

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

HC-MD-CIV-ACT-CON-2021/00406

In the matter between:

**GREENTEAM CONSULTANTS CC**

**PLAINTIFF**

And

**MINISTER OF AGRICULTURE, WATER AND LAND REFORM**

**DEFENDANT**

**Neutral citation:** *Green Team Consultants CC v Minister of Agriculture, Water and Land Reform* (HC-MD-CIV-ACT-CON-2021/00406) [2022] NAHCMD 437 (25 August 2022)

**Coram:** Tommasi J

**Heard:** 18 July 2022

**Delivered:** 25 August 2022

**Flynote:** Interlocutory application – condonation for non-compliance with court orders – requirements for condonation considered – Opposed by other party – Condonation for non-compliance with court orders is hereby granted.

**Summary:** This is an interlocutory application for condonation and upliftment of the bar launched by the defendant as a result of non-compliance with court orders (the parties will be referred to as they appear in the main action). The defendant is essentially seeking condonation for failing to comply with the court orders issued on 10 November 2021 and 26 January 2022 respectively. The order issued on 10 November requires that the parties must file their witness statements before or on 3 December 2021. The defendant having failed to do so approached the court with a request to be permitted to file an application condoning such non-compliance. The court then ordered the defendant on 26 January 2022 to file its application before or on 11 February 2022. The plaintiff also failed to do this and only filed its application on 2 March 2022.

Plaintiff submits that the defendant has no prospects of success and has not made out a case for condonation to be granted in respect of its failure to file witness statements as ordered, as well as in respect of the failure to file its condonation application for condonation. As result, plaintiff prays for the court to refuse the applications and that sanctions be issued against the defendant in terms of Rule 53 (2) (a) and (b) be applied against the defendant, and that its defence be struck. Plaintiff prays for the defendant to be ordered to pay the plaintiff's costs regardless of the outcome of the applications, on an attorney and client scale.

*Held that* the court has a duty to consider whether the condonation should in the circumstances of the case be granted. In this regard, the court exercises discretion. That discretion must be exercised in the light of all the relevant factors. These factors include the degree of delay, the reasonableness of the explanation for the delay, the prospects of success, the importance of the case, the interest in the finality of litigation and the need to avoid unnecessary delay in the administration of justice. These factors are not exhaustive.

*Held that* the court must consider the circumstances along the guidelines provided for in Rule 56 to determine in terms of Rule 56(3) whether the defendant has shown good cause for the court to condone its non-compliance with the court order of 10 November 2021.

Consequently the court therefore grants the defendant condonation for non-compliance with the court orders dated 10 November 2021 and 26 January 2022.

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### ORDER

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1. The defendant's application for condonation of the late filing of the condonation application is granted.
2. The defendant's application for condonation for the late filing of the witness statement and upliftment of the bar, is granted;
3. The defendant is directed to file its witness statements on or before 8 September 2022.
4. The applicant is to pay the respondent's costs on an attorney and client scale and the costs is not limited in terms of rule 32(11).
5. The parties are to file joint pre-trial report in WORD format on or before 15 September 2022.
6. The case is postponed to 21 September 2022 at 08h30 for Pre Trial Conference.

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### JUDGMENT

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Tommasi J,

[1] This is an interlocutory application for condonation and upliftment of the bar launched by the defendant as a result of non-compliance with court orders (the parties will be referred to as they appear in the main action). Before I go into the application's

merits, it is necessary to discuss the history of the matter that gave rise to the current application.

### Brief background

[2] The Plaintiff instituted an action against the defendant for, *inter alia*, payment in the amount of N\$ 311 250 for phase 1; payment in the amount of N\$ 3 112 500 for the remainder of the agreement, and interest on the aforesaid amount at a rate of 20% per annum from the date of judgment until the date of final payment.

