

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
EX TEMPORE JUDGMENT

Case no: **HC-MD-CIV-MOT-ACT-OTH-2021/01182**

In the matter between:

**JAQUELINE FILLENTIE VRIES**

**PLAINTIFF**

And

**JACO MELVIN STRAUSS**

**DEFENDANT**

**Neutral citation:** *Vries v Strauss* (HC-MD-CIV-ACT-OTH-2021/01182) [2021]  
NAHCMD 495 (7 October 2021)

**Coram:** Schimming-Chase J

**Heard:** 7 October 2021

**Delivered:** 7 October 2021

**Released:** 27 October 2021

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**ORDER**

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1. The plaintiff's application for condonation is refused.
2. The case is postponed to 27 October 2021 at 15:30 for a status hearing.
3. The parties are directed to file a joint status report deal with the further conduct of the matter.

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## JUDGMENT

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### **SCHIMMING-CHASE, J**

[1] This application for condonation by the plaintiff was set down for hearing on 7 October 2021 via court order made on 7 September 2021. The plaintiff's legal practitioner uploaded a status report at approximately 18:00 on 6 October 2021, in which she attached a medical certificate booking her off until 8 October 2021, and medical reports of the plaintiff.

[2] In the status report, the plaintiff's practitioner requested that the condonation application be determined on the papers due to her inability to attend the hearing, alternatively, a postponement was sought. The plaintiff's practitioner waived her rights to make oral submissions. In the report the defendant's practitioner insisted that he was not amenable to waiving the defendant's rights for oral transmission. However at the hearing of the application, and due to his unavailability to appear on the alternative dates suggested, he too, waived his rights to be heard orally.

[3] The plaintiff's condonation application is for non-compliance with the order of this court dated 20 April 2021, which required her to deliver her plea to the defendant's counterclaim, and replication (if any) to the plea by 21 May 2021.

[4] The plaintiff's application for condonation was launched on 16 September 2021, after a further order of this court made on 8 September 2021 directing that the plaintiff file her condonation application on or before 15 September 2021.

[5] The application for condonation is brought via notice of motion and affidavit deposed to by the plaintiff's legal practitioner, together with a confirmatory affidavit deposed to by plaintiff.

[6] It is to be mentioned at the outset that the court has on numerous occasions, frowned upon the consistent filing of affidavits by legal practitioners as opposed to the parties themselves. Masuku J expressed the principle thus

'There is an insidious and pervasive practice that appears to be holding some practitioners in this court by its ensnaring tentacles. This is the ubiquitous practice in this jurisdiction and in terms of which legal practitioners wantonly file affidavits in respect of matters in which they appear. In many cases, this is totally needless and not unusually, has certain unintended consequences, and which cause degeneration of proceedings and more often than not, poison and cause a toxic atmosphere in which the matters are heard and determined to prevail.'<sup>1</sup>

[7] The application for condonation is the plaintiff's application, and not the legal practitioner's application. Although there are some factual allegations therein that relate to the legal practitioners' circumstances, a confirmatory affidavit should have been filed by the practitioner concerned, instead of the legal practitioner doing so. Practitioners are discouraged from deposing to affidavits on behalf of their clients.

[8] As regards the condonation application, it is now trite in our jurisdiction that in order to succeed in a condonation application there are two requisites to be met. Firstly, the applicant must show good cause and set out the reasons for the non-compliance. Secondly, the applicant is to set out, at least in some basic way or form, that there are prospects of success on the merits.<sup>2</sup>

[9] In the founding affidavit deposed to by the plaintiff's practitioner the following facts were placed as reasons for the non-compliance with the court's order of 20 April 2021, requiring the plea and counterclaim (if any) to be delivered by 21 May 2021:

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<sup>1</sup> *Soltec CC v Swakopmund Super Spar* (I 160/2015) [2017] NAHCMD 115 (18 April 2017) at [55]-[56] and the authorities collected there

<sup>2</sup> *Pertue v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) at 640 at [10]

(a) The plaintiff is not residing in Windhoek and is consequently not readily available for consultations.

