

REPUBLIC OF NAMIBIA



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

<b>Case Title:</b>  Amalia Festus and Minister of Health and Social Services	<b>Case No:</b> HC-MD-CIV-ACT-DEL- 2021/00077
Plaintiff	<b>Division of Court:</b> Main Division
Defendant	<b>Heard on:</b> 7 October 2021
<b>Heard before:</b> Honourable Lady Justice Rakow, J	<b>Delivered on:</b> 28 October 2021
<b>Neutral citation:</b> <i>Festus v Minister of Health and Social Services</i> (HC-MD-CIV-ACT-DEL-2021/00077) [2021] NAHCMD 504 (28 October 2021)	
<b>Order:</b>  <ol style="list-style-type: none"><li>1. The court grants condonation for the late filing of the heads of argument of the defendant and accepts the explanation provided by the defendant for failure to file a mediation brief.</li><li>2. The defendant to pay the opposing party's costs caused by the non-compliance with the mediation order.</li><li>3. The court further found that the purpose of these proceedings was not an application for the upliftment of the bar for the filing of a plea and as such, the defendants remained barred from pleading and will have to address such bar in a subsequent application.</li><li>4. The matter is postponed to 9 November 2021 at 15h30 for mediation referral and the parties are to file a draft mediation referral order in word format on or before 4 November 2021.</li></ol>	
<b>Reasons for order:</b>	

RAKOW, J:

## Background

[1] The plaintiff alleges that the cause of action arose on or about December 2017 when the defendant intentionally or negligently caused permanent damage to the plaintiff's womb, by subjecting her to a sterilization procedure without her informed consent and leaving her sterilized and the amount claimed for the alleged damages is N\$ 3 850 000.

[2] The matter became defended and as part of the pre-trial process was referred for court-connected mediation and the defendant had to file its mediation brief on or before 12 August 2021. This brief was never filed, which resulted in the mediation being canceled. During the appearance on 7 September, 2021 the legal practitioner of the defendant was ordered to file a sanctions affidavit, explaining why sanctions should not be imposed against the plaintiff for failure to file a mediation brief. This sanctions affidavit was to be filed on or before 14 September 2021 and the plaintiff was afforded the opportunity to participate in the sanctions process if they wished to do so by 21 September 2021. The parties were ordered to file heads on or before 28 September 2021 and the matter was set down for hearing on 1 October 2021.

[3] The defendant filed its sanctions affidavit but failed to file the heads of argument on or before 28 September 2021 and only filed it on 1 October 2021 without filing a condonation application. The court ordered Mr. Tibinyane to file a condonation application and to engage in terms of rule 32(9) and file a subsequent report in terms of rule 32(10). This was then done and the application was heard on 7 October 2021.

[4] Mr. Tibinyane explained in short that he failed to file the mediation brief on time as he asked his candidate legal practitioner to deal with the matter as he was taking his annual leave and would be on the family farm taking care of his mother who was recovering from Covid 19. He arranged with Mr. Khoa as to his contact details and as such, they agreed on a mediation date. He however failed to arrange with his colleagues to file a mediation brief in time and attribute it to human error. Regarding the late filing of the heads of argument, it was explained that the defendant intended to bring a postponement application for the sanctions hearing as the legal representative of the defendant was engaged in another matter before another court. As such the affidavit of the representative of the defendant was prepared over the weekend of 26 September 2021 but unfortunately not uploaded.

[5] The defendant is further in default of filing their plea and is as such barred from doing so. The plea was to be filed by 4 May 2021, which was Cassinga day and a public holiday in Namibia. It seems further that the legal practitioner for the defendant did not receive proper instructions from the Ministry of Health and Social Services. The third reason put forward by the defendant is that the candidate legal practitioner who dealt with the matter was out of the office and did not attend to the matter. The plea was eventually filed on 28 May 2021 but without an application for the upliftment of the bar. This issue was not dealt with as the matter was first then referred to mediation.