[3] The defendant entered an appearance to defend and a case plan notice was issued. On 19 April 2021, the court ordered the parties to, *inter alia*, file discovery affidavits and exchange bundles of discovered documents on or before 4 June 2021. The Plaintiff complied with the court order. The defendant did not comply with the order in its entirety. The defendant failed to file its discovery affidavit (s) on or before 4 June 2021 and instead filed the said affidavit (s) on 9 June 2021. No condonation application accompanied the discovery affidavit (s). The defendant however took no issue with the non-compliance and the parties agreed that the matter should be referred for mediation. The parties however could not obtain mediation dates due to Covid 19 until 17 August 2021. The mediation however failed. The parties entered into settlement negotiations and same also failed.

[4] On 10 November 2021, the parties were ordered, *inter alia* to file their witness statements/affidavits on or before 3 December 2021. The plaintiff complied with the court order. The defendant failed to file its witness statements as ordered. The parties were ordered to file a pre-trial report on 21 January 2022 and the matter was postponed to 26 January 2022. On 21 January 2022, the parties filed unilateral status reports. It was common cause that the defendant sought an indulgence from the plaintiff to file its witness statements on or before 13 December 2021 and the plaintiff did not oppose the indulgence sought. By 21 January 2022, the defendant had not filed any witness statement nor did the defendant bring an application for condonation or for the extension of the dates. The plaintiff threatened that it would apply for the defendant's

defence to be struck. Needless to say no pre-trial conference report was filed. The plaintiff indicated that it would apply for sanctions to be imposed.

[5] On 26 January 2022, the court having listened to both parties granted the postponement sought by the defendant and ordered the parties to comply with Rule 32 (9) and (10) before 28 January 2022 and to file its application for condonation in respect of the witness statements on or before 18 February 2022 and the defendant to reply on or before 25 February 2022. The case was postponed to 9 March 2022 for a date to be allocated for the hearing of the application for condonation.

[6] The defendant filed a Rule 32 (10) report on 28 January 2022. Annexed thereto was Annexure A which was a letter addressed to the plaintiff wherein the legal practitioner of defendant gave the following reasons for the delay:

‘The writer hereof was on sick leave from 29 November 2021 to 3 December 2021. When the writer hereof returned from sick leave, she requested an extension and simultaneously contacted client for instructions. The writer hereon called and wrote letters to our client which went unanswered only to be informed that our client is on leave. We only managed to get hold of and consulted with our client on 16 December 2021, whereby we managed to draft the first witness statement. We also had trouble locating our second witness. The phone was off and the emails was (sic) was not being responded to. We only managed to get hold of the second witness on 12 January 2022 and consulted with him. We hereby attached (sic) the draft witness statement.’

[7] The draft unsigned witness statements of Mr Mujetenga and Mr Nangolo were attached. The plaintiff’s legal practitioner advised that he holds instructions to oppose the application for condonation as the plaintiff is prejudiced by the late filing and delay caused in the matter. The defendant reported in terms of Rule 32 (10) that the parties could not resolve the matter amicably.

[8] The defendant however did not comply with the court order to file the application for condonation by 11 February 2022 but did so more than two weeks thereafter on 2 March 2022. This meant that the plaintiff was unable to file an answering affidavit as ordered by the court on 18 February 2022.

[9] The defendant on 7 March 2022 filed a status report indicating that they now managed to file their condonation and indicating that the plaintiff had been informed that the witness statements are now signed and the matter is ready to proceed to trial. The defendant sought new dates for the filing of the answering and replying affidavits and guidance from the managing judge on “the best way forward”. The status report is accompanied by a Rule 32 (10) report to which the following is annexed – a letter addressed to plaintiff dated 3 March 2022 written in terms of Rule 32 (9); the Notice of Motion applying for condonation and upliftment of the automatic bar together with its supporting affidavits; the signed witness statements and a letter from plaintiff’s legal representative reiterating his client’s position to oppose the application.

