HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

IN THE HIGH COURT OF NAMIBIA

Case Title: BANK WINDHOEK LIMITED VS WINFRIED VINZENZ LEITNER AND 2 OTHERS	**Case No:** HC-MD-CIV-ACT-CON-2020/02299 **Division of Court:** HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	**Date of hearing:** 16 February 2022 **Date of order:** 8 March 2022

Neutral citation: *Bank Windhoek Limited v Leitner* (HC-MD-CIV-ACT-CON-2020/02299) [2021] NAHCMD 96 (8 March 2022)

Results on merits:

Application for condonation. Merits not considered.

The order:

Having heard **MS KISHI**, for the Plaintiff and **MR VAATZ**, for the Defendants, and having read the documents filed of record:

IT IS HEREBY ORDERED:

1. The application in terms of rule 61 is upheld and the defendants' rule 56 proceedings are hereby set aside.
2. Defendants to pay the costs of this application limited to rule 32(11).

Further conduct of the matter

3. The matter is postponed until 31 March 2022 for pre-trial conference.
4. The Parties should file an amended proposed pre-trial order must be filed on or before 27 March 2022, if so advised.

Reasons for orders:

Introduction and brief background

[1] Before this court, is an application filed in terms of Rule 61. 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.

[2] The defendants were ordered to file their witness statements in terms of a court order dated 4 February 2021. The defendant's failure to file their witness statements timeously in terms of the court order dated 4 February 2021 brought about the plaintiff filling an application to have the defendants defence dismissed in terms of rule 53 (2) and (b) and or (c) and in the alternative precluding the defendants from calling witnesses to give evidence at trial in terms of rule 93 (5). The defendants as a result filed their notice to oppose the said application and their condonation application for the late filing of their witness statement (which witness statements were filed without leave from the court).

[3] This court adjudicated the condonation application on the papers, and on 8 July 2021, this court dismissed the defendants' application for condonation[1]. The refusal of the condonation application therefore had the effect that the defendants remained barred from filing their witness statements and were precluded from relying on witness statements during the trial.

[1] *Bank Windhoek Limited v Leitner* (HC-MD-CIV-ACT-CON-2020/02299) [2021] NAHCMD 326 (8 July 2021).

[4] The matter was postponed to 29 July 2021 for the parties to file a status report setting out the further conduct of the matter. Covid 19 caused a further setback in the prosecution of this matter when the country went into yet another lock-down, and all matters were attended to from chambers. On 6 September 2021, the parties approached the court and requested that a pre-trial conference be held, which was scheduled for 21 October 2021. During the pre-trial conference, the court raised the issue of the witness statements with Mr Vaatz again as the defendants had some options at their disposal in this regard, in terms of the Rules of Court. Mr Vaatz then indicated that he intends to bring an application for relief from sanctions in terms of rule 56.

[5] Mr Vaatz proceeded to file the application in terms of rule 56 on 18 November 2022, which gave rise to the current application as the plaintiff is of the view that application in terms of rule 56 constitutes irregular proceedings and a second application for condonation.

Application

[6] An application in terms of rule 61(1) was brought in the following terms:

> 'i) That the intended application in terms of Rule 56 by the Respondents, dated 18 November 2021, constituted an irregular step or proceeding pursuant to Rule 61(1) of the Rules of this Honourable Court,
>
> ii) That the application brought about by the Respondents be struck and set aside as an irregular proceeding and that the Respondents be ordered to pay the costs of the application *de bonis propriis*.
>
> iii) Further and/or alternative relief.'

Arguments advanced

[7] When I use the words 'submit' and 'argue' and their derivatives in the course of this judgment, they must be understood to encompass both the heads of arguments and the oral submissions made in court.

On behalf of the plaintiff

[8] Ms Kishi argued that the defendants' application constitutes an irregular proceeding since the court previously refused condonation. Ms Kishi argued that there are several other options open to the defendants, i.e.:

> a) a rescission application in terms of rule 103 of the Rules of Court;

b) an appeal against the ruling dated 8 July 2021, and

c) an application in terms of rule 93(5) to lead oral evidence at the trial.

[9] Ms Kishi argued that the defendants could not apply for condonation twice in respect of the same failure.

[10] Ms Kishi referred the court to *Schameerah Seven (7) Reg: CC 2003/2211 v Standard Bank of Namibia*[2], where the court states as follows:

'[19] This is not to say litigants must accept judgments against them with no interrogation whatsoever. There are channels provided by law for dissatisfied litigants in respect of High Court judgments, namely appeal and/or review before the Supreme Court.'

