

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

<b>Case Title:</b>  JJRK Investments CC  and  Taiyo Namibia (Pty) Ltd	<b>Plaintiff</b>    <b>Defendant</b>	<b>Case No:</b> HC-MD-CIV-ACT-CON-2021/02436	<b>Division of Court:</b> Main Division	<b>Heard on:</b> 6 September 2022	<b>Delivered on:</b> 27 September 2022
<b>Neutral citation:</b> <i>JJRK Investments CC v Taiyo Namibia (Pty) Ltd</i> (HC-MD-CIV-ACT-CON-2021/02436) [2022] NAHCMD 505 (27 September 2022)					
<b>Order:</b>					
<ol style="list-style-type: none"><li>1. The plaintiff's condonation application in respect of its failure to file witness statements, is dismissed.</li><li>2. The plaintiff is ordered to pay the defendant's costs occasioned by the above application.</li><li>3. The plaintiff's condonation application in respect of its failure to file a replying affidavit, is dismissed. I make no order as to costs in respect of this application.</li><li>4. The matter is postponed to 26 October 2022 at 15h15 for status hearing.</li><li>5. The parties shall file a joint status report on or before 19 October 2022.</li></ol>					
<b>Reasons for order:</b>					
USIKU J:					

## Introduction

- [1] The matters for determination by this court are two applications by the plaintiff, namely:
- (a) an application for condonation in respect of plaintiff's failure to file witness statements, and
  - (b) an application for condonation in respect of plaintiff's failure to file its replication to the defendant's answering affidavit.

## Background

[2] By court order dated 2 December 2021, the plaintiff was directed to file its witness statements on or before 31 January 2022. The plaintiff did not do so.

[3] By court order dated 11 May 2022, the plaintiff was directed to file its replying affidavit to the defendant's answering affidavit, on or before 2 May 2022. Again, the plaintiff did not file its replying affidavit by that date.

[4] The defendant opposes the condonation application in respect of plaintiff's failure to file witness statements. The condonation application in respect of plaintiff's failure to file a replying affidavit is unopposed.

## The condonation applications

[5] The plaintiff explains that during the beginning of December 2021, plaintiff was requested by its legal practitioners of record, to deposit funds with them so that they continue appearing for the plaintiff during trial. The plaintiff did not provide its legal practitioners with the requested funds. As a result the plaintiff's legal practitioners withdrew. The plaintiff further states that due to the Covid pandemic and its effects, it was not easy for the plaintiff to obtain the necessary funds. The plaintiff only furnished the requested funds on 16 March 2022. For the above reasons, the plaintiff failed to file its witness statements by 31 January 2022.

[6] In regard to the issue of bona fide defence on the merits of the main case, the plaintiff avers that the plaintiff's case is based on a written agreement, which was drafted by the defendant. The plaintiff states that it complied with its obligations in terms of the agreement and

the defendant failed to honour the agreement.

[7] In regard to its failure to file its replying affidavit by 27 May 2022, the plaintiff explains that on 19 May 2022 its legal practitioner, Mr Helmut Stolze, who works in Windhoek, forwarded to Ms Hilya Neshuku, who works in Swakopmund, the plaintiff's draft replying affidavit. Together with instructions to consult with plaintiff who resides in Walvis Bay, and have the replying affidavit signed and filed timeously.

[8] On 27 May 2022 at 20h00, Mr Stolze followed up on the issue with Ms Neshuku. However, Ms Neshuku came to realise that due to technical difficulties that occurred with her laptop, those instructions were never received by her and consequently the date and time to file the replying affidavit had already lapsed.

[9] On Monday 30 May 2022, plaintiff's legal practitioners informed the defendant's legal practitioner about what transpired and the defendant's legal practitioner indicated that they will not oppose the plaintiff's late filing of the replying affidavit.

[10] On the issue of prospects of success on the merits for the main case, the plaintiff avers that its claim is based on a written agreement that was drafted and presented by the defendant. The plaintiff complied with the terms and conditions of the agreement, the defendant breached the said agreement.

### Analysis

[11] The legal principles applicable to condonation applications are trite and I deem it not necessary to repeat them here.

[12] In the present application the plaintiff is required to show good cause for its failure to deliver its witness statement. The court shall then take into account the degree of lateness, the reasons for the lateness and the plaintiff's prospects of success on the merits and any other relevant factor.

[13] In showing good cause, the plaintiff is required to provide an explanation to establish how and why the default occurred, for each period of the delay.

[14] It is trite that condonation is not to be had merely for the asking. A full and detailed explanation for the default is necessary to enable the court to understand clearly how the delay occurred and the reason therefor.

[15] In the present matter the plaintiff was ordered to deliver its witness statements on or before 31 January 2022. The plaintiff has not done so.

[16] The explanation furnished by the plaintiff for the delay is that the plaintiff could not, during the period of December 2021, put its legal practitioners in sufficient funds to enable the legal practitioners to continue representing it. According to the plaintiff, it could only put its legal practitioners in funds on 16 March 2022.

