

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING IN TERMS OF PRACTICE DIRECTIVE 61

<b>Case Title:</b>  Whitney Snyder  and  Minister of Health and Social Services Government of the Republic of Namibia	Plaintiff   1 <sup>st</sup> Defendant 2 <sup>nd</sup> Defendant	<b>Case No:</b> HC-MD-CIV-ACT-DEL-2022/00608
		<b>Division of Court:</b> Main Division
		<b>Heard on:</b> 30 March 2023
<b>Heard before:</b> Honourable Justice Usiku	<b>Delivered on:</b> 24 April 2023	
<b>Neutral citation:</b> <i>Snyder v Minister of Health and Social Services</i> (HC-MD-CIV-ACT-DEL-2022/00608) [2023] NAHCMD 215 (24 April 2023)		
<b>Order:</b>  <ol style="list-style-type: none"><li>1. The defendants' application for condonation of failure to file their plea, is granted.</li><li>2. The automatic bar is uplifted.</li><li>3. The defendants are ordered to pay the costs of the plaintiff, jointly and severally, the one paying the other to be absolved. Such costs shall not be capped in terms of rule 32(11).</li><li>4. The matter is postponed to 17 May 2023 at 15h15 for a further case planning conference.</li><li>5. The parties shall file a further joint case plan on or before 10 May 2023.</li></ol>		

**Reasons for order:**

USIKU J:

Introduction

[1] This is an opposed interlocutory application in which the defendants seek condonation of their non-compliance with a court order dated 17 July 2022 wherein they were directed to file their plea on or before 5 August 2022, but failed to do so. On 11 August 2022, the defendants' legal practitioner addressed a letter to plaintiff's legal practitioner indicating, among other things, that the defendants intend to deliver a condonation application. Their condonation application, however, was only filed on 13 October 2022 (about two months later).

Application for condonation

[2] The present application was filed on 13 October 2022 and the defendants seek the following order:

- (a) condoning the defendants' non-compliance with the case plan order dated 19 July 2022;
- (b) uplifting the automatic bar as a result of the non compliance with the aforementioned court order;
- (c) granting the defendants leave to file their plea;
- (d) granting the plaintiff wasted costs occasioned by the defendants' non compliance.

[3] Mr Joseph Siseho, the head of the Directorate of Legal Services in the Ministry of Health and Social Services ('the Ministry'), deposed to the defendants' founding affidavit. According to Mr Siseho, once a civil action is instituted against the Ministry and the Government by a State hospital patient, the practice is for his office to obtain the patient's hospital file from the hospital in question, to consider the medical records therein vis-à-vis the nature of the civil claim and to thereafter, provide the Ministry's instructions to the Government Attorney. The consideration of the medical records vis-à-vis the patient's grievances is often with the assistance of a medical expert in the particular matter. The challenge experienced sometimes is that the medical experts are often busy professionals rendering critical care to the public and sometimes take long to provide the sought medical opinions on alleged medical negligence claims.

[4] In this matter, according to Mr Siseho, there was a delay in the provision of the plaintiff's hospital file and medical records by the Otjiwarongo State hospital. They could not find the medical file and looked for it for some time. Mr Siseho avers that some medical files and records end up at the Health Professions Council of Namibia and all these places were checked whilst they awaited them at the Ministry's head office. He avers that his office's inability to and the long delay in the location of the plaintiff's hospital file resulted in the delay in the Ministry's provision of the defendants' instructions to the Government Attorney for the timeous preparation and filing of the defendants' plea.

[5] A copy of the plaintiff's medical file, as stated by Mr Siseho, was only located and availed to the Government Attorney on 8 August 2022. This was already late as the defendants' plea was due not later than 5 August 2022. Even after the plaintiff's medical file and records were located, Mr Siseho contends, they still could not provide the Government Attorney with the instructions for the preparation of the plea as the defendants still required the medical experts' assessment of the records and the treatment complained of. The defendants only received the expert opinion at the end of September 2022, after the scheduled case management conference hearing on 21 September 2022.

[6] As far as reasonable prospects of success of the defendants' case is concerned, Mr Siseho asserts that the defendants will rely on the expert medical assessment of the plaintiff's treatment and care complained of. According to the assessment, there was no medical negligence as alleged by the plaintiff. The defendants' explanation of the treatment is that the plaintiff suffered from a rare pregnancy complication that resulted in the treatment and care rendered to her. The alleged physical abuse of the plaintiff is disputed.