[11] Counsel argued that the third option available to the defendants is to apply for leave to lead oral evidence during the trial, and in this regard, counsel referred the court to *Ewert v Coetzer*[3], which bears certain similarities to the matter before this court. In the *Ewert* matter, the application for condonation for the late filing of witness statements was also refused by the court as in the current matter. However, the plaintiff's claim in the *Ewert* matter was dismissed. At the trial proceedings, the court directed the parties to show cause why the plaintiff should not be allowed to testify in terms of rule 93(5) of the Rules of Court.

[12] I was specifically referred to para 37 of the judgment where Ueitele J remarked as follows:

'[37] I furthermore do not agree with Mr Naude that the plaintiffs' are impermissibly reopening the application for condoning the late filing of the witness statement. I say so because of the following reason; the second leg of the court order of 02 July 2018 is again clear, it calls upon the plaintiff to show cause why she must at the trial of the matter be allowed to give oral evidence. This order is in line with Rule 93 (5) which contemplates the situation the plaintiffs find themselves in, namely that the plaintiffs' witness statement was filed out of time, the plaintiff could therefore not call the witness who deposed to the statement to testify at the trial. In fact the court on 02 May 2018 said that much. But that is not the end of the matter because the rule, that is Rule 93(5), empowers the court to, on 'good cause' shown, permit a witness who is otherwise 'barred' to participate and testify at the hearing. For this reason also the question of whether or not the plaintiff must be allowed to testify at the trial is not res *judicata.* The court did not

[2] (HC-MD-CIV-MOT-REV-2020/00355) [2021] NAHCMD 114 (2 March 2021) at para 19.
[3] (HC-MD-CIV-ACT-OTH-2016/02233) [2019] NAHCMD 53 (31 January 2019).

deal with that aspect, it was simply concerned with whether or not to condone the late filing of the plaintiffs' witnesses' statements.'

[13] Ms Kishi argued that the institution of the application in terms of rule 56 by the defendants prejudiced the plaintiff in the following ways:

a) The intended application requires that the plaintiff must answer on an irregular matter. A matter in which the court has pronounced itself and is thus *fuctus officio*.
b) To answer this application consumes time and resources that could have to be allocated differently and lead to unnecessary legal costs.
c) The step taken by the defendants is bad in law.
d) It creates legal chaos and uncertainty.
e) The defendants are protracting and delaying the proceedings, and as a result, the plaintiff will be unable to obtain the relief it is entitled to.

[14] On the issue of costs, Ms Kishi submitted that Mr Vaatz was cautioned on various occasions that the step he intends to take is irregular. Still, Mr Vaatz persisted in filing the application, resulting in an irregular step. As a result, Ms Kishi submitted that cost *de bonis propriis* should be granted as the application brought by the defendants is vexatious and malicious and a mere delaying tactic.

<u>On behalf of the defendants</u>

[15] Mr Vaatz argued that if one has regards to the wording of rule 56(1), which reads as follows:

'(1) On application for relief from a sanction imposed or an adverse consequence arising from a failure to comply with a rule, practice direction or court order, the court will consider all the circumstances, including -..'

then it is clear that an application under this rule can only be made if some previous order caused harsh sanctions or adverse consequences.

[16] Mr Vaatz argues that the application in terms of rule 56 is not a duplication of the previous application, which this court dismissed. Mr Vaatz further submits that the defendants do not query the court's discretion to dismiss an application for condonation; however, in the current matter, the refusal of the condonation had as a consequence a harsh penalty as the defendants could

not file their witness statements and thus cannot lead evidence at the trial.

[17] Mr Vaatz submitted that the refusal to grant condonation created an adverse consequence and all the defendants want to accomplish by employing rule 56 is that different sanctions be imposed. Counsel submits that this cannot be to the prejudice of the plaintiff as the plaintiff already has the witness statements available and can therefore not be disadvantaged in the conduct of the trial.

[18] Mr Vaatz argued that if one has regard to the plaintiff's argument, then the only real complaint raised by the plaintiff is that the defendants' application is a duplication. Mr Vaatz expressed his surprise that the plaintiff would argue that the defendants should have filed an application in terms of rule 93(5) as, in his view, such an application would be more prejudicial to the plaintiff than an application in terms of rule 56. Mr Vaatz submitted that the outcome of the two applications would be the same, namely that the defendants' witnesses would be able to testify during the trial.

[19] Mr Vaatz is of the view that the plaintiff cannot show any prejudice as required in terms of rule 61(2).

Discussion

[20] Rule 53 deals explicitly with sanctions for failure to comply with the rules, practice direction or court order or a direction issued by a managing judge.