[10] The defendant in the letter written to the defendant dated 3 March 2022 in terms of Rule 32 (9) explained the delay in filing the application for condonation as follow:

‘Our letters to our client for them to sign the condonation affidavits and witnesses’ statement went unanswered due to our clients point out that they did not know who was and who is handling the matter since the previous legal practitioner of record Ms Ndungula had resigned and her final working day for the Government Attorney was on 28 February 2022. Our clients had difficulties in signing the condonation affidavits and witnesses’ statements since they had some factual enquires and corrections that needed to be made on the affidavits and witnesses’ statements, and therefore, without our client’s knowing which legal practitioner was handling the matter from our office it became a factor in them not signing the documents on time.

We further wish to point out that we had to escalate this matter to the Honourable Minister in order for condonation affidavits and witnesses’ statements and instructions to be finalized. Such meeting was held between our office, our clients and the Honourable Minister on 2 March 2022.’

[My underling]

[11] On the same day i.e. 7 March 2022, the plaintiff filed its answering affidavit and a unilateral status report wherein it indicated, *inter alia*, the following:

‘1...

2. The Defendant has not complied with the Court Order and only filed its application on 2 March 2022. As a result, the Plaintiff could not have filed its answering affidavit timeously and could only file it on 7 March 2022.

3. The Plaintiff submits that the Defendant is barred from filing the Condonation Application, as it was filed out of time and with no leave of the Court. The Plaintiff prays that sanctions in terms of Rule 53 (2) (a) and (b) be applied against the 2 Defendant, and that its defence be struck.’

[12] On 9 March 2022, after hearing the parties, the court ordered the defendant to comply with Rule 32 (9) and (10) on or before 14 March 2022 for its delay in filing the condonation application; to file its reply to the plaintiff’s answering affidavit and to file a supplementary affidavit explaining the failure to file the application for condonation timeously. The court also afforded the defendant an opportunity to file a supplementary answering affidavit. The plaintiff submitted that the defendant once again failed to comply with the court order and only filed its Rule 32 (10) report on 17 March 2022. A Rule 32 (10) report was however filed already on 7 March 2022. On 20 April 2022, the court ordered the parties to file their heads of argument in respect of the respective condonation applications.

#### Submissions/ arguments advanced on behalf of the defendant

[13] Mr Petrus Canisius Nangolo (hereinafter referred to as “Mr Nangolo”), deposed to the affidavit on behalf of the defendant. His explanation for the delay is almost identical to the explanation referred to in paragraph 6 above. He added that he was unaware that there were witness statements which needed to be filed but confirms that the legal practitioner calls and e-mails went unanswered.

[14] Mr Nangolo confirms that his legal practitioner informed him that she had trouble locating the second witness and that she only located him on 12 January 2022. He also

confirms that she informed him that this witness had his phone turned off and the emails she sent went unanswered.

[15] Mr Nangolo submits that the defendant has reasonable prospect of success having regard to the plea. He provided a detailed account of what the defendant's case is. He stated that the plaintiff is claiming payment in respect of a contract in terms whereof the plaintiff was to complete a project in 4 different phases each one with its own deliverables. The deliverables were subject to the defendant's approval and the total amount payable could only take place once the project was completed and all 4 phases were finalised. He further stated that the amount due in respect of the first phase was N\$1 037 500 and that the plaintiff was paid 70% of this amount. The remaining 30% (N\$311 250) was not paid as there were outstanding issues in the Inception Report which were pointed out to the plaintiff. One such issue was the fact that the report was submitted without correction whereas it was required for the plaintiff to ensure that the Inception Report was edited that it had to provide proof that it was done. He stated that the plaintiff was informed that he would be compensated once the remaining issues had been ironed out to the defendant's satisfaction. According to Mr Nangolo, the issues could not be resolved as the plaintiff was not interested in agreeing to complete the first phase but expected payment thereof. The plaintiff was advised to apply for an extension of the contract before its expiry on 31 July 2020 but the plaintiff indicated on 30 June 2020 that it was not in a position to request an extension of the contract. He concluded by stating that he cannot certify payment of the N\$311 250 for work which was not done adequately and N\$3 112 500 for the remaining phases which were not done at all.