[17] The explanation for the non-compliance with the court order dated 2 December 2021, is scant. It would appear that the plaintiff and its attorneys were aware during December 2021 that they would not be able to comply with the court order on account of insufficient funds on the part of the plaintiff. However, despite this knowledge the plaintiff did not apply for extension of time within which to file the witness statements.

[18] In addition to the foregoing, lack of funds, on its own, does not constitute a reasonable explanation for the non-compliance with a court order or for the delay. When pleading lack of funds as a cause for a delay, an applicant is required to provide more than a mere assertion that the reason for the delay or non-compliance was lack of funds. The applicant is required, in those circumstances, to explain when and how the funds were eventually raised. If there was any further delay after the funds were raised, the applicant is required to provide an explanation for such further delay.

[19] In the present case the plaintiff relied on lack of funds as the only explanation for the delay. The explanation offered for the non-compliance with the court order of 2 December 2021 is not reasonable nor acceptable in that it does not explain:

- (a) when the plaintiff made efforts to raise the required funds;
- (b) when and how the funds were eventually raised; and
- (c) when, after raising the funds, did the plaintiff start making efforts to apply for condonation.

[20] The explanation offered by the plaintiff for the non-compliance with the court order dated 2 December 2021 is not reasonable nor acceptable, and stands to be rejected.

[21] In regard to the explanation for the non-compliance with the court order dated 11 May 2022 (failure to file a reply affidavit), the substance of the explanation is that, “due to technical difficulties” that occurred with Ms Neshuku’s laptop, the instructions forwarded by Mr Stolze for Ms Neshuku to draft the replying affidavit, were not received by Ms Neshuku, and therefore the replying affidavit was never prepared.

[22] The plaintiff does not explain:

- (a) the nature of the “technical difficulties” that occurred to Ms Neshuku’s laptop; and
- (b) when were those difficulties detected and how were they eventually rectified or repaired.

[23] The explanation furnished is short of details and does not put the court in a position to understand how and why the delay occurred. I am, therefore, of the view that the explanation furnished by the plaintiff for the non-compliance with the court order dated 11 May 2022 is neither reasonable nor acceptable and stand to be rejected.

[24] I now turn to the issue of prospect of success on the merits. A consideration of prospects of success implies a determination of the likelihood of success when the main case is heard. The test is whether an applicant for condonation would succeed in the main action if the facts pleaded by it in the condonation application were established at trial.

[25] In the present matter, the plaintiff asserts that its claim in the main action is based on a written agreement that was drafted and presented by the defendant. The plaintiff alleges that it complied with the terms and conditions of the agreement and the defendant breached the agreement. The plaintiff therefore submits that it has prospects of success on the merits.

[26] I am not persuaded that the plaintiff has set forth, briefly and succinctly, essential information as may enable the court to assess the plaintiff’s prospects of success. In its particulars of claim, the plaintiff pleaded that the parties had entered into a “facilitation agreement” in terms of which the plaintiff was to “facilitate” the sale of quota between the defendant and certain Tukondja Enterprises (Pty) Ltd. In terms of the agreement the plaintiff was

to receive payment in the amount of N\$1 021 077.52. The defendant breached the agreement in that, despite the plaintiff's attempts to "facilitate" the sale of the quota, the defendant refused or alternatively declined to accept such offers. As a result of defendant's repudiation of the agreement, the plaintiff suffered damages in the sum of N\$4 552 275. The plaintiff therefore seeks payment of the above amounts plus ancillary relief.

[27] Against the above summary of the facts pleaded by the plaintiff in its particulars of claim, I am not persuaded that the facts put forth by the plaintiff in the condonation application enable the court to assess that it has good prospects of success. I am therefore of the opinion that the plaintiff has failed to establish that it has reasonable prospects of success at trial.

[28] In conclusion, I am of the opinion that the plaintiff's applications for condonation stand to be dismissed.

[29] With regard to the issue of costs, I am of the view that the defendant was justified to oppose the application for condonation. The defendant is therefore entitled to costs in respect of its opposition to the condonation in respect of the non-compliance with the court order dated 2 December 2021.

[30] In the result, I make the following order:

1. The plaintiff's condonation application in respect of its failure to file witness statements, is dismissed.
2. The plaintiff is ordered to pay the defendant's costs occasioned by the above application.
3. The plaintiff's condonation application in respect of its failure to file a replying affidavit, is dismissed. I make no order as to costs in respect of this application.
4. The matter is postponed to 26 October 2022 at 15h15 for status hearing.
5. The parties shall file a joint status report on or before 19 October 2022.

<b>Judge's signature</b>	<b>Note to the parties:</b>
B Usiku Judge	Not applicable

<b>Counsel:</b>	
<b>Plaintiff:</b>	<b>Defendant:</b>
H Stolze Masiza Law Chambers, Windhoek	M Kuzeeko Dr Weder, Kauta & Hoveka Inc., Windhoek