(b) Telephonic consultations are not convenient as continuous network connections are experienced and thus face to face consultations with the plaintiff has been preferred at all times, and thus consultations could not take place in time in order to file the required documents.

(c) Non-compliance was further exacerbated by the fact that the plaintiff's practitioner fell ill during that same period, and due to the fact that 3 staff members contracted the corona virus, their office started working remotely from 16 June 2021.

(d) As the only admitted practitioner in the firm it became difficult for the plaintiff's legal practitioner to keep track of all the activities on a particular file and to comply with the timelines.

(e) The problem was further exacerbated by the lockdown which was only lifted on 1 August 2021.

(f) Around 17 May 2021, the plaintiff, her husband and son also contracted the corona virus and could not attend to the offices of the plaintiff's practitioner in any event. The plaintiff's son passed away on 21 June 2021 (the allegation relating to the son's passing is not disputed in the affidavit).

[10] In the replying affidavit, also deposed to by the plaintiff's legal practitioner, after the issue of practitioners deposing to affidavits was raised in the defendant's answering affidavit, the plaintiff's practitioner also made the following averments for the first time<sup>3</sup>:

(a) That the applicant could not come to the offices of her legal practitioner because she lives out of town and waiting for her to travel to Windhoek requires the applicant to source funds to travel.

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<sup>3</sup> An applicant must make out her case in the founding affidavit and not raise facts that should have been contained in the founding affidavit for the first time in reply. See *Transnamib v Imcor Zinc*

(b) That the applicant is not in a financial position to travel to Windhoek regularly;

(c) As regards the legal practitioner's own illness, she obtained medication and isolated herself immediately. The same protocol was followed by her employees. As she is self-employed she did not feel the need to obtain a medical certificate.

[11] It is important to note also, that on 21 May 2021, the plaintiff's practitioner timeously sought to comply with rule 32(9) and 10. In the correspondence, she states that:

'Unfortunately we could not file our plea to counterclaim today as per the court order because Ms Kathleen was out of town for a family emergency and only returned to Windhoek this morning'.

This information is not contained anywhere in the founding affidavit.

[12] Before dealing with the acceptability of the plaintiff's allegations in respect of good cause, it is important to note that the entire world has been affected by the Corona virus pandemic. However, this does not absolve a party from the requirement to show good cause in an affidavit, in support of the condonation application.

[13] Unfortunately plaintiff's averments and explanation in support of good cause, is poor. This is for the following reasons. Firstly, the vague allegation that the plaintiff does not reside in Windhoek. The plaintiff's residence could only be gleaned from the confirmatory affidavit. There is not even an attempt to state that the parties made an effort to have a face to face consultation, or even on which dates attempts were made to schedule a consultation. Only the glib reference to telephonic consultations not being convenient is made.

[14] No explanation of even the type of network, or how many attempts were made to have telephonic consultations given the lock down is explained at all. The plaintiff's practitioner says she fell ill. In her reply she states that she isolated herself, together with

her employees. Not even an approximate date is given for when she fell ill, and although it is correct that she may not need a medical certificate as she is a sole practitioner, she would at least require some form of certificate if her illness cause her not to perform her duties, which would result in her having to file an affidavit, explaining the failure to comply with a court order.

[15] This is exacerbated by the fact that in the rule 32 (9) and (10) proceedings, her explanation was that she had to attend a family emergency. This information similarly does not appear in the papers and is also contradictory to what was averred. These allegations are particularly vague and no attempt was made to properly explain the non-compliance. The court simply cannot accept these explanations as showing good cause.

[16] Coupled with the fact that not a single allegation is made in support of prospects of success on the merits, the court, though having empathy for the plaintiff's plight, simply cannot condone the composite failures in this application.

[17] Accordingly the application for condonation is refused and the plaintiff remains in Bar.

[18] Given the situation of the plaintiff, the court will not make a costs order.

[19] The matter is postponed for a status hearing to 27 October 2021.

[20] The parties are directed to file a status report dealing with the further conduct of this matter by no later than 22 October 2021.

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EM SCHIMMING-CHASE

Judge

APPEARANCES

APPLICANT

No appearance

RESPONDENT

Mr N Katjivena

Katjaerua Legal Practitioners