

“ANNEXURE 11”

Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: FREEDOM SQUARE (PTY) LTD v THE SOCIAL SECURITY COMMISSION	Case No: HC-MD-CIV-ACT-CON-2017/04390
	Division of Court: MAIN DIVISION
Heard before HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 1 February 2021
	Delivered: 18 February 2021
Neutral citation: <i>Freedom Square (Pty) Ltd v The Social Security Commission</i> (HC-MD-CIV-ACT-CON-2017/04390) [2021] NAHCMD 58 (18 February 2021)	
Having heard SHUMIRAI NYASHANU , on behalf of the Plaintiff(s) and CHRISSEY TURCK , on behalf of the Defendant(s) and having read the pleading for HC-MD-CIV-ACT-CON-2017/04390 and other documents filed of record:	
IT IS HEREBY ORDERED THAT:	
<u>Ruling</u>	
1. The application for condonation is granted.	
2. The automatic bar for non-compliance with the court orders dated the 3 August 2020 and 29 October 2020 are uplifted.	
3. The applicant’s witness statement of Mr David Keendjele is accepted as filed.	
4. The applicant to pay the cost of the application, which include the costs of one instructing and one instructed counsel. Such costs to be limited to rule 32(11).	
<u>Further conduct of the matter</u>	
5. The case is postponed to 13/04/2021 at 08:30 for Pre Trial Conference hearing (Reason: Parties to file joint pre-trial conference report).	

6. The counsel who will be conducting the trial must be personally present during the pre-trial meeting between the parties and must be actively involved in the drafting of the proposed pre-trial order.

7. Pursuant to the pre-trial meeting the parties must file a joint proposed pre-trial order on or before 7 April 2021.

Reasons for orders:

Introduction and brief background

[1] The matter before me is an application for condonation by the first defendant for failing to file its further factual witness statements by the date directed by this court.

[2] The applicant and the respondent are the first defendant and the plaintiff respectively in the main action and for the sake of convenience I will refer to the parties as they are in the main action. Only the first defendant is relevant for purposes of these proceedings.

[3] On 3 August 2020 this court made an order (“the first order”), *inter alia*, directing the first defendant to file its factual witness statements on or before 9 October 2020. The first defendant failed to meet the deadline set by the court, prompting it to firstly engage the plaintiff in terms of rule 32(9) and thereafter seek the court’s condonation for its non-compliance with the aforementioned order.

[4] In a subsequent court order dated 29 October 2020 (“the second order”), first defendant was directed to file its condonation application on or before 6 November 2020. The first defendant persisted in its non-compliance with this court’s directions by failing to file its condonation papers by 6 November 2020, only doing so on 10 November 2020.

[5] The plaintiff noted its opposition to first defendant’s application, filing a notice in terms of rule 66(1) (c) wherein it raised two points of law, namely whether the condonation application was lodged without delay, and whether the applicant has sufficiently demonstrated good cause for the grant of the condonation.

[6] Both parties provided this court with written heads in support of their respective arguments herein. I will not attempt to replicate them. Instead, I will attempt to lift out the major points made by the respective counsel in support of their arguments.

[7] It bears noting from the onset that there was uncertainty as to the relief sought by the first defendant. In its notice of motion the first defendant prayed for an order 'condoning the applicant's non-compliance with the court order issued 29th October 2020.' However, in its heads of argument first defendant states that the application is brought due to its failure to comply with the court order of 3 August 2020, in that it failed to file the witness statement of one Mr Keendjele. This was reiterated by counsel for the first defendant in the opening lines of his oral argument. The inconsistency in the relief sought was pointed out by counsel for the plaintiff, but he submitted that plaintiff did not take issue with it. In any event, the court notes that first defendant dealt with the reasons for its non-compliance in respect of both orders in its founding affidavit, heads of argument and oral argument, and I accept that plaintiff's failure to explicitly request relief in respect of both orders is a mere oversight on its part.

First defendant's founding affidavit

[8] The first defendant's chief executive officer, Ms Milka Mungunda deposed to the affidavit in support of first defendant's application.

[9] Briefly, she records the reasons for the first defendant's non-compliance as follows: Following the court order of 3 August 2020 directing the first defendant to file its further factual witness statements on or before 9 October 2020, first defendant's legal practitioner of record, Mr Kauta, contacted its South African counsel to advise on the necessity of filing further factual witness statements. This was done on 2 September 2020. On 15 September 2020 counsel advised that the necessity to file further witness statements would be determined by documentation to be provided by the third defendant (The Municipal Council of Windhoek).

[10] After what appears to have been much hassle, first defendant received a file of the requested documentation from the third defendant on 1 October 2020. It however became apparent to Mr Kauta that there was a second file which had not been availed by the third defendant, which he then requested.

