

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA,

MAIN DIVISION,

WINDHOEK

RULING

Case Title: JONATHAN HUNIBEB vs THE MINISTER OF SAFETY AND SECURITY: CHARLES NAMOLOH & OTHERS And JONATHAN HUNIBEB vs THE MINISTER OF SAFETY SECURITY: FRANS KAPOFI & OTHERS	Case No: HC-MD-CIV-ACT-CON-2020/01731 And HC-MD-CIV-ACT-CON-2021/03327
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	Date of hearing: 17 March 2022
	Date of order: 20 April 2022
Neutral citation: <i>Hunibeb v The Minister of Safety and Security: Charles Namoloh</i> (HC-MD-CIV-ACT-CON-2020/01731) and <i>Hunibeb v The Minister of Safety and Security: Frans Kapofi</i> (HC-MD-CIV-ACT-CON-2021/03327) [2022] NAHCMD 203 (20 April 2022)	
Results on merits: Application for condonation. Merits not considered.	

The order:

Having heard **Mr Jonathan Hunibeb**, Plaintiff in person and **Mr Kauari** and **Ms Da Silva**, for the Defendants and having read the documents filed of record:

IT IS HEREBY ORDERED IN BOTH MATTERS THAT:

1. The defendants' condonation applications are hereby granted.
2. The automatic bars operating against the defendants are uplifted.
3. There is no order as to costs.

Further conduct of the matters

4. Both cases are postponed to **28 April 2022** at **15:00** for a Status Hearing (Reasons: Setting out the further conduct of the matter)
5. Joint status report must be filed on or before 26 April 2022.

Reasons for orders:

PRINSLOO J:

Introduction and brief background

[1] Serving before this court are two condonation applications filed by the defendants in two separate matters under case HC-MD-CIV-ACT-CON-2020/01731 and HC-MD-CIV-ACT-CON-2021/03327, respectively and which are both opposed by the plaintiff.

[2] The parties will be referred to as they appear in the main action.

[3] I will refer to the parties' heads of arguments and oral arguments interchangeably for my discussion below.

Case HC-MD-CIV-ACT-CON-2020/01731

[4] On 27 January 2022, the court ordered the defendants to file their condonation application in respect of their non-compliance with the court order dated 11 November 2021, directing the defendants to file their amended plea on or before 25 November 2021, on or

before 18 February 2022 and the matter was postponed to 3 March 2022 for this purpose. On 3 March 2022, Mr Kauari appeared in court, informing the court that Ms Ndungula, who had been seized with the matter, was no longer in the employ of the Government Attorneys, being the legal practitioners of the defendants. The defendants filed the said condonation application as directed.

[5] The defendants essentially seek to be granted condonation in the following regard: Condonation for having filed its amended plea late, the upliftment of the automatic bar and the defendants' plea filed on 14 January 2022 be accepted as a pleading.

Arguments advanced by defendants

[6] Mr Kauari, counsel for the defendants, argued that an ex-colleague, Ms Ndungula, previously handled the matter. Ms Ndungula resigned from the office of the Government Attorneys on 31 January 2022, and before that date, she was on compassionate leave until 2 February 2022. Mr Kauari also argued that before Ms Ndungula resigned, she was inundated with other matters that she needed to finalise before leaving the Government Attorneys. Mr Kauari referred me to matters serving before my Brother Ndauendapo J¹ and before myself².

[7] Mr Kauari argued that as a result of Ms Ndungula's resignation, she was no longer active on the current file as she had to engage in the process of drafting hand-over memos on the next action steps on all the files that were assigned to her for the Government Attorney's perusal and re-assignment of the files. As a result, Ms Ndungula could not file the amended plea timeously as directed by the court. In support of Mr Kauri's contentions, a supporting affidavit was filed, deposed to by Ms Ndungula.

[8] Mr Kauari submitted that the failure to file the defendants' amended plea timeously was neither willful /intentional nor a result of any deliberate conduct by the defendants or their legal practitioners. Mr Kauari submits that the amended plea sought to be filed is a relevant and significant document for the defendants' case, which the court should have insight to.

[9] Mr Kauari submitted that the defendants would suffer irreparable harm if the bar is not uplifted and the amended plea is not accepted. Mr Kauari further submitted that the amended plea would provide the court with a holistic picture of the issues subject of this action which

¹ *Alvenath Uiseb vs Minister of Safety and Security* HC-MD-CIV-ACT-DEL-2019/03375.

