



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

Case Title: R K INVESTMENTS CC AND ANOTHER VS UNION TILES WINDHOEK (PTY) LTD AND ANOTHER	Case No: HC-MD-CIV-ACT-CON-2019/04266 Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	Date of hearing: Adjudicated on the papers Date of order: 04 April 2022
Neutral citation: <i>R K Investments CC v Union Tiles Windhoek (Pty) Ltd</i> (HC-MD-CIV-ACT-CON-2019/04266) [2022] NAHCMD 168 (4 April 2022)	
Results on merits: Application for condonation. Merits not considered.	
The order: Having heard Mr Aderam , for the Plaintiffs and Mr Neves , for the First Defendant and having noted the non-appearance on behalf of the Third Party, and having read the documents filed of record: IT IS HEREBY ORDERED:	

1. The third party's application for condonation is hereby dismissed.
2. The third party is ordered to pay the plaintiffs and first defendants costs as follows:
 - 2.1 The costs in opposing the application for condonation, such costs to be limited in terms of Rule 32(11) on an attorney and client scale;

Further conduct of the matter

3. The case is postponed to **21 April 2022 at 15:00** for Status Hearing (Reasons: Setting out the further conduct of the matter.)
4. Joint status report must be filed on or before 18 April 2022.

Reasons for orders:

Introduction and brief background

[1] This matter relates to a condonation application filed by the applicants (who are the third party in the main action) for the late filing of the third party's discovery affidavit and its witness statements as directed by the court order dated 21 October 2021. The parties will be referred to as they are in the main action.

[2] On 21 October 2021 the court ordered the parties to file their discovery affidavits and witnesses statements in terms of the timelines as set out in the order and the pre-trial report on or before 31 January 2022. More specifically the third party was ordered to file its discovery affidavit and deliver discovered bundle on 12 November 2021 and its witness statement(s) on 01 December 2021. The plaintiff and first defendant complied with the court order. The parties failed to file their pre-trial report and the third party failed to comply with the said court order as ordered. This non-compliance by the third party resulted in the current condonation application serving before this court, which is opposed by the plaintiff and the first defendant.

[3] On 1 February 2022, the third party filed a status report wherein it indicated that the reasons for such non-compliance will be properly set out in an application proper for condonation.

Pleadings

[4] The third party brought an application for condonation on 14 February 2022 and sought the following relief:

- '1. Condoning non-compliance with the court order dated 21 October 2021;
2. Uplifting of the automatic bar;
3. Costs of this application (only in the event of same being opposed);
4. Further and/or alternative relief.'

[5] The above notice of motion was accompanied by a founding affidavit deposed to by a Mr Yahya Hassan, an admitted legal practitioner in the High Court of South Africa who is the instructing attorney of the third party. Mr Hassan contends that the discovery affidavit of Yusuf Ismail Randeree was deposed to on 14 December 2021 and sent to the attorney on the same date. The reason for delay is because certain of the items discovered were archived in the records of the third party and had to be retrieved. Mr Hassan contends that there was no intentional delay on the part of the third party.

[6] Mr Hassan contends in his affidavit that one witness statement being that of Mr Imraan Shaik who has relocated to Cape Town and due to the Covid-19 Pandemic it was decided to convene a virtual meeting instead of meeting face to face. Mr Hassan contends that the parties involved in the drafting of the witness statements and discovery affidavits were only available after 1 December 2021. Once the draft witness statement was done, the witness had to peruse the statement, check and rectify it to be satisfied that it was correct before submission, which caused an additional delay.

[7] The plaintiff and first defendant opposed the application and filed a notice in terms of rule 66 (1) (c) wherein they raised the following questions of law in respect of the third party's condonation:

'A. AD POINT IN LIMINE- failure to demonstrate and prove prospects of success.

1. It is submitted that the 2nd Defendant or third party has failed to show and/or demonstrate the prospects of success of their defense. This is one of the two requirements of any condonation application to succeed.
2. Kindly take further notice that the plaintiff's reserves their right to expand and amplify the aforesaid question of law with reference to case law during the hearing of the matter.'

No opposing affidavit were filed in support of the oppositions as the oppositions were in terms

of rule 66 (1) (c), in terms of which it is not obligatory for an affidavit to be filed.