[11] Upon studying the file, Mr Kauta identified three further witnesses necessary to introduce the documentation provided by the third defendant. These witnesses were Mr Kahimise, Mr Shipiki and the maker of the witness statement in contention, Mr Keendjele.

[12] On 5 October 2020 it became clear to Mr Kauta that the first defendant would be unable to file its factual witness statements by the deadline set by the court. He attempted to contact plaintiff's practitioner of

record telephonically on the same date but was unable to reach him.

[13] Three days later, on 8 October 2020, Mr Kauta addressed a letter to Mr Shikongo pursuant to rule 32(9). The essence of the letter was that in light of the first defendant's inability to file its further factual witness statements by 9 October 2020, it proposed filing its witness statements and a condonation application on or before 6 November 2020, and sought the plaintiff's agreement and indulgence in this regard.

[14] In explaining first defendant's non-compliance with the second court order of 29 October 2020, Ms Mungunda states that in preparing and filing Mr Keendjele's witness statement, a discovery affidavit and further request in terms of rule 28 on 6 November 2020, the applicant's legal practitioner became sidetracked and did not realize until the following court day of 9 November 2020 that the condonation application had not been drafted and filed.

Arguments on behalf of the first defendant

[15] In its heads of argument the first defendant notes that in order for an application for condonation to be successful the application must meet two requisites – firstly it must establish a reasonable and acceptable explanation for the delay and secondly satisfy the court that there are reasonable prospects of success on appeal. The first defendant submits that it has met both these requirements in that it provided a detailed, sufficient, reasonable and acceptable explanation for its delay in filing its further factual witness statements and that should the court accept the evidence contained in Mr Keendjele's witness statement, the first respondent enjoys favourable prospects of success in the main action.

[16] During oral arguments counsel for the first defendant, Mr Kauta, impressed the importance of understanding the distinction between points of fact and points of law. He explained the difference to be the following: a point of fact is answered by reference to the facts and evidence, and inferences arising from those facts. A point of law is answered by applying the relevant legal principles to the issue.

[17] Mr Kauta argued that although the plaintiff had opposed the first defendant's condonation on two points of law, it had made factual averments in its heads of argument and relies on inferences which should have been properly raised in an answering affidavit. In addition thereto, the inferences made by the plaintiff were all false.

[18] In response to the plaintiff's argument that upon becoming aware on 5 October 2020 that it would not

be able to comply with the first court order the first defendant should have applied for an extension in terms of rule 55, Mr Kauta argued that taking that course of action would have rendered rule 32(9) nugatory. The rule 32(9) approach advances the case where the parties agree to filing 'everything together' (ie the condonation application and the belated witness statements).

[19] Insofar as the plaintiff regarded the first defendant's filing of Mr Keendjele' witness statement as irregular, Mr Kauta argued that the plaintiff should have used rule 61 to raise this issue as opposed to rule 66.

[20] Mr Kauta submitted that he would not deal with the issue of prejudice at all as same had not been raised as an issue in plaintiff's notice of opposition.

[21] With respect to costs, Mr Kauta submitted that the first defendant tenders the wasted costs for the plaintiff's appearance on 29 October 2020 as the first defendant was at remiss in that instance. He however requested that the costs of the plaintiff's appearance in arguing the current matter (ie 1 February 2021) should be covered by the plaintiff, as its opposition was academic, frivolous, unnecessary and simply delayed the matter. Furthermore, the opposition offered no defence but merely requested the court to determine questions of law. Such determination was usually reserved for appeals and not in cases where the court has a discretion in condonation applications. In conclusion Mr Kauta submitted that the costs should be capped in terms of rule 32(11).

Arguments on behalf of the plaintiff

[22] Counsel for the plaintiff, Mr Diedericks, reiterated plaintiff's position as stated in its heads of argument, namely that the plaintiff does not dispute any of the factual averments made by the first defendant. The plaintiff was not in a position to challenge the facts averred by the first defendant as such facts fell within the peculiar knowledge of the first defendant.

[23] Mr Diedericks submitted that the plaintiff agrees with the law and authorities set out by the first defendant in its heads of argument, with specific reference to *Arangies t/a Auto Tech v Quick Build*¹ and *Stipp and Another v Shade Centre and Another*². It was the plaintiff's contention that in applying the law to the facts averred by the first defendant the first defendant has not complied with what is required by the law.

[24] Mr Diedericks further submitted that it was unnecessary for the plaintiff to formally raise the issue of

¹ *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC).

