the court order dated 25 January 2021, the defendants were ordered to file their witness statements on or before 31 March 2021. The defendants did not do so, nor did they file any application for condonation or extension of time.

[10] On 14 April 2021 the defendants were directed to file a sanctions affidavit on or before 28 April 2021 explaining reasons for their non-compliance with the court order dated 25 January 2021 and showing cause why sanctions contemplated under rule 53(2) should not be imposed. The defendants did not file a sanctions affidavit by 28 April 2021. Instead, the defendants filed a sanctions affidavit on 29 April 2021. On the 29 April 2021 the defendants also filed an application

for condonation for the late filing of the sanctions affidavit.

[11] In terms of the court order dated 5 May 2021, the parties were, among other things, directed to file heads of argument. The plaintiff was directed to file heads of argument on or before 17 June 2021. The defendants were directed to file their heads of argument on or before 10 June 2021. The plaintiff filed their heads of argument timeously. The defendants did not file any heads by 10 June 2021. They only filed their heads of argument on 28 June 2021. On the same day, 28 June 2021, the defendants filed an application for condonation of the late filing of their heads of argument.

#### The defendants' version

[12] Mr Mhata, the defendants' legal practitioner, deposed to the founding affidavit in respect of the application for condonation of the late filing of the defendants' heads of argument. He explained that, after the defendants filed their replying affidavit on 28 May 2021, the parties engaged in settlement negotiations. According to Mr Mhata, the parties reached a 'substantive settlement' on 9 June 2021. Mr Mhata then proceeded to confirm, via email addressed to plaintiff's legal practitioner, that the matter has become settled. After confirmation, the legal practitioner for the plaintiff came back with a draft settlement agreement containing material differences from the agreed terms. The parties could not resolve the impasse. The defendants' version of the parties having concluded a settlement agreement is denied by the plaintiff. According to plaintiff, the defendants (through their legal practitioner) offered to the plaintiff a settlement proposal on or about 7 June 2021. The plaintiff responded to the defendants' proposal with a counter-proposal on 8 June 2021. Furthermore, according to the plaintiff, on 10 June 2021 the plaintiff forwarded a draft settlement proposal to the defendants. The defendants remained quiet until 24 June 2021.

[13] In regard to the application for condonation of the late filing of the sanctions affidavit, Mr Mhata explains that he prepared the sanctions affidavit and had it commissioned on 27 April 2021. On 28 April 2021 he requested his legal secretary to upload the sanctions affidavit on e-justice. His legal secretary informed him that she had done so. Thereafter, the power went off in their area being Windhoek-West. Mr Mhata could not check his e-mails to determine whether there was notification on e-justice that the sanctions affidavit had indeed been filed. It was only during the morning of 29 April 2021 did Mr Mhata learn that the sanctions affidavit was not filed. He thereafter contacted counsel for the plaintiff, and prepared the present condonation application. Mr Mhata submits that the late filing of the sanctions affidavit was not due to willful

disobedience of the court order but due to the circumstances that he set out.

[14] In the sanctions affidavit, Mr Mhata explains that he had in January 2021 commenced drafting the defendants' witness statements, but required further information from the defendants 'and the identified witnesses'. The third and fifth defendants travelled to China before the court order directing the filing of witness statements was made and are unable to travel back because of Covid-19 restrictions, despite them wanting to do so.

[15] In argument, Mr Chibwana, counsel for the defendants, argued that rules 53 and 55 do not find application in the circumstances where the defendants failed to file witness statements. According to counsel, where a party failed to file a witness statement, the provisions of rule 93(5) come into operation automatically. In those circumstances, counsel contends, there is no need to impose further sanctions in terms of rule 53. Mr Chibwana therefore submitted that sanctions must not be imposed, as the automatic sanction in terms of rule 93(5) has already taken effect against the defendants.

[16] As regards the merits, Mr Chibwana submitted that the defendants have put forth a reasonable explanation and should therefore be relieved from sanctions. In the event that the court is inclined to impose sanctions, counsel suggests that a costs order will be appropriate in the circumstance.

#### The plaintiff's version

[17] It is argued on behalf of the plaintiff that both applications for condonation are fatally defective in that the defendants did not deal with the prospects of success.

[18] As regards the late filing of the sanctions affidavit, the plaintiff contends that there is no explanation of when exactly the power failure occurred in relation to the time of the attempt at filing the sanctions affidavit and the duration of the power failure. The plaintiff, therefore submits that the defendants have failed to make out a good case for condonation for the late filing of the sanctions affidavit.

[19] In argument, Mr Narib, counsel for the plaintiff, contended that the defendants have not provided a full detailed and accurate explanation in their condonation applications. Nor have they set out prospects of success on the merits of the case. Counsel therefore submitted that the condonation application by the defendants be dismissed with costs.