Arguments advanced

On behalf of the third party

[8] Counsel for the third party submits that there are range of factors relevant to determining whether an application for condonation should be granted. These factors are not determinative, but must be weight, one against the other. Nor are all these factors necessarily considered in each case as stated in the *Arangies t/a Tech v Quick Build* 2014 (1) NR 187 (SC) at 189-190. Further that the court has the discretion, to be judicially upon a consideration of the facts, and it is a matter of fairness to both sides.

[9] Counsel submits that the third party on various instances engaged the plaintiff and first defendant in terms of rule 32 (9) and informed them of its non-compliance with the order dated 21 October 2021 since 15 December 2021, when it addressed correspondence to the plaintiff and first defendant and attached the unsigned witness statement and discovery bundle. Counsel submits that the plaintiff and first defendant opted not to participate in those engagements wherein the third party insisted that the best way to resolve the main action was for the parties not to unnecessarily cloud the process with interlocutory applications.

[10] Counsel submits that this is an exceptional matter where the court should depart from the general rule, which is to consider, with reference to the founding affidavit only, whether the third party made out a prima facie cause of action. Counsel submits that the third party engaged the plaintiff and first defendant in terms of rule 32(9) on 15 December 2021 and indicated of its intention to launch this application and that the third party could not file the discovery affidavit, discovery bundle and the witness statement without leave of court.

[11] Counsel submits that the circumstances that contributed to the third party's failure to comply with the court order are set out fully in the supporting affidavit.{ own emphasis} The explanations provided for the delay are detailed, sufficient and constitute a reasonable and acceptable explanation for the delay. Counsel further submits that on the facts as set out, the non-compliance with the rules, is not glaring, flagrant and inexplicable.

[12] Counsel submits that the court will endeavour to reach a conclusion that will be in the

best interest of justice, and it is on that basis that the non-compliance be condoned. The delay can be cured by a costs order at the very most. Counsel further submits that the prospects of success with the third party claim against it are well set out in the replying affidavit. Counsel submits that the third party is not acting mala fide in bringing the application nor is the application brought for the purpose of delaying the respondent's enjoyment of their judgment.

[13] In conclusion, counsel submits that the plaintiff and first defendant suffers no prejudice that cannot be cured by a costs order and that no hearing date has been lost as a result of the condonation application. The intended pre-trial could not be held, and the respondents had a part to play in that delay, as the initiating document was sent by the plaintiff's counsel to the third party's counsel on the 11th hour.

On behalf of the plaintiff and first defendant

[14] Counsel for the first defendant filed a status report wherein he indicated that the first defendant is in agreement with the submissions made by the plaintiff and therefore did not deem it necessary to file heads of argument.

[15] Counsel for plaintiff submits that the third party simply refused and/or failed to comply with the court order in question. Counsel submits that the third party fails to disclose any defence or prospects of success as far as its defence to the defendants claim for indemnification is concerned.

[16] Counsel submits that in respect of condonation for non-compliance with court order, it is settled law that there are two requirements for the favourable exercise of the courts discretion. The first one is that the applicant should file an affidavit satisfactorily explaining the non-compliance with the rules of the court. The second is that the applicant should satisfy the court under oath that he has a bona fide defence as stated in the *Solomon v De Klerk 2009 (1) NR 77 (HC) at 79F-G*.

[17] Counsel submits that since affidavits constitute both the pleadings and the evidence in the case, a party must make sure that all the evidence necessary to support its case is included in the affidavit. The affidavits must contain all the averments necessary to sustain a cause of action or a defence. As the adage goes, in motion proceedings you stand or fall by your founding papers. A court may only grant the relief sought in the notice of motion and

supported by the affidavit in support thereof.

[18] Counsel submits that the third party has failed to show under oath that it has prospects of success in its defence, and as such its condonation application is bad in law, and on this basis alone, the court is invited to dismiss it with costs. Counsel further submits that court orders must be complied with. If a party is dissatisfied with the decision of the court, and it is appealable, the recourse lies in appealing it and not ignoring it. A court order, even if wrong, must be complied with. Failure to do so amounts to contempt of court as held in the */AE//Gan Data (Pty) Ltd and others v St Sebata Municipal Solutions (Pty) Ltd and others 2011 (1) NR 247 (HC)*.