[7] In his supporting affidavit, counsel for the defendants, Mr Khupe, confirms that the non-compliance relating to the non-filing of plea, was as a result of the Ministry's challenges in obtaining the information on the plaintiff's treatment and care, the subject of this civil action, from the Otjiwarongo State Hospital. Without the plaintiff's medical file and medical records, the defendants could not assess the treatment complained of to provide the necessary instructions to their legal practitioners for the timeous preparation and filing of the defendants' plea.

[8] Mr Khupe, concedes that he, as defendants' legal practitioner, should and could have approached the plaintiff seeking extension of the period for the filing of plea. According to Mr

Khupe, he did not take the pro-active approach because the Ministry did not inform him of the difficulty it was experiencing with the plaintiff's medical file and records.

[9] It is Mr Khupe's assertion that soon after the defendants fell foul of the court's case plan order dated 19 July 2022, the outstanding medical file and records were located. They were availed to him on 8 August 2022, some 3 days after the deadline to file the plea lapsed. A plea could not be prepared on the medical records on their own. There was still the need to consult with the relevant witnesses, the State nurses and doctors that treated the plaintiff and whose treatment and care is the subject of the plaintiff's substantial damages claim. Further, the defendants' legal practitioner and the defendants required a reasonable opportunity to consult with the relevant witnesses and for the preparation of the plea. The said consultation included the assessment of the treatment and care rendered to the plaintiff by independent medical experts in the field before the defendants' answer to the plaintiff's claim could be prepared and filed.

[10] Whilst the expert opinion on the treatment complained of has since been obtained, Mr Khupe avers that he still requires to consult with the relevant witnesses at the Otjiwarongo State hospital before the defendants' plea can be prepared and filed. A reasonable opportunity to do so will be required by the defendants if the court does condone the non-compliance with the case plan order aforesaid.

[11] Mr Khupe concedes that the delay in not promptly bringing the condonation application is his and cannot be faulted on the defendants themselves as it is a technical procedural issue.

Mr Khupe explains that he was unable to institute the interlocutory application promptly due to the overwhelming work pressure currently being experienced at the Government Attorney's office, where he has been employed for more than 20 years now. The situation, according to Mr Khupe, has not been as difficult as it is now.

[12] In conclusion, Mr Khupe avers that the omission to institute this interlocutory application was not willful and a proper case has been made out for the condonation sought. It is however, accepted by Mr Khupe that the plaintiff must not be put out-of-pocket because of the defendants' non-compliance with the court order dated 19 July 2022. It is in these circumstances that the defendants have tendered the plaintiff's wasted costs occasioned by the non-compliance sought to be condoned as they contend that that would prevent any financial prejudice to the

plaintiff.

### Opposition

[13] The plaintiff, opposes the condonation application on the basis that it is without merit, does not comply with rule 56, does not meet all the requirements and should therefore, be dismissed.

[14] The plaintiff, in her answering affidavit, asserts that there was a long delay in the defendants filing their condonation application and the explanation given is unconvincing and thus, unacceptable. No detailed and satisfactory explanation is given as to why it took them two months to seek condonation. A two months delay is too long to be attributed to work pressure. The plaintiff insists that the defendants had about four months from the moment they entered appearance to defend to the deadline for filing their plea. They had more than enough time to inform the court about their challenge and seek a solution that could have avoided this application. It is the plaintiff's assertion that not only did the defendants fail to communicate to the court or the plaintiff about the alleged challenge(s) in obtaining the medical records, but they also failed to inform their own legal practitioners, as deduced from Mr Khupe's affidavit. This proves gross negligence and remissness on the part of the defendants and/or their legal representatives in litigating this matter and is fatal to their case.

[15] No proof, according to the plaintiff, is put forward by the defendants to show that they were struggling to get the record and to show the steps taken to locate the record without delay. Neither do the defendants state when and where they finally located the record. Further, the reason given by the defendants to utilize rule 55 is not acceptable. The plaintiff submits that the applicants have failed to make a proper case for granting of the condonation sought. The delay they caused is substantial and cannot be condoned without satisfactory explanation being given. Therefore, the plaintiff contends, the instant application should be dismissed with punitive costs.

### Analysis

#### Delay in filing condonation application

[16] From the evidence, it is apparent that the defendants were aware of their non compliance with the court order dated 19 July 2022, at least by 11 August 2022 when they

addressed a letter to the defendants referring to the non compliance.

[17] In my view, the condonation application was brought very late. A persuasive explanation is required to cure the lateness.

