

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Kerii Architects & Designers and Nice Consulting Engineers (Pty) Ltd	Plaintiff Defendant	Case No: HC-MD-CIV-ACT-CON-2021/02257 Division of Court: Main Division Heard on: 9 September 2022
Heard before: Honourable Mr Justice Usiku	Delivered on: 29 September 2022	
Neutral citation: <i>Kerii Architects & Designers v Nice Consulting Engineers (Pty) Ltd</i> (HC-MD-CIV-ACT-CON-2021/02257) [2022] NAHCMD 515 (29 September 2022)		
Order: <ol style="list-style-type: none">1. The defendant's application for condonation is dismissed.2. The defendant is ordered to pay the plaintiff's costs occasioned by the condonation application. Such costs shall not be subject to the limit imposed by rule 32(11).3. The matter is postponed to 26 October 2022 at 15:15 for status hearing.4. The parties shall file a joint status report on or before 19 October 2022.		
Reasons for order:		
USIKU J: <u>Introduction</u> [1] Serving before this court for determination is a condonation application by the defendant in respect of its failure to file its witness statements ordered by this court on 14 March 2022. <u>Background</u>		

[2] The court order dated 14 March 2022 directed the defendant, among other things, to file its witness statements on or before 6 April 2022. The defendant did not comply with the aforesaid direction.

[3] The defendant has filed a condonation application in respect of the non-compliance with the aforesaid court order. The plaintiff opposes the application.

The condonation application

[4] The defendant explains that the reason for the non-compliance was that the defendant's legal practitioners 'did not have regard to the contents of the court order until the time due for filing the witness statements had lapsed'. The defendant further explains that its legal practitioners 'only had regard and took cognizance of the court order dated 14 March 2022 after the time for filing the witness statements had lapsed'. According to the defendant this 'was as a result of a genuine administrative/clerical oversight'.

[5] As regards the issue of prospects of success on the merits, the defendant avers that the plaintiff relies on an agreement between the parties in respect of a tender for a development project of the Ministry of Higher Education. The defendant disputes that such agreement was concluded between the parties. In denying the existence of the agreement, the defendant also denies the averments made by the plaintiff to the effect that the plaintiff had performed its obligations in terms of the agreement. The defendant therefore submits that it has placed before the court sufficient facts that it has reasonable prospects of success on the merits.

[6] In its answering papers the plaintiff submits that the defendant has not complied with the provision of rule 32(9). The plaintiff states that the defendant did not meaningfully engage the plaintiff before filing its condonation application. Therefore, the condonation application warrants to be struck from the roll or be dismissed with costs, which costs should not be limited in terms of rule 32(11).

[7] As regards the merits of the application, the plaintiff contends that the defendant has failed to advance a reasonable and acceptable explanation for its failure to comply with the relevant court order. Furthermore, the plaintiff contends that the defendant has failed to demonstrate that it has good prospects of success on the merits. The plaintiff therefore submits

that the application be dismissed with costs and that such costs not be subject to the limit imposed under rule 32(11).

Analysis

[8] The legal principles applicable to condonation applications are trite and I am not going to repeat them here. Suffice it to say that in the present case the defendant is required to show good cause for the non-compliance with the relevant court order and show that it has prospects of success on the merits of the main case.

[9] In showing good cause, the defendant is required to provide an explanation establishing how and why the non-compliance (or default) occurred, for each period of the delay.

[10] In the present case the defendants' explanation for the non-compliance is that its legal practitioner 'did not have regard to the contents of the court order until the time for filing witness statements had lapsed'.

[11] The issue now is whether the explanation put forth by the defendant amounts to a reasonable and acceptable explanation for the non-compliance. From the substance of the explanation itself, it would appear that if the defendant's legal practitioner had regard to the contents of the court order, the witness statements would have been delivered timeously.

[12] In my opinion the explanation given by the defendant lacks details in material respects. It does not explain:

- (a) what transpired after the court order was issued on 14 March 2022;
- (b) in what respects did the defendant's legal practitioner not have regard to the contents of the order,
- (c) when did the contents of the court order come to the attention of the defendant's legal practitioner, and
- (d) when, after 6 April 2022, did the non-compliance with the court order come to the attention of the defendant or its legal practitioner.

[13] There is no evidence that the defendant took any effort to comply with the relevant court order. Furthermore, there is no evidence why the defendant's legal practitioner disregarded the

contents of the relevant court order.

[14] I am of the opinion that the explanation put forth by the defendant is unreasonable and unacceptable in the circumstances and falls to be rejected.

[15] As regards the requirement of showing prospects of success, the test is whether the defendant has set out facts in its condonation application which, if established at the trial, give the defendant a chance of success when the main case is heard.

[16] In its application for condonation, the defendant denies having concluded an agreement with the plaintiff and denies that the development project in question required the services of an architect. The defendant then avers that it has reasonable prospects of success.

[17] In the present case, I am not persuaded that the defendant has set forth, briefly and succinctly, essential information to enable the court to assess its prospects of success. For the foregoing reason the submission by the defendant to the effect that it has established reasonable prospects of success on the merits stands to be rejected.

[18] As regards the issue of costs, I am of the opinion that the plaintiff is the successful party and is entitled to its costs. In this matter, the defendant was previously directed in the court order dated 28 September 2021 to file its witness statements by 3 December 2021. The defendant failed to do so. The non-compliance was condoned by this court on 14 March 2022. The issue of the previous non-compliance, albeit explained, and the lack of a reasonable and acceptable explanation in the present case, persuades me to grant costs that are not subject to the limitation imposed by rule 32(11).

[19] Accordingly, the defendant's condonation application stands to be dismissed with costs.

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

1. The defendant's application for condonation is dismissed.
2. The defendant is ordered to pay the plaintiff's costs occasioned by the condonation application. Such costs shall not be subject to the limit imposed by rule 32(11).
3. The matter is postponed to 26 October 2022 at 15:15 for status hearing.
4. The parties shall file a joint status report on or before 19 October 2022.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
Mr Tjitere Dr Weder, Kauta & Hoveka Inc., Windhoek	Ms Chinsebu Henry Shimutwikeni & Co Inc., Windhoek