

REPUBLIC OF NAMIBIA



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

<b>Case Title:</b>  Adforce Namibia CC  and  Blackthorn Investments (PTY) Ltd Hermanus Smit Denise Billy William Pretorius Martha Pretorius Magret Goliath	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 6 <sup>th</sup> Defendant	<b>Case No:</b> HC-MD-CIV-ACT-OTH-2019/03391  <b>Division of Court:</b> Main Division  <b>Heard on:</b> 19 October 2021
<b>Heard before:</b> Honourable Mr. Justice Miller, AJ	<b>Delivered on:</b> 12 November 2021	
<b>Neutral citation:</b> <i>Adforce Namibia CC v Blackthorn Investments (PTY) Ltd &amp; 5 Others</i> (HC-MD-CIV-ACT-OTH-2019/03391) [2021] NAHCMD 524 (12 November 2021)		
<b>Order:</b>  <ol style="list-style-type: none"><li>1. The applicant is granted leave to file a witness statement by an expert witness related to the quantum of the counterclaim</li><li>2. The witness statement must be filed not later than close of business on 1 February 2022.</li><li>3. There will be status hearing on 9 February 2022 at 15h15 in order to allocate dates for the commencement of the trial.</li><li>4. The applicant is ordered to pay the respondents costs, which costs shall not be limited</li></ol>		

to the amount mentioned in Rule 32(11).

**Reasons for order:**

**MILLER, AJ:**

Introduction

[1] This was an interlocutory application filed at the behest of the defendants for the following relief:

‘1. Condoning the applicant’s non-compliance in respect of the failure to have filed an expert witness statement, and granting leave to applicant to file such statement on such terms and directions as the Honourable Court deem appropriate;

2. In the alternative, granting the applicant leave pursuant to rule 93(5) to call such witness for the purpose of testifying to the quantum of applicant’s counterclaim, subject to such directions which the Honourable Court deem appropriate.

3. Costs of suit, only in the event of opposition, limited to rule 32(11).

4. Further and/or alternative relief.’

[2] The matter is opposed.

[3] In essence the applicant seeks to introduce a witness statement of an actuary presumably of Mr Dirk Stuber who it is intended will give evidence on the quantum of the defendant’s counterclaim, should that claim be upheld

[4] In *Balzer v Vries* (SA 2014/2 NASC 8) it was held that an applicant seeking condonation needs to establish firstly a reasonable and acceptable explanation for the delay. And secondly, it must establish prospects of success. I also have in mind the remarks in *Teek v President of the Republic of Namibia & Other* (SA 2013/2 NASC 16). What I have in mind is the following message.

‘The court has a duty to consider whether condonation should in the circumstance of the case be granted. In this regard the court exercises a discretion. That discretion must be exercised in light of all the relevant factors these factors which include the degree of delay, the reasonableness of the explanation for the delay, the prospects of success, the importance of the case, the interest in the finality of the litigation and the need to avoid unnecessary delay in the administration of justice. These factors are interrelated and are not exhaustive.’

[5] What weight is attached to the relevant considerations will inevitably vary depending on the facts peculiar to the case. Depending on the circumstances a relevant factor may carry more weight in some cases and less so in other cases. The exercise of a judicial discretion always involves the consideration of the relevant factors and the weight to be attached thereto. Ultimately, the court will seek justice to all the parties in the litigation.

[6] Factors which strike me as relevant are the following:

a) The reason for the delay in filing the statement is remarkable for its paucity. The founding affidavit states no more than the following:

“The applicant has never before been in a position to procure the services of an available expert for the purpose of testifying at the trial as initially scheduled.” This bare statement raises more questions than answers, and is clearly subject to criticism.

b) The quantum of the counterclaim is an issue which needs to be determined by the trial court,

c) It forms a vital component of the counterclaim itself in the sense that absent evidence as to quantum in counterclaim it still born.

d) Both the claim and counterclaim involve large sums of money.

e) There is at present no trial date set for the hearing to commence, due to the previous trial date being vacated.

f) In the event that the application is granted the plaintiff/respondent will be deprived of a technical advantage but will not ultimately suffer prejudice.

g) The commencement of the trial will entail some delay although not entirely caused by this application.

h) Based upon what is before me at present the counterclaim has prospects of success. Whether or not that will be the case in the final analysis will be for the trial judge to decide.

i) An appropriate order as to costs may adequately address the issue of delay and inconvenience.

[7] In weighing up these factors, one against the other and affording to each the weight it requires I conclude that the application must succeed.

[8] I consequently make the following orders:

1. The applicant is granted leave to file a witness statement by an expert witness related to the quantum of the counterclaim.
2. The witness statement must be filed not later than close of business on 1 February

2022.

3. There will be status hearing on 9 February 2022 at 15h15 in order to allocate dates for the commencement of the trial.
4. The applicant is ordered to pay the respondents costs, which costs shall not be limited to the amount mentioned in Rule 32(11).

<b>Judge's signature</b>	<b>Note to the parties:</b>
K Miller Acting Judge	Not applicable
<b>Counsel:</b>	
<b>Plaintiff:</b>	<b>Defendant:</b>
Ms E Angula Of AngulaCo Inc Windhoek	Mr J Diedericks Instructed by Van Wyk Legal Practitioners Windhoek