² *Immanuel Engelbreg vs Ministry of Safety And Security* HC-MD-CIV-ACT-DEL-2019/00458.

will assist the court to come to a just and speedy disposal of the matter herein. In conclusion, Mr Kauari, on the issue of prospects of success, submits that on the pleadings filed of record, the defendants have a good prima facie defence to the plaintiff's action.

Arguments advanced by the plaintiff

[10] Mr Hunibeb appeared in person. Mr Hunibeb, in essence, opposed the condonation application on the ground that the defendants' affidavit is not clear in the following respects:

1. There are no attachments to support the defendants' contentions as to when Ms Ndungula resigned;
2. When Justice Ndauendapo directed Ms Ndungula to file witness statements in a matter appearing before him or when Ms Ndungula was informed to assist in the matter that appeared before me.
3. When Mr Kauari informed the court when Ms Ndungula resigned or when Ms Ndungula had to draft the hand-over notes.

[11] In conclusion, Mr Hunibeb argued that the court should not condone the non-compliance of the defendants and that he would suffer irreparable harm should the defendants' condonation application succeed.

Case HC-MD-CIV-ACT-CON-2021/03327

[12] The defendants filed their plea in this matter on 25 November 2021. However, the legal practitioner of record at the time failed to sign the defendants' plea. As a result, the plaintiff indicated that he intends to bring an application to strike-out the defendants' plea for non-compliance with rule 45(1) of the court rules. In the order dated 10 February 2022, the court gave directions and ordered the parties to comply with specific procedural steps regarding the plaintiff's strike-out application. The court, inter alia, also ordered the defendants to file an affidavit explaining their non-participation in drafting the case management conference report.

[13] The defendants now seek condonation for the aforementioned non-compliance.

[14] During the court proceedings of 3 March 2022, Ms Da Silva appeared on behalf of the defendants. She informed the court that Ms Boois, the legal practitioner who was previously seized with the matter, resigned from the office of the Government Attorney, and the file was assigned to her that morning, ie 3 March 2022. Accordingly, counsel requested the

opportunity to acquaint herself with the file and comply with the court's directives. The court acceded to the request, and the defendants were ordered to file their application for condonation on or before 14 March 2022 for their non-compliance with the court order of 10 February 2022.

[15] The defendants filed their application for condonation on 14 March 2022, however, only at 21:15, which in terms of the Practice Directives was only filed on 15 March 2022.

Arguments on behalf of the defendants

[16] Ms Da Silva, counsel for the defendants, submitted that the legal practitioner seized with the matter left the employment of the Government Attorney in December 2021. She could not get a hold of the previous legal practitioner to obtain and file her confirmatory affidavit. Ms Da Silva contended that this could be attributed to Ms Boois's new role as a magistrate. Ms Da Silva argued that the non-compliance with the court order is not a disregard for the court's rules and that circumstances beyond the clients' control brought about this unfortunate failure to comply. Counsel maintained that the resignation of Ms Boois and the subsequent resignations of two other legal practitioners in the office of the Government Attorney made the re-assignment of files difficult.

[17] Ms Da Silva argued that the defendants initially complied with all the timelines as prescribed before the resignation of Ms Boois. Ms Da Silva submitted that the filing of the case management report, compliance with rule 32(9) and (10) and the filing of the defendants' answering affidavit was not due to the lack of diligence on the part of the defendants and/or their legal practitioners but due to the circumstances as mentioned earlier. Ms Da Silva argued that it is imperative that the court grants the condonation sought to enable the court to have a bird's eye view of the matter, in concluding the matter and to allow the defendants to participate in the trial fully.

[18] Ms Da Silva submitted that the defendants would suffer irreparable harm should the plaintiff be granted the default judgment that he seeks. Counsel submitted that save for the delay in filling the above mentioned, the plaintiff did not suffer prejudice. Ms Da Silva argued that the defendants have a good defence to the plaintiff's claim, as demonstrated in the defendants' unsigned special plea and plea. Ms Da Silva submitted that the plaintiff's case is without merits and not supported by law and will stand to be ignored or dismissed once the

case is decided on the merits.