[19] Counsel submits that the current case falls under the rubric of those instances where non-compliance is so glaring wrong and no satisfactory explanation is given under oath for all the delays in the matter. The present matter, the third party does not disclose to the court what transpired after the witness statements and discovery affidavit were ready for filing in the first week of December 2021. The delays involving the whole month of January 2022 and the period leading to pre-trial conference in the first week of February 2022 are not explained at all.

[20] Counsel submits that to make matters worse, having regard to the third party's founding papers, the third party fails to explain and confide to court the reason why it did not and could not bring the instant condonation application promptly immediately after it became clear that they could not comply with the court order dated 21 October 2021. Therefore the application stands to be dismissed for non-compliance with rule 56.

[21] Counsel submits that the plaintiffs and first defendant suffered substantial prejudice as a result of the third party's conduct and unjustified non-compliance. A period of four months has passed since the case management conference order was issued. The prejudice suffered by the plaintiff can hardly be cured by a cost order and the only appropriate remedy in the circumstances is the dismissal of the condonation application and striking out the third party's defence/ opposition and the matter to proceed as unopposed. The third party should therefore be ordered to pay the costs of this application on an attorney and clients scale.

The legal principles and application to the facts

Condonation

[22] From the onset it is important that I voice my displeasure with the affidavit in support of the condonation application filed on behalf of the third party. No effort was put in in drafting the supporting affidavit to ensure that it complied with the requirements of condonation. I will deal in more detail in this aspect in my discussion.

[23] One of the leading cases in this jurisdiction on condonation applications is the case of *Petrus v Roman Catholic Archdiocese*¹, wherein O'Regan AJA, the learned Supreme court judge made the following remarks:

'[9] It is trite that a litigant seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. Moreover, it is also clear that a litigant should launch a condonation application without delay. In a recent judgment of this court, *Beukes and Another v Swabou and Others*, [2010] NASC 14 (5 November 2010), the principles governing condonation were once again set out by Langa AJA noted that "an application for condonation is not a mere formality" (at para 12) and that it must be launched as soon as a litigant becomes aware that there has been a failure to comply with the rules (at para 12). The affidavit accompanying the condonation application must set out a "full, detailed and accurate" (at para 13) explanation for the failure to comply with the rules. In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation and will also consider the litigant's prospects of success on the merits, save in cases of "flagrant" non-compliance with the rules which demonstrate a "glaring and inexplicable disregard" for the processes of the court (*Beukes*, at para 20).'

[24] This court has in several cases ruled that a party seeking condonation must provide reasonable, acceptable and bona fide explanation for the non-compliance with the rules of court. It is imperative for the party to satisfy the court, through its founding papers, that there are reasonable prospects of success should the condonation application be granted.²

*Rule 55*³

¹ 2011 (2) NR 637 (SC).

² *Minister of Health and Social Services v Amakali Matheus* (SA 4-2017) [2018] NASC (6 December 2018).

³ **Upliftment of bar, extension of time, relaxation or condonation**

55. (1) The court or the managing judge may, on application on notice to every party and on good cause shown, make an order extending or shortening a time prescribed by these rules or by an order of court for doing an act or taking a step in connection with proceedings of any nature whatsoever, on such terms as the court or managing judge considers suitable or appropriate.

(2) An extension of time may be ordered although the application is made before the expiry of the time prescribed or fixed and the managing judge ordering the extension may make any order he or she

[25] The rules expressly provides for an application in terms of Rule 55 which allows a party to bring an application for and relaxation of timelines or for condonation of the non-compliance of the rules. ⁴

Discussion

[26] The founding affidavit filed on behalf of the third party does not take this matter any further apart from proffering what I term as brief explanation for the lack of a better word as to the unavailability of the parties that were involved in the drafting of witness statements and the discovery affidavit due to the Covid-19 Pandemic. By the time the parties were able to meet virtually, the discovery affidavit and bundle as well as the witness statements were already past due.

