



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

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| Case Title: MICHAEL MCLAUGHLIN RAYMOND MCLAUGHLIN & ANOTHER VS RYNO DU PLESSIS T/A FOUR U RENOVATIONS | Case No: HC-MD-CIV-ACT-CON-2020/02377 |
| | Division of Court: HIGH COURT (MAIN DIVISION) |
| Heard before: HONOURABLE LADY JUSTICE PRINSLOO | Date of hearing: Adjudicated on the papers |
| | Date of order: 06 April 2022 |
| Neutral citation: <i>Mclaughlin v Ryno Du Plessis t/a Four U Renovations</i> (HC-MD-CIV-ACT-CON-2020/02377) [2022] NAHCMD 176 (6 April 2022) | |
| Results on merits: Application for condonation. Merits not considered. Having heard SEAN MCCULLOCH , on behalf of the Plaintiff(s) and CHRISTOFFEL JANSEN VAN VUUREN , on behalf of the Defendant(s) and having read the pleading for HC-MD-CIV-ACT-CON-2020/02377 and other documents filed of record: | |
| <u>Ruling:</u> 1. The defendant's application for condonation is hereby granted. 2. There is no order as to costs. | |

Further conduct of the matter:

3. The defendant is directed to file its witness statements on or before 20 April 2022.
4. The defendant is directed to file his discovery affidavit and exchange discovery bundles on or before 20 April 2022.
5. The case is postponed to **12/05/2022** at **15:00** 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 9 May 2202.
8. The legal practitioners seized with the matter must attend the pre-trial conference.

Reasons for orders:**Introduction and brief background**

[1] This is an application by the defendant for condonation of his non-compliance with a court order dated 30 September 2021. That order directed the defendant to, among other things, deliver his witness statements on or before 25 October 2021. The defendant did not deliver the witness statements. It is that non-compliance that gave rise to the present application. The plaintiffs oppose the application for condonation. The parties will be referred to as they appear in the main action.

[2] On 15 September 2021, the parties filed a joint case management report proposing, *inter alia*, dates for the delivery of the parties' respective witness statements. On 29 September 2021, the defendant's erstwhile legal practitioners filed a notice of withdrawal as legal practitioners of record on behalf of the defendant.

[3] As no return of service of such withdrawal on the defendant had been filed in compliance with rule 44(7) were filed the erstwhile legal practitioner was regarded to still be on record. On 30 September 2021 the court adopted the proposed joint case management report. It directed the parties to file their respective witness statements by 25 October 2021, and the matter was postponed to 28 October 2021 for the defendant to appear. During these court proceedings, the defendant's erstwhile legal practitioners, Metcalfe Beukes Attorneys, were ordered to serve the court order on the defendant and file the proof of service on the defendant of the notice of withdrawal legal practitioners of record. According to the pleadings, the defendant signed the notice of withdrawal on 26 October 2021 for receipt of the notice.

[4] On 28 October 2021 a new legal practitioner representing the defendant appeared. The matter was postponed to 11 November 2021 for the new legal practitioner to come on record and acquaint himself with the file.

[5] On 05 November 2021 the parties filed a joint status report wherein both parties indicated that they intended on launching condonation applications in respect of the witness statements. I pause here to mention that the plaintiffs filed their witness statements as directed. However, one of the witness statements was filed after 16h00, which means, in terms of the court rules, it was regarded to have been filed the next day, 26 October 2021. As a result, the plaintiffs saw the need to launch a condonation application in that respect. The defendant did not oppose the plaintiffs' condonation application, and the court took no issue with it. As a result, the plaintiffs' condonation is granted.

[6] On 10 November 2021 the court gave directions regarding the exchange of documents in respect of the condonation application of the defendant's non-compliance with the court order dated 30 September 2021.

The application

[7] In summary, in his application for condonation, the deponent to the defendant's affidavit explains that Metcalfe Beukes Attorneys, who previously acted on his behalf, informed him on 28 September 2021 that they will be withdrawing as his legal practitioners of record. The defendant then requested the legal practitioner to remain on record. Nevertheless, after approximately a week, they informed him that they would not reconsider

their position.

[8] The defendant contends that on 12 October 2021 he contacted his current legal practitioner to assist him in the matter, who requested him to obtain the file's contents from his previous legal practitioner and place them in funds. He could only place the current legal practitioners in funds on 27 October 2021, which he did. And he provided the content of the file on 28 October 2021.

[9] The defendant further contends that the plaintiffs claim an amount of N\$350 000 paid to him for the renovations, constructions and interior decorating to Unit 44, Amstrand, Swakopmund. The defendant contends that the plaintiffs are not entitled to the full amount claimed as some work was done to the unit, which work carries some value. The defendant disputes the allegation by the plaintiffs in their replication wherein they alleged that the work done by him only amounts to only N\$20 350.40 and refers the court to his plea and counterclaim. The defendant contends that a further issue that needs to be resolved during the trial is the agreed completion date and as a result, submits that he has good prospects of success.