### Legal principles

[20] Condonation is not a mere formality and is not to be had for the asking. An applicant for condonation is required to:

- (a) furnish a reasonable and acceptable explanation for the default and;
- (b) show prospects of success on the merits.<sup>1</sup>

[21] In the present case, the applicant is required to provide an explanation for the delay in the:

- (a) timeous filing of the heads of argument, as well as an explanation for the delay in;
- (b) seeking condonation for the non-compliance.<sup>2</sup>

In other words, an applicant is required to give an explanation for failing to comply with the time-limits, as well as an explanation for failing to apply for condonation as soon as he realises he has not complied with an order of the court.

[22] A full and detailed account of the causes of the delay must be provided and the date, duration and extent of any obstacle on which reliance is placed must be spelt out.<sup>3</sup>

[23] As for the requirement of the prospects of success, if there are no prospects of success, then there would be no point in granting condonation. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. A court may not assess the prospects of success, if there are facts that make the application for condonation 'obviously unworthy of consideration'.<sup>4</sup> This would be in instances of flagrant non-compliances with the rules or court orders, especially where there is no acceptable explanation for the non-compliance.

### Analysis

[24] As a point in *limine*, Mr Chibwana, counsel for defendants, argued that rule 53 and rule 55

<sup>1</sup> *Sun Square Hotel (Pty) Limited v Southern Sun Africa and Another*, Case No. SA 26/2018 para 13.

<sup>2</sup> *The Member of the Executive Council: Health and Social Development v Mthimkulu* [2018] ZAGPJHC 405 (21 May 2018) para 8.

<sup>3</sup> *Minister of Health and Social Services v Amakali*, Case No. SA 4/2017 para 17.

<sup>4</sup> *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Ltd* 2017(6) SA 90 (SCA) para 34.

do not find application in circumstances where a party failed to file witness statements because the provisions of rule 93(5) automatically come into operation in those circumstances. Counsel therefore contends that the court erred on 14 April 2021 in directing the defendants to file a sanctions affidavit, as sanctions may not be imposed in the circumstances.

[25] The relevant parts of rule 53(1) provide as follows:

‘53. (1) If a party or his or her legal practitioner, if represented, without reasonable explanation fails to -

(a) .....

(b) .....

(c) comply with a case plan order, case management order, a status hearing order or the managing judge’s pre-trial order;

(d) .....

(e) comply with a case plan order or any direction issued by the managing judge; or

(f) comply with deadlines set by any order of court,

the managing judge may enter any order that is just and fair in the matter including any of the orders set out in subrule (2).’

[26] Rule 93(5) provides that:

‘If a witness statement for use at the trial is not served within the time specified by the court the witness may not be called to give oral evidence, unless the court on good cause shown permits such witness to give oral evidence.’

[27] It appears apparent that rule 53(1) empowers the court to impose sanctions on a party or his/her legal practitioner, where such party or his/her legal practitioner fails to comply, among other things, with a court order.

[28] It is common cause that the court order dated 25 January 2021 ordered the defendants to file their witness statements on or before 31 March 2021. The defendants did not do so, nor did they apply for condonation or for extension of time.

[29] When the defendants failed to file their witness statements by 31 March 2021, they were not in breach of rule 93(5) but were in breach of the court order dated 25 January 2021. Rule 93(5) does not specify the time within which witness statements must be filed. It is the court order dated 25 January 2021 that does that.

[30] In my view, rule 93(5) prescribes sanction in a situation where there is a witness

statement before court, for use at trial, which was not served within the time specified by the court and in respect of which a party wishes to call a witness to give oral evidence.

[31] In the present matter, the court is not faced with a situation envisaged under rule 93(5) and therefore rule 93(5) is not applicable and is irrelevant to the present case. From the language of rule 54 and rule 56, (which deal with provisions relating to automatic sanctions) it appears to me that automatic sanctions apply in respect of sanctions imposed by the very rule or court order of which the party is in breach, hence the use of the words 'imposed by the rule .... or court order ....' in rule 54.

[32] The issue, in the present matter, is a failure to comply with the court order dated 25 January 2021, that itself prescribed no sanction for default.

[33] For the foregoing reasons, I am of the opinion that the present matter does not fall within the ambit of rule 93(5) and the defendants' point in *limine* stands to be dismissed.

[34] It is common cause that, the court order 5 May 2021 directed the defendants to file their heads of argument on or before 10 June 2021. The defendants only filed their heads of argument on 29 June 2021, about one day before the hearing date of the matter (ie 1 July 2021). It is further common cause that the defendants filed the condonation application in respect of the late filing of the heads of argument, on 28 June 2021.

[35] It would appear from the defendants' own version, that by 9 June 2021, before the conclusion of the alleged agreement, the defendants were not ready to comply with the court order and file their heads of argument on 10 June 2021. At least by 11 June 2021, the defendants have obviously been aware that the parties did not reach agreement. Yet there is glaring lack of explanation why the application for condonation was not made soon after that, nor is there explanation why extension of dates was not applied for if the defendants needed more time for negotiation purposes.