[16] Mr Nangolo submits that substantial injustice will ensue to the defendant's if condonation is not allowed and that this would lead to the plaintiff being unjustly enriched at the expense of tax payers.

[17] Mr Nangolo submits that as a Director for Land Reform in Windhoek his duties include supervising employees and staff members in his Directorate of Land Reform in all the regions. Throughout these times he had to travel to regions with no network



coverage which made it difficult to be able to communicate telephonically and by electronic messaging. Mr Nangolo submits that he was unreachable during the period of 11 February 2022 until 1 March 2022 due to work responsibilities. On 1 February 2022 to 14 February 2022 he was traveling in between regions with work responsibilities. From 15 February 2022 he was tasked to prepare their Quarterly Reviews and inputs for the Ministerial Strategic Plan and during this time he conducted Directorate meetings.

[18] Mr Nangolo submits that he only became aware on 1 March 2022 that Ms Ndungula was no longer in the employ of the Office of the Government Attorney and that Ms Hinda and Mr Ilovu will be handling the matter.

[19] In his supplementary affidavit, Mr Nangolo submits that he asked Ms Ndungula to file a supporting replying affidavit and that the same would be filed with his affidavit.

#### Submissions/ arguments on behalf of the plaintiff

[20] Mr Sakaria Hivuluwa Nalusha (hereinafter Mr Nalusha), deposed to the affidavit on behalf of the plaintiff. Mr Nalusha contends that there is no condonation application before this court as the defendant was not granted leave to file an application after 11 February 2022 and as result the defendant is barred from filing the witness statements, and further barred from filing the condonation application. The plaintiff therefore prays that sanctions be imposed against the defendant.

[21] Counsel for the plaintiff argues that the defendant is represented by the Office of the Government Attorney, which office has more than 20 legal practitioners and that in any event, the defendant was at all times represented by two legal practitioners, being Ms Hinda and Ms Ndungula. Counsel argues that no explanation is given as to why Ms Ndungula or any other legal practitioner could not attend to the witness statements.

[22] Counsel argues that Mr Nangolo alleged that his legal practitioner wrote letters and made calls which went unanswered however no letters are attached as proof

thereof, it is not indicated when the letters were written, who were they addressed to or who the calls were made to and why such calls and letters were not answered. Counsel argues that no explanation is given as to why the second witness's phone was off or why he could not reply to his emails, given the fact that he is a public servant.

[23] Counsel argues that there is no averment by the defendant indicating that the defendants' legal practitioner tried contacting him or any other officials at the defendants' office. Despite claiming to have been unavailable, Mr Nangolo does not aver that anyone tried getting hold of him before 1 March 2022. Counsel argues that there is no good cause shown and that the deponent has placed vague statements and not full and complete facts explaining the non-compliance. Counsel argues that the defendant failed to file its witness statements over a period of almost two months, while in respect of the condonation application; the defendant filed the application after almost a month.

[24] Counsel submits that the defendant's vague and incomplete explanations are, if considered, clear that its actions are "glaring" and "inexplicable" and that there was a "flagrant" non-compliance with the rules on the part of the defendant. Counsel further submits that the plaintiff will be prejudiced by the granting of the condonation application. Counsel argues that the plaintiff has to pay legal fees for appearances and drafting of pleadings dealing with the non-compliances by the defendant.

[25] Counsel submits that the defendant has no prospects of success and has not made out a case for condonation to be granted in respect of its failure to file witness statements as ordered, as well as in respect of the failure to file its condonation application for condonation. He refers the court to his witness statement wherein he fully deals with the issues which were raised by the defendant. As result, Counsel prays for the court to refuse the applications and that sanctions be issued against the defendant in terms of Rule 53 (2) (a) and (b) be applied against the defendant, and that its defence be struck. Counsel prays for the defendant to be ordered to pay the plaintiff's costs regardless of the outcome of the applications, on an attorney and client scale.