#### The arguments

[6] It was argued by the defendant's legal practitioner that the defendant filed its sanction affidavit in an attempt of satisfying or providing a reasonable explanation of the defendant's failure of filing their mediation brief and where the court is not satisfied with such explanation, the court is entitled to apply its discretion regarding what is just and fair when sanctions are imposed on the defaulting party. The court may consider any order that is just and fair in the matter and is not limited to the orders reflected under the provisions of rule 53 (2) of the High Court Rules.

[7] On behalf of the plaintiff, it was argued that the defendant has failed to comply with numerous court orders and as such should not be condoned. It was further pointed out that Mr. Siseho filed the supporting affidavit on behalf of the defendant but the facts that he attested to were all facts that were relayed to him by Mr. Tibinyane the legal representative of the defendant and as such hearsay as he has no personal knowledge about these facts. Mr. Tibinyane filed a belated affidavit in support of the affidavit of Mr. Siseho on the morning of the hearing but again without a condonation application accompanying the said.

[8] Mr. Tibinyane only brought his application on 27 September 2021 and should have brought it as soon as he realized he was double booked. This was three days before the hearing and no indication is given as to when he realized this.

#### The legal considerations

[9] Rule 53(1) of the High Court Rules provides as follows:

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

- (a) attend a case planning conference, case management conference, a status hearing, an additional case management conference or a pre-trial conference;
  - (b) participate in the creation of a case plan, a joint case management report, or parties' proposed pretrial order;
  - (c) comply with a case plan order, case management order, a status hearing order, or the managing judge's pre-trial order;
  - (d) participate in good faith in a case planning, case management, or pre-trial process;
  - (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)'

[10] This was then also what was done by the defendant's legal practitioner when he failed to file his mediation brief, and more specifically he failed to comply with an order of the court.

[11] Rule 53 (2) of the High Court Rules provides:

'Without derogating from any power of the court under these rules the court may issue an order -

- (a) refusing to allow the non-compliant party to support or oppose any claims or defences;
- (b) striking out pleadings or part thereof, including any defence, exception or special plea;
- (c) dismissing a claim or entering a final judgment; or
- (d) directing the non-compliant party or his or her legal practitioner to pay the opposing party's costs caused by the non-compliance

[12] Concerning the granting of condonation, the following was said in the Supreme Court matter of *Leweis v Sampoio*<sup>1</sup> where Strydom CJ stated that:

'Although the Courts have studiously refrained from attempting an exhaustive definition of the words 'good cause' they have laid down what an applicant should do to comply with such requirement. In this regard it was stated that an applicant:

- (a) must give a reasonable explanation for his default;
- (b) the application must be made bona fide; and
- (c) the applicant must show that he has a bona fide defence to the plaintiff's claim'

[13] The court takes into account the explanation provided by Mr. Tibinyane for the failure to

<sup>1</sup> *Leweis v Sampoio* - 2000 NR 186 (SC).

file his mediation brief and the subsequent prejudice suffered by the plaintiff in that the matter did not move forward. The previous times where the defendants also did not comply with court orders were also taken into consideration. At this stage, the court believes that the transgression is not of such a nature that it merits the striking of the defense, and will therefore not consider imposing a sanction that will bar the defendant in further participating. It is also true that the plaintiff is represented by the Legal Assistance Centre and is therefore not entitled to legal costs but at least they can claim disbursements.

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

1. The court grants condonation for the late filing of the heads of argument of the defendant and accepts the explanation provided by the defendant for failure to file a mediation brief.
2. The defendant to pay the opposing party's costs caused by the non-compliance with the mediation order.
3. The court further found that the purpose of these proceedings were not an application for the upliftment of the bar for the filing of a plea and as such, the defendants remained barred from pleading and will have to address such bar in a subsequent application.
4. The matter is postponed to 9 November 2021 at 15h30 for mediation referral and the parties are to file a draft mediation referral order in word format on or before 4 November 2021.

<b>Judge's signature</b>	<b>Note to the parties:</b>
E RAKOW  Judge	Not applicable
<b>Counsel:</b>	
<b>Plaintiff:</b>	<b>Defendant:</b>
Mr. Khao  Of  the Legal Assistance Centre	Mr Tibinyane  Of  the Government Attorneys