[36] The issue for consideration is whether the explanation put forth by the defendants is reasonable and acceptable in the circumstances.

[37] It would appear that the substance of the explanation given by the defendants is to the effect that the defendants decided not to comply with the court order because they believed the parties would reach settlement agreement. In the circumstances I am not persuaded that the



defendants have set out the basis for such a belief.

[38] In any event, a party who is engaged (or about to engage) in settlement negotiation is not justified to simply disregard the provisions of a court order, in the hope that settlement negotiations would be successful. I am of the opinion that settlement negotiations are not an acceptable excuse for a failure to comply with a court order.

[39] For the foregoing reasons, I am of the view that the explanation furnished by the defendants for the default is neither reasonable nor acceptable in the circumstances.

[40] It is common cause that the defendants' application for condonation of the late filing of heads of argument does not deal with the aspect of prospects of success on the merits. Due to the series of non-compliance with court orders by the defendants, and the lack of acceptable explanation therefor, I do not deem it necessary to assess the prospects of success in this matter.

[41] I am of the opinion that the defendants application for condonation of the late filing of heads of argument stands to be dismissed.

[42] In view of the conclusion I have reached above, I am of the opinion that it is not necessary to deal with the issue of application for condonation of late filing of the defendants' sanctions affidavit.

[43] However, in the event that I turn out to be wrong in my view that the issue of condonation for late filing of sanctions affidavit does not need consideration in the circumstances, I should state that I also hold the following views. In regard to the defendants' late filing of the sanctions affidavit, it appears that Mr Mhata's reason for the default is the alleged power-failure on 28 April 2021. The duration of that power-failure is not explained. Furthermore, in view of the fact that the court order that directed the defendants to file the sanctions affidavit was issued on 14 April 2021, it is not explained why Mr Mhata only decided to attend to the filing of the affidavit on 28 April 2021, the deadline date. I am therefore of the view that the explanation given by the defendants for the late filing of the sanctions affidavit is neither reasonable nor acceptable in the circumstances, and must be dismissed.

[44] I am of the opinion that sanctions should be imposed in the circumstances. The court must therefore consider the appropriate sanction.

The appropriate sanction

[45] It should be noted that, in the present matter, the defendants do not argue that the period granted for the filing of witness statements was unreasonable. Nor do they argue that later developments in the course of the litigation process rendered the period granted, unreasonable or unrealistic to meet. There appears to be no acceptable reason at all why the defendants did not apply for extension of time when it became obvious that they would not be able to comply with the set deadline. Furthermore there is no acceptable reason why the defendants did not apply for condonation soon after they realised of the non-compliance.

[46] The non-compliance in relation to the late filing of the sanctions affidavit, taken in isolation, might be considered not significant. However, when it is taken against the background of the failure to file witness statements and the failure to file the heads of arguments on time, the non-compliance becomes significant. In addition, the aforesaid non-compliances are made grave by the absence of an acceptable explanation for the default.

[47] For the purposes of considering the appropriate sanction, I have considered the fact that the defendants are currently in China and that they are unable to travel to Namibia, on account of Covid-19 related international restrictions allegedly applicable in China. It appears, in these circumstances, that even if witness statements were filed, the trial may not take place until the defendants are able to travel. Against that light, it appears that the absence of witness statements had limited practical effect on the course of litigation.

[48] I consider the foregoing factor as weighing against the imposition of a sanction that has effect of closing the court's door to the defendants. For this reason, I am of the opinion that a costs-sanction is appropriate in the circumstances. I will therefore impose a costs-sanction in this matter.

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

1. The application filed by the first, third and fifth defendants, for condonation of the late filing of their heads of argument is refused.
2. The following sanction is hereby imposed in terms of rule 53(2)(d), in respect of the Defendants' non-compliance with the court order dated 25 January 2021 (ie failure to file witness statements):

- 2.1 The defendants are directed to pay, jointly and severally, the one paying the other to be absolved, the costs of the Plaintiff caused by the non-compliance.
3. The Defendants are ordered to pay, jointly and severally, the one paying the other to be absolved, the costs of the plaintiff occasioned by the filing of defendants' sanctions affidavit, the condonation application in respect of the late filing of the sanctions affidavit and the condonation application in respect of the late filing of the heads of argument. The costs include costs of one instructing and one instructed counsel.
4. The matter is postponed to 8 September 2021 at 15h15 for a status hearing.
5. The parties are directed to file a joint status report on or before 1 September 2021.

<b>Judge's signature</b>	<b>Note to the parties:</b>
B Usiku Judge	Not applicable
<b>Counsel:</b>	
<b>Plaintiff:</b>	<b>Defendant:</b>
Loini Shikale Of Shikale & Associates Windhoek	Nambili Mhata Of Nambili Mhata Legal Practitioners Windhoek