### Point in limine

[26] The plaintiff raised the failure of the plaintiff to comply with Rule 32 (9) and (10) on or before 14 March 2022 as ordered by the court. The short answer to this point is that the defendant in fact filed such a report on 7 March 2022. The plaintiff's stance remain unchanged and clearly indicated that it intended to oppose any application for condonation which the defendant was to bring. I am satisfied that the objective of Rule 32 (9) and (10) has been adequately met by the defendant and that a genuine attempt was made to explain the delay by the defendant.

### Legal Principles and application to the facts – Condonation Application

[27] The defendant is essentially seeking condonation for failing to comply with the court orders issued on 10 November 2021 and 26 January 2022 respectively. The order issued on 10 November requires that the parties must file their witness statements before or on 3 December 2021. The defendant having failed to do so approached the court with a request to be permitted to file an application condoning such non-compliance. The court then ordered the defendant on 26 January 2022 to file its application before or on 11 February 2022. The plaintiff also failed to do this and only filed its application on 2 March 2022.

[28] The defendant is asking this court that sanctions be issued against the defendant in terms of Rule 53(2) (a) and (b) and that its defence be struck out.

[29] Rule 54. (1) provides as follow:

‘Where a party has failed to comply with a rule, practice direction or court order, any sanction for a failure to comply imposed by the rule, practice direction or court order has effect and consequences for such failure and such effect and consequences follow, unless the party in default applies for and is granted relaxation or extension of time from sanction.’

The effect and consequences which follow from the failure of the defendant to file witness statements within the time provided therefore in the order is clearly stated in Rule 93 (5) which provides as follow:

'If a witness statement for use at the trial is not served within the time specified by the court the witness may not be called to give oral evidence, unless the court on good cause shown permits such witness to give oral evidence.'

[30] The defendant then approached the court for an opportunity to be allowed to bring the application to be granted a relaxation or extension of time from sanction or commonly referred to as an application for condonation. Rule 56 (1) (a) enjoins this court to consider whether this application has been made without delay. In this instance the defendant delayed in filing this application from the 3 December 2021 when it became evident that the defendant would not be able to file the witness(es) statements timeously and not only from 11 February 2022 when the court ordered the defendant to bring the application. The court however must consider the circumstances along the guidelines provided for in Rule 56 to determine in terms of Rule 56(3) whether the defendant has shown good cause for the court to condone it non-compliance with the court order of 10 November 2021.

[31] In *Teek v President of the Republic of Namibia*,<sup>1</sup> the Supreme Court expressed itself on this very question in the following emphatic terms:

'The court has a duty to consider whether the condonation should in the circumstances of the case be granted. In this regard, the court exercises a discretion. That discretion must be exercised in the light of all the relevant factors. These factors include the degree of delay, the reasonableness of the explanation for the delay, the prospects of success, the importance of the case, the interest in the finality of litigation and the need to avoid unnecessary delay in the administration of justice. These factors are not exhaustive.'

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<sup>1</sup> *Teek v President of the Republic of Namibia* 2015(1) NR 51 (SC) at 61 E-H.

[32] The court ordered the applicant on 10 November 2021 to file its witness statement. The legal practitioner of the applicant underwent an operation on 23 November 2021 and was on sick leave since 23 November 2021 until 3 December 2021. The legal practitioner ought to have anticipated that this period would impact on the timelines set by the court for filing the witness statement yet no application in terms of Rule 55 was brought during the eight working days preceding her sick leave. Having failed to do so, the applicant admitted that the delay which was occasioned afterwards was ascribed by the witnesses who did not respond to telephone calls and e-mails. Mr Nangolo explained that he himself had been on sick leave but on his return immediately contacted the legal practitioner. The second witness merely confirmed in the founding affidavit that he failed to respond to telephone calls and e-mails. I am satisfied with the explanation given by Mr Nangolo but I consider the explanation given by the Legal Practitioner and Mr Christof Mutenga to be poor. It lacks essential averments on which the court can glean their reasons for delaying this matter. This court however must consider whether the non-compliance with the court orders was intentional.