[10] The plaintiffs oppose the application for condonation. The plaintiffs contend that the defendant's application for condonation is defective and devoid of merit in that:

- a) the defendant has not explained the period from 14 September 2021 (the period after the joint case management report was signed by the parties) when he was privy to the date for filing the witness statements.
- b) The plaintiffs further contend that the requirements of rule 56 (1) and (2) have not been satisfied or adequately addressed.
- c) The wasted costs of the plaintiff in respect of this current proceedings are not tendered.
- d) No supporting evidence was submitted to substantiate the allegations made by the deponent in the founding affidavit as to what happened and when.
- e) Nor were the prospects of success of the defendant's defence and counterclaim properly or fully addressed.

The plaintiff, therefore, submits that the application for condonation should be dismissed with costs.

The legal principles and application to the facts

Condonation

[11] 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).'

[12] This court has in several cases ruled that a party seeking condonation must provide a 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

Discussion

[13] The plaintiff argues that the defendant fails to explain the period from 14 September 2021 when the joint case management report was filed. Court is of the view that the defendant would not be able to explain that period for the following reasons, the defendant is not the one that signed the proposed case management report. His legal practitioners at the time did. Therefore it cannot be said that the defendant was aware of the contents of the case management report as of 14 September 2021. The defendant contended that he only became aware of the non-compliance when his current legal practitioner drew his attention to the fact.

¹ 2011 (2) NR 637 (SC).

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

As mentioned above, the court ordered the defendant's erstwhile legal practitioner to serve the court order of 30 September 2021 on the defendant, which he only became aware of on 26 October 2021.

[14] The plaintiffs, in their affidavit supporting the opposition, argue that Counsel had telephonic conversations with the erstwhile legal practitioner of the defendant, who confirmed, among other things, that the defendant was aware of the dates for filing of the witness statements, however, in the absence of confirmatory affidavit such allegations can only but amount to hearsay evidence and the Court will therefore disregard those portions.

[15] The plaintiff argues that there is no supporting evidence to substantiate the allegations made by the defendant. However, when one regards to the rule 32 (9) letter sent to the plaintiffs' counsel dated 05 November 2021, this letter confirms the events as stated by the defendant in his founding affidavit. In addition, the plaintiffs argue that no effort was made by the defendant or his current legal practitioner to contact the plaintiffs' legal practitioner to secure an agreement and approach the Court for an extension of time. The defendant's present legal practitioner only came on record on 28 October 2021 and could therefore only act on behalf of the defendant as from that date. By then, the date for filing the witness statement had passed. Even if the defendant engaged the current legal practitioner on 12 October 2021, the present legal practitioner in his rule 32 (9) confirms that he was only placed in funds on 28 October 2021.

[16] The defendant's current legal practitioner only came on record on 28 October 2021. The parties filed a joint status report on 08 November 2021, whereafter the matter was postponed to 11 November 2021 for the current legal practitioner to acquaint himself with the file. At that stage, he indicated that the defendant intends to bring an application on 11 November 2021, and as directed by the court, the application for condonation was filed. Two weeks after the current legal practitioner came on record.

[17] The plaintiff argues that the defendant has failed to address the prospects of success of its defence and counterclaim. I do agree that the defendant's founding affidavit is not a model of draftsmanship and is quite crisp in dealing with the prospects of success. However, on the plaintiffs' own version work was done by the defendant, the exact nature and value thereof is still a contentious issue between the parties. Therefore, there are prospects of

success in defending a portion of the plaintiffs' claim. One should also not lose sight of the fact that the defendant has a counterclaim against the plaintiffs and raised a special plea, which, if successful, can be definitive of the outcome of the matter. The court is of the view that the defendant has adequately addressed that aspect of prospects of success in his plea, counterclaim and founding affidavit.

[18] I am further of the view that the court can only adjudicate the disputes raised in the pleadings after having heard all the evidence in this regard.

Conclusion

[19] The Court is satisfied that the defendant's explanation for the non-compliance is reasonable, acceptable and bona fide. The defendant has explained what was within his control. The court is further satisfied that the defendant's current legal practitioner acted promptly and without delay in bringing the condonation application. The defendant has met the requirements of condonation and should be granted.

Costs

[20] The plaintiff prayed that defendant should be mulcted with costs due to the defendant's continuous non-compliance. However, this is the first time the defendant has not complied with a court order. It was not a result of his own doing but due to the circumstances that he found himself in due to his erstwhile legal practitioners withdrawing. As stated above, the defendant's condonation application was brought without delay, and therefore plaintiff has not suffered any prejudice and will not suffer any in granting this condonation. As a result, I make no order as to costs.

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

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| Judge's signature | Note to the parties: |
| Prinsloo J | Not applicable. |
| Counsel: | |
| Plaintiff | First Defendant |
| Mr A Ellis | Mr J Van Vuuren |

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| <p>Of</p> <p>Ellis Attorneys</p> <p>c/o Fisher, Quarmby & Pfeifer</p> | <p>Of</p> <p>Kruger, Van Vuuren & Co</p> |
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