[21] Rule 55 sets out the options available to a party who wishes to seek extension, relaxation or condonation in respect of anticipated default or a past non-compliance. The defendants brought an application in terms of rule 55(1) for condonation for their past non-compliance, which application was dismissed and the sanctions entailed the defendants being barred from using their witness statements during the trial. This is a sanction for the non-compliance and falls within the ambit of rule 53.

[22] In *Tsumeb Mall (Pty) Ltd v Hallie Investment Number Two Hundred and Twenty-Two*[4] Usiku J discussed the rules 53, 54, 55 and 56 and under which circumstances to apply the relevant rules. In his discussion on sanctions imposed in terms of rule 53(2) the learned judge

[4] (I 724/2016) [2019] NAHCMD 201 (21 June 2019)

stated as follows:

'[29] The example of a court order given above is different from a court order imposing sanctions in terms of rule 53(2) in circumstances where the defaulting party was afforded opportunity to explain the default and to show cause why the sanctions contemplated under that rule should not be imposed. If the defaulting party was afforded an opportunity to explain why the failure or default occurred and the party either failed to furnish the explanation or having furnished the explanation such explanation is found to be not a good reason for the default and the court imposes sanctions pursuant thereto, such party, in my opinion, cannot as happened in the present case, merely apply for relief from the sanctions.

[30] In other words, rule 53 contemplates imposition of sanctions on a defaulting party after the court had afforded a defaulting party an opportunity to explain the default and such party either fails to explain or the explanation is found by the court not to be reasonable[5].Whereas the effect and consequences of failure to comply with a rule or court order referred to under rule 54 follow automatically upon the default without affording the defaulting party an opportunity to be heard. In my opinion, the application for relief from sanctions referred to under rule 56 applies in respect of a failure to comply with a rule or court order referred to under rule 54 and does not apply to sanctions imposed under rule 53.

[23] It is clear from the aforementioned case that the defendants do not have the option to apply for relief from sanctions in terms of rule 56.

[24] It is further quite clear that the defendants were aware of this limitation as the defendants' Notice of Motion seeking relief from sanctions in terms of rule 56 is coached in the following terms:

'…the 1st Defendant intends to make an application for relief from sanctions or adverse consequences in terms of Rule 56 of the rules of court and apply for the an order in the following terms:
1) that the 1st and 2nd Defendants be allowed to give evidence at the trial as witnesses in their cause and in line with their witness statements dated 23rd April 2021 and filed on 28th April 2021;
2) that the court imposes a different sanction to that imposed as a result of refusing 1st Defendants application for condonation on 23 April 2021;
3) alternatively that 1st & 2nd Defendants be permitted to appeal against the court's ruling in response to the application for condonation.'

[5] Rule 53(1) reads: '(1) If a party or his or her legal practitioner, if represented, without reasonable explanation fails to -
(a) – (d)……
the managing judge may enter any order that is just and fair in the matter including any of the orders set out in subrule (2).
(2)……'

[25] The application by the defendants is a mishmash for different reliefs sought but certainly not relief in terms of rule 56. Prayer a) of the Notice of Motion is essentially an application in terms of rule 93(5), prayer b) borders on an application for rescission of the court order dated 8 July 2021 and prayer c) is a leave to appeal the decision dated 8 July 2021. These relief prayed for by the defendants are exactly the options discussed by the plaintiff as possible recourse available to the defendants. None of the prayers as set out in the Notice of Motion falls within the ambit of rule 56. Each one of these prayers constitute an independent and substantive application. The defendants' application is misguided and wrong.

[26] The defendants are seeking for a different sanction to be imposed but there is no basis in law to bring a condonation application upon a condonation application based on fundamentally the same facts. The defendants' recourse lay elsewhere and in my view it would lay in rule 93(5). The defendants are reminded that a condonation application is interlocutory in nature and thus not easily appealable. The non-compliance by the defendants was of a procedural nature and the refusal of the condonation application did not dispose of the relief claimed, either in part or as a whole.

[27] To allow the defendants to proceed with the application for relief from sanctions in terms of rule 56 would be a second bite to the condonation cherry, which would be irregular. The rule 61 proceedings were thus correctly raised.

Costs

[28] Ms Kishi argued that the court must imposed cost on a *de bonis propriis* basis against the opposing counsel. I am of the view that the circumstance of the current matter requires neither punitive costs nor does it call for *de bonis propriis* costs. I am of the view that the cost for this application should be limited to rule 32(11).

[29] My order is as above.

Judge's signature	**Note to the parties:**

	Not applicable.
Counsel:	
Plaintiff /Applicant	**Defendants/Respondents**
Ms F Kishi Of Dr. Weder. Kauta & Hoveka Inc.	Mr A Vaatz Of Andreas Vaatz & Partners.