[33] The delay in bringing the application is quite substantial. The delay occasioned thereby meant that the finalisation of the matter has been delayed for more than nine months. This does not reflect positively on the efforts by the court to deal with matters expediently and the respondent rightly advanced that he suffered prejudice in that he had to incur costs to deal with the defendant's application. The prejudice complained of may, however, be addressed with an appropriate cost order. Mr Nangolo's explanation for his failure to comply with the court order to bring the application relates to the pressing nature of his duties. This ought not to be an excuse for not attending to urgent matters such as ensuring that there is compliance with court orders. The court cannot, however, conclude that there was a deliberate and intentional failure to do so.

[34] I am reminded in this regard what Angula DJP stated in *Kashe v Veterans Board and Others 2020* (4) NR 1165 (HC) at page 1169, para 15 that:

'... the framers of the rules of this court knew from experience that life is full of vagaries in that things do not always happen according to set rules or plans. They foresaw that it would not always be possible for litigants to abide by the time periods prescribed by the rules. Hence, rule

55 was promulgated dealing with the extension of time and condonation in the event of non-compliance with the time period prescribed by the rules on good cause shown. ...'

[35] It is clear that the defendant's legal practitioner had difficulties with obtaining instructions from the clients and the court accepts the explanation advanced. It does however, not take away the fact that this court's orders were not complied with.

[36] The court however must voice its displeasure in the manner and the delays caused in this matter by the defendant. There has been non-compliance after non-compliance with the court orders by the defendant. Non-compliance with the directions given by this court can never be a minor transgression irrespective of how miniature it may appear to be.<sup>2</sup> Of necessity, the court must express its displeasure by making a punitive costs order. This would simultaneously ensure that the plaintiff is not out of pocket as a result of the delay occasioned by the defendant.

[37] The court takes into consideration that the defendant would not be able to call the witnesses to give oral evidence and it would essentially have the same effect as striking the defence herein. The court considered the applicant's explanation as to its prospects of success and is satisfied that the applicant has shown that it has reasonable prospects that it may succeed with its defence. The court further considers that the witness statements have been drafted and are ready for filing and it gives this court the assurance that the matter may progress to the pre-trial stage. To allow this matter to go to trial and for the issues to be properly ventilated would be a better course to take to bring the matter to its close. Consequently the court therefore grants the defendant condonation for non-compliance with the court orders dated 10 November 2021 and 26 January 2022.

### Costs

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<sup>2</sup> *Shihepo v Project Hope Namibia* (HC-NLD-CIV-ACT-CON-2021/00218) [2022] NAHCNLD 61 (13 June 2022).

[38] I have already hereinabove determined that this is a case where the court ought to grant a punitive cost order. I have come to the conclusion that the opposition raised by the plaintiff was not unwarranted. In light of this, the defendant is to pay the costs of the application on an attorney and client scale and not limited in terms of Rule 32(11).

[39] In the result the court makes the following order:

1. The defendant's application for condonation of the late filing of the condonation application is granted.
2. The defendant's application for condonation for the late filing of the witness statement and upliftment of the bar, is granted;
3. The defendant is directed to file its witness statements on or before 8 September 2022.
4. The applicant is to pay the respondent's costs on an attorney and client scale and the costs is not limited in terms of rule 32(11).
5. The parties are to file joint pre-trial report in WORD format on or before 15 September 2022.
6. The case is postponed to 21 September 2022 at 08h30 for Pre Trial Conference.

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MA TOMMASI  
Judge

## APPEARANCES:

PLAINTIFF:           A Shimakaleni  
  of Appolus Shimakaleni Lawyers, Windhoek

DEFENDANT:          N Tjahikika  
  of Office of the Government Attorney, Windhoek