[27] The proposed case management report filed on the e-file was signed by the third party's attorney, Mr Tjiteere it appears on 18 October 2021 wherein the parties agreed to the timelines as made an order of court on 21 October 2021, therefor the third party had close to three weeks to file its discovery affidavit and discovered bundle and a whole month to file its witness statement. The explanation tendered for the non-compliance of the discovery affidavit and discovered bundle is that some of the items were archived and had to be retrieved. And on behalf of the witness statment is that the parties involved were not available up until after 1 December 2021. It appears to this court, that at no stage did it occur to the third party that was aware of the timelines or its legal practitioners that they would not meet the timelines and that their actions would result in non-compliance with the court order. The court is of the view as soon as the third party realised that it would not meet the timlines it had to approach the court immediately for an application in terms of rule 55 in order to be released from the binding effects of the applicable court order.

[28] No extension was sought from court in terms of rule 55. From the submissions made it appears that the third party only realised that it was out of time and in non-complaine of the court order on 15 December 2021 when it enagagd the plaintiff and first defendant in terms of rule 32 (9). The court is however of the view that 15 December 2021 could not have been the date the third party realised it was in non-compliance with the court order. Even if it was, the third party failed to act immeidately and promptly and apply for an extension of time,

considers suitable or appropriate as to the recalling, varying or cancelling of the consequences of default, whether such consequences flow from the terms of any order or from these rules.

⁴ *Voigts v Voigts* (I 924/2016) [2018] NAHCMD 55 (16 March 2018) par 20.

alternatively, condonation.

[29] I agree with counsel for the plaintiff, in that the third party's affidavit is silent regarding the time periods and what transpired during those time periods, what effort to say the least the third party made to ensure compliance with the court order. From when the court order was issued, 21 October to 15 December 2021 and from the period of January 2022 to the date of 1 February 2022 when it filed a status report indicating that it would bring an application for condonation. In addition there are no confirmatory affidavits from Mr Randeere and Mr Shaik. The third party has not taken the court in confidence. The explanation tendered in the supporting affidavit is of no assistance to this court.

[30] In the matter of *Balzer v Vries*⁵ the Supreme Court pronounced itself on this matter as follows:

[20] It is well settled that an application for condonation is required to meet the two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal.'

[31] The third party failed to effectively deal with by the two requisites in the founding affidavit.

[32] The third party cannot escape the results of their legal practitioner's lack of diligence. In the case of *Moraliswani v Mamiliwhich*⁶, per Grosskopf JA, cited with approval⁷, Steyn CJ in *Saloojee and Another NNO v Minister of Community Development*⁸ stated the following:

'There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence, or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous affect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the

⁵ *Balzer v Vries* 2015 (2) NR 547 (SC) at 661J-552F.

⁶ 1989(4) SA 1 (A).

⁷ At p 10 at A-C.

⁸ 1965 (2) SA 135 (A) at 141 C.

circumstances of the failure are⁹.

[33] Rule 53(1)(c)¹⁰ essentially provides that if a party or his or her legal practitioner, without reasonable explanation, fails to comply with a case management order the managing judge may enter any order that is just and fair in the matter, including any of the orders set out in sub-rule (2)¹¹ of this rule.

Conclusion

[34] There was absolutely no acceptable explanation given for the non-compliance with the court order dated 21 October 2022 in support of this condonation application nor a reasonable explanation for the failure to timeously apply for condonation when it became clear that the third party will not be in compliance with the court order.

[35] Having regard to documents filed of record and the written arguments, I am unpersuaded that there are factors which could sway me to make a decision in favour of granting condonation. The third party's condonation application has been characterized by unexplained gaps and cannot succeed in its present form.

[36] My order is therefore as set out above.

Judge's signature	Note to the parties:
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⁹ See also *Immelmon v Loubser en 'n Ander* 1974 (3) SA 816 (A) 824 A-B and *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799F.

¹⁰ Rule 53 (1) states that:

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

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

...;

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

¹¹ Rule 53 (2) states that:

'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.

	Not applicable.
Counsel:	
Plaintiff	First Defendant
Mr F Bangamwabo Of FB Law Chambers	Mr J Neves Of Neves Legal Practitioners <u>Third Party</u> Mr M Tjiteere Of Dr. Weder. Kauta & Hoveka Inc