Arguments on behalf of the plaintiff

[19] Mr Hunibeb appeared in person in this matter. He argued that the defendants failed to provide evidence of when the previous legal practitioner resigned and when Ms Da Silva became seized with the matter. Mr Hunibeb argued that the court should impose sanctions for the defendants' non-compliance with the abovementioned court order. In addition, Mr Hunibeb maintained that he would suffer irreparable harm should the defendants be granted the condonation sought.

Legal principles

[20] In *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others*³ Langa AJA stipulated the principles applicable to applications for condonation even under the new rules. In dealing with condonation, the learned Judge of Appeal stated the following:⁴

'An application for condonation is not a mere formality. The trigger for it is non-compliance with the Rules of Court. Accordingly, once there has been non-compliance, the applicant should, without delay, apply for condonation and comply with the Rules. . . In seeking condonation, the applicants have to make out their cases on the papers submitted to explain the delay and the failure to comply with the Rules. The explanation must be full, detailed and accurate in order to enable the Court to understand clearly the reasons for it.'

[21] In order to succeed with an application for condonation, the applicant must file an affidavit explaining satisfactorily the non-compliance with the rules. This explanation must enable the court to fully understand how the delay came about. This, however, only deals with one aspect of the application for condonation.⁵

[22] In the case of *Swakop Uranium (Pty) Ltd v Kalipa*⁶ Unengu AJ said the following:

'[17] Similarly, in *Arangies t/a Auto Tech v Quick Build*⁷ O'Regan AJA stated the following

³ *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others* (SA 10-2006) [2010] NASC 14 (5 November 2010).

⁴ *Supra*.

⁵ *Alex Kamwi Kamwi v S* (HC-MD-CIV-ACT-OTH-2017/01050) [2017] NAHCMD 339 (28 November 2017) para 14.

⁶ *Swakop Uranium (Pty) Ltd v Kalipa* (LCA 41-2014) [2015] NALCMD 28 (04 December 2015) para 17. See also *Zaire v Van Biljon* (HC- MD-CIV-ACT-OTH-2019/00180) [2019] NAHCMD 253 (25 July 2019) para 23.

⁷ *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) at 189-190E-B.

with regard to applications for condonation:

“The application for condonation must thus be lodged without delay, and must provide a “full, detailed, and accurate” explanation for it.³ This court has also recently reconsidered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. They include –

“the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent’s (and where applicable, the public’s) interest in the finality of the judgment, the prejudice, suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.”⁴

These factors are not individually determinative, but must be weighed, one against the other.⁵ There are times, for example, where this court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been ‘glaring’, ‘flagrant’ and ‘inexplicable’.”

[23] It is trite learning that an applicant who seeks condonation must satisfy the court that he has a reasonable explanation for the delay and has prospects of success on the merits.⁸ The defendants are not required to give a perfect explanation for the non-compliance but must provide a reasonable explanation for the said non-compliance.⁹ It is quite clear that the defendants’ non-compliance with the court order is attributed to the resignation of the legal practitioners seized with the matters of the defendants. Although defendants’ non-compliance can be seen to a certain extent as careless, as they failed to comply with the court orders, it will be more prejudicial to the defendants should the court refuse the condonation application. Refusing condonation will effectively close the doors of the court to the defendants. There appears to be no intentional disregard of the rules of court. I am, therefore, satisfied with the explanation advanced by the defendants regarding the respective non-compliances. The failure to sign the defendants’ plea under case nr HC-MD-CIV-ACT-CON-2021/03327 clearly appears to be an oversight.

[24] Regarding the condonation application filed on 14 March 2022 at 21:15, the court views that the delay was minimal, and there is no prejudice caused to the plaintiff due to the delay.

⁸ *Petrus v Roman Catholic Archdiocese SA* 32/2009.

⁹ *Viviers vs Ireland* (HC-MD-CIV-ACT-CON-2018/03932) [2019] NAHCMD 514 (30 October 2019).

[25] Regarding the prospects of success, the court was referred to the defendants' respective defences to the plaintiff's claim. If the trial court accepts the defendants' respective defences as valid defences to the plaintiff's claims, the plaintiff's claim may fail. I am thus of the view that there are prospects of success in the main action. The second requirement of the application for condonation is therefore also met. I accordingly grant the application for condonation as prayed.

[26] My order is set out above.

Judge's signature	Note to the parties:
PRINSLOO Judge	Not applicable.
Counsel:	
Plaintiff	Defendants
Mr J Hunibeb Appearing in person	Mr N Kauari and Ms Da Silva Of the office of the Government Attorneys