[18] In their explanation for the delay, Mr Khupe ascribes the delay to work pressure at the office. There is lack of information about how the pressure of work prevented him from applying for extension of time or for condonation as soon as the non compliance had come to his attention. In addition, Mr Khupe does not deal with the issue as to what he did when he realized that the time period within which the plea was to be delivered was about to expire. Neither does he explain what he did as soon as he came to know that there was a non compliance.

### Condonation

[19] Where the non compliance is time related, the date, duration and extent of any impediment to compliance, on which reliance is placed, must be spelt out.<sup>1</sup> Condonation is not to be had merely for the asking. A full, detailed and accurate account of the cause of the delay and its effect must be stated.

[20] The defendants' explanation for the delay lacks a full description of what exactly happened during the period between 19 July 2022 and 5 August 2022 when the due date for delivery of the plea arrived and no plea was filed. I am therefore, of the view that the defendants' explanation for the delay is unsatisfactory.

[21] With regards to the prospects of success, the defendants merely stated that they rely on 'JS3', which is an attachment to the founding affidavit with a heading 'Medical Report: Ms Whitney Snyder.' There is no indication on which aspects of that attachment the defendants rely for the submission that they have reasonable prospects of success. However, the defendants went on to further state that (a) the expert medical assessment of plaintiff's treatment and care complained of, is that there was no medical negligence, as alleged by the plaintiff; (b) the defendants' explanation of the treatment is that the plaintiff suffered from a rare pregnancy complication that resulted in the treatment and care rendered to her; and (c) the alleged physical abuse of the plaintiff is disputed.

[22] The plaintiff, did not, in the answering affidavit, refute the above mentioned allegations and as such, they remain unchallenged. In the grounds put forth as prospects of success, the defendants state that plaintiff suffered from a rare pregnancy complication that resulted in the treatment rendered to her. If indeed the treatment rendered was in response to plaintiff's rare

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<sup>1</sup> *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA).

pregnancy complication and was justified in the circumstances, then the defendants have alleged a defence that qualifies as bona fide. Since the defendants' version on this aspect was not challenged, they have satisfied the requirement for prospects of success.

[23] In *Ekandjo NO v Van Der Berg* (19/2004) [2008] NASC 20 (12 December 2008), the court cited the following dictum in *TransNamib Holdings Ltd v Bernhardt Garoëb*, No. 26/2003 (unreported):

'...On the other hand is the interest of the defaulting litigant in maintaining and presenting his defence. If such a litigant demonstrates a potentially good defence on the merits, the Courts will normally be reluctant to let a default judgment pass without proper adjudication. Litigants have a constitutional right to a fair trial in the 'determination of their civil rights and obligations'. (Article 12(1)(a) of the Constitution). In the adjudication of those rights and obligations, Courts of law have a fundamental duty to do justice between the parties by, *inter alia*, allowing them a proper opportunity to ventilate the issues arising from their competing claims or assertions. To the extent that that right is limited by the entry of default judgment if a litigant fails to comply with the procedures prescribed for the presentation of his or her case, a litigant who has shown substantive merits in his or her defence and good cause for the non-compliance will not be deprived of a just resolution in due course. In the absence of gross negligence or willful disregard of its rules, the Court will not shut its doors to a *bona fide* litigant with a good defence just because of his or her failure to comply with the Rules.'(My emphasis)

[24] I am of the view that the foregoing remarks are applicable in the present matter. In the circumstances, I am of the opinion that the defendants' prospects of success are capable of and do tip the scales of the condonation in their favour. These prospects of success mitigate the poor explanation furnished by the defendants for the default. The court therefore, exercises its discretion and grants the condonation application.

[25] As regards the issue of costs, an applicant seeking condonation pays the costs occasioned by the application as he/she seeks the indulgence of the court.<sup>2</sup> In addition, I am of the opinion that the remissness on the part of the defendants in complying with the court order dated 19 July 2022 and the poor explanation for the defendants warrant the granting of a costs order not limited in terms of rule 32(11). I shall therefore, make an order to that effect.

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

1. The defendants' application for condonation of failure to file their plea, is granted.
2. The automatic bar is uplifted.
3. The defendants are ordered to pay the costs of the plaintiff, jointly and severally,

<sup>2</sup> *Town Council of Helao Nafidi v Northland Development Project Ltd* I 2725/2014 [2015] NAHCMD 73 (27 March 2015) para.22.

the one paying the other to be absolved. Such costs shall not be capped in terms of rule 32(11).

4. The matter is postponed to 17 May 2023 at 15h15 for a further case planning conference.
5. The parties shall file a further joint case plan on or before 10 May 2023.

<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>
F Bangamwabo Of FB Law Chambers, Windhoek	M Khupe Of Government Attorneys' Office, Windhoek