² *Stipp and Another v Shade Centre and Another* 2007 (2) NR 627 (SC).

prejudice in opposition to the application, as prejudice is a consideration which arises when the court is called upon to consider a condonation application.³ If the plaintiff had raised prejudice as a factual issue under rule 66 the plaintiff would have had to provide an affidavit to demonstrate such prejudice.

[25] Mr Diedericks appeared perplexed by Mr Kauta's argument regarding the parties' engagement in terms of rule 32(9). He submitted that rule 54⁴ expressly prevents parties from agreeing to an extension. In addition thereto, the law requires that a party should bring an appropriate application as soon as it realizes that it will not be able to comply with an order of court.

[26] He further submitted that the plaintiff had not raised the issue of irregularity of the first defendant filing its witness statement out of time, but had merely made this observation in its heads of argument.

[27] With regards to costs, Mr Diedericks countered Mr Kauta's argument that the plaintiff was vexatious in its opposition, submitting that the first defendant was in fact responsible in its opposition, and confined to issues of law on the basis of the applicant's facts.

Legal principles and application of the law to the facts

Plaintiff's opposition: Points of law vs points of fact

[28] A perusal of the plaintiff's heads of argument supports its contention that it firstly, does not dispute the factual averments made by first defendant, and secondly, that it has not raised any new factual averments, but has merely applied the law to the facts set out by the defendant.

Condonation

[29] The legal principles regarding applications for condonation are trite and bear no repeating, save to state that an applicant for condonation is required to:

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

³ Rule 56 (1)(g) – (h).

⁴ Rule 54 (2) Where a rule, practice direction or court order -

(a) requires a party to do something within a specified time; or

(b) specifies the consequences of a failure to comply,

the time for doing the act in question may not be extended by agreement between the parties.

[30] The court accepts the first defendant's explanation for the delay in filing its further factual witness statements. It is however unclear as to why when the first defendant became aware that it would not meet the court's deadline, it did not immediately take steps to obtain an extension for the filing of its witness statements, or at the very least hasten to bring a condonation application. An application under these circumstances must be made as soon as the non-compliance has come to the fore.⁵ An application for condonation must be made without delay.

[31] In considering the explanation proffered by the first defendant to explain its non-compliance with the second order, the court is once again at a loss to understand why the first defendant busied itself with drafting and filing other pleadings and a witness statement which it was in any event barred from filing, instead of ensuring its compliance with the court order. In fact first defendant in its founding affidavit appear to suggest that the condonation application had not even been drafted⁶ by the date that it was meant to be filed, namely 6 November 2020.

[32] The first respondent submits that if Mr Keendjele's evidence is accepted by the court it will enjoy favourable prospects of success in this matter as Mr Keendjele's witness statement facilitates the resolution of the real issues in dispute by addressing the issue of liability raised in the first defendant's plea.

[33] With regards to the issue of prejudice, the court order of 3 August 2020 had made provision for a pre-trial conference on 29 October 2020. As submitted by the plaintiff in its heads of argument, had the first defendant complied with the order the pre-trial conference would have taken place and trial dates would have been allocated. It is therefore clear the case would have been closer to reaching its finalization if not for the first defendant's non-compliance.

[34] Taking into consideration the explanations submitted by the first defendant and taking into account the necessity to bring this matter to finalization (it having been instituted in 2017), the court grants the first defendant's application for condonation.

Costs

[35] With regards to costs, the court also considered that despite the prejudice suffered by the plaintiff due to the delay caused, such prejudice can be cured by an appropriate cost order. The first defendant was obliged to bring the application for condonation and that the plaintiff was entitled to oppose it. The first defendant sought an indulgence and should pay the costs of the application. In *Meyers v Abrahamson*⁷ the

⁵ Damaseb P *Court-managed civil procedure of the High Court of Namibia* (2020) at 118.

⁶ Applicant's founding affidavit at para 21.

⁷ *Myers v Abramson* [1951 \(3\) SA 438](#) (CPD) at 455 F – H.

court stated that it is neither reasonable nor fair for the opponent in an application for an indulgence to be put in a position that he opposes the granting of such indulgence at his peril as the applicant in this application attempted to do by requesting a costs order against the respondent only if it opposed the application.

[36] The court in *Myers* then added that:

'It seems to me that the applicant for the indulgence should pay all such costs as can reasonably be said to be wasted because of the application; these costs to include the costs of such opposition as is in the circumstances reasonable, and not vexatious or frivolous.'

[37] The opposition of the application was neither frivolous nor vexatious. I therefore find no reason to deviate from the general practice regarding costs.

[38] My order is therefor as set out above.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendant
Adv Diedericks on instruction of Shikongo Law Chambers Windhoek	Mr Kauta from Dr Weder Kauta and Hoveka Windhoek