

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Practice Directive 61

RULING

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| Case Title: Harvey Boulter Applicant Porton Manager GLT | 1 st Applicant 2 nd Applicant | Case No: HC-MD-CIV-MOT-GEN- 2022/00458 |
| Tabarak Trading and Contracting, LLC Ahmed Mohamed Abdul Aziz Al-Othman Abdul Ilah Mohammed Abdul Aziz Badr Mohamed Abdul Aziz Al-Othman Badriya Saleh Abdullah Al-Madini Mohamed Abdullah Muhammad Al-Hamdani | 1 st Respondent 2 nd Respondent 3 rd Respondent 4 th Respondent 5 th Respondent 6 th Respondent | Division of Court: High Court, Main Division |
| Coram: HONOURABLE JUSTICE CLAASEN | | Heard: 5 May 2023 Delivered: 26 May 2023 |
| Neutral citation: <i>Boulter v Tabarak Trading and Contracting LLC</i> (HC-MD-CIV-MOT-GEN-2022/00458) [2023] NAHCMD 286 (26 May 2023) | | |
| Order: | | |

1. The application for condonation is granted and the bar is lifted.
2. The applicant in the condonation application must file its answering affidavit to the main application no later than 2 June 2023.
3. The applicant is ordered to pay the costs of this application, subject to rule 32(11).
4. The matter is removed from the residual roll and it is referred to the Registrar to deal with it in terms of rule 66(4) upon the close of pleadings.

Ruling:

CLAASEN J :

Introduction

[1] This is an interlocutory application for the condonation of the late filing of an answering affidavit and the lifting of the bar thereon. In the main application, the respondents herein seek that the court declares a foreign civil judgment for the payment of monies and interests (granted by the Dubai Courts of First Instance) enforceable and executable against those parties.

[2] The main application was served on 20 October 2022 and matter was set down on the residual court of 2 December 2022. On 28 October 2022, Mr Namandje, filed a notice of intention to defend on behalf of the first respondent, but did not timeously file an answering affidavit. Thereafter on 10 January 2023 Mr Namandje filed a condonation application. It was opposed by Ms Kemp, counsel for the respondents. After the exchange of an answering and replying affidavit, the matter was set down for hearing.

Condonation Application

[3] Mr Namandje filed a founding affidavit, which is supported by a confirmatory affidavit by the first applicant. Counsel for the applicant painted a picture of a protracted history between the parties, which I will attempt to summarise. He referred to a previous case¹ on the same facts between the same parties, which was withdrawn by them on 10 March 2022. Despite that, the respondents instituted the current matter in October 2022, and he entered an appearance to defend the enforcement application. He stated that he failed to file an answering affidavit on or before 17 November 2022, which was the due date.²

[4] He deposed that the reason for the failure is because he inadvertently mixed up this file with another file, being a criminal case file of the first respondent which had a later due date. Thus, he did not remember to make an appointment with his client for an answering affidavit. He only became aware of the omission a day later when the legal practitioners set the matter down for hearing. He telephonically contacted Ms Kemp about the situation and forwarded a letter on 21 November 2022 to indicate that a condonation application and answering affidavit will follow. He also proposed that the Notice of set down on 2 December 2022 be withdrawn and he will tender costs. She replied that she needed to obtain instructions from the clients. She reverted back to him on 28 November 2022 with information that the clients agreed to remove the matter from the court roll if the first respondent abandons the taxation of wasted costs in respect of the withdrawal of the earlier matter.

[5] He reciprocated by sending a status report to Ms Kemp wherein he proposed to file an answering affidavit by 23 January 2023. She replied via e-mail on 2 December 2023 wherein she stated that 'Our client agreed to remove the matter from the roll. It is merely the issue of when further pleadings shall be filed.' A few days later, on 6 December 2023, he followed up on the status report. She responded by asking for a date for the filing of a condonation application

¹ Case No HC-MD-CIV-MOT-GEN-2022/00497.

² Rule 66 of the Rules of the High Court.

as well and stated that her clients are not amenable to extensive timelines.

[6] Thereafter, he gave an undertaking to file the condonation application by 14 December 2022, but that did not materialize because he had to assist a junior counsel in his firm. The junior counsel was engaged in an urgent application for the release of four Angolan boys who were in unlawful detention for four years and another significant constitutional matter between Hollard and the Minister of Finance and Namibia Reinsurance Company. He furthermore deposed that the client at all material times intended to oppose the enforcement application and that he as legal practitioner, told the client that he will provide a date to consult on the answering affidavit. Thus the client was not aware that the affidavit was due on 17 November 2022.

[7] Finally, as for the prospects of merit of the enforcement application, he deposed that the application was flawed for several reasons, namely that the applicants ought not to have brought the same matter without leave of the court, that the power of attorney expired, and that the application does not meet the requirements at common law for the recognition and enforcement of a foreign civil judgment in Namibia.

Opposing Affidavit

[8] Mr Sadek Belhadri, a major businessman with a postal address in Windhoek, deposed to an answering affidavit, stating that the condonation application fails to make out a case for the relief sought. He also challenges the authority of the legal practitioner to bring the condonation application on behalf of the client. Mr Belhadri also made mention of the 'various and unnecessary engagements' with his legal practitioners of record to agree to filing dates, an answering affidavit and a condonation application. He furthermore stated that he is advised that the condonation application should have been filed without delay and that a failure to diarise a matter or assist a junior colleague or an impending important constitutional case do not constitute a reasonable explanation for the delay.

[9] He denies the relevance of the previous withdrawn matter but nevertheless submits that nothing precluded them from instituting the matter afresh as there was no judgment on the merits. He mentions that the notice of intention to defend was also a day late and that the correct due date of the answering affidavit was 16 November 2022.

[10] In relation to the proposed status report, Mr Belhadri laments the position that it omitted to refer to a condonation application and that the proposed date for the answering affidavit moved to 23 January 2023 instead of 2 December 2022, when the matter was removed from the residual roll. He labels the default blatant and willful. He stated that they would be prejudiced if the court grants condonation for the late filing of an answering affidavit.

[11] I will not delve too deeply into the replying affidavit. In brief, it stated that the affidavits are made with full authority and instructions for the condonation application and accused the opposing party of causing obstructive delays instead of advancing the cause of justice on the merits of the matter.

Summary of Arguments

[12] Mr Namandje emphasised that he gave a detailed and frank explanation for the delay and that his client cannot be blamed for the dilemma. He cited case law³ against the unyielding attitude of some litigants towards the opponent's circumstances that caused the delay. He urged the court not to shut the door in this case as there are good prospects of success. He referred to a longstanding policy of the courts being to exercise its discretion in favour of allowing a party to put up a defense as part of the rights to a fair trial.

[13] Ms Kemp started out by asking the court to struck the additional heads of argument filed

³ *Rally for Democracy and Progress and Others v Electoral Commission for Namibia and Others* 2013 (3) NR 664 (SC) para 37.

by Mr Namandje. The court concurs with her argument relating to the additional heads filed a day before the hearing and has had no regard to it. She reiterated that the explanation cannot be accepted by the court and relied on the sentiments expressed in *Johannes v Nedbank Namibia Ltd*⁴ that the explanation of a legal practitioner being inundated with work was found not to be an acceptable explanation for non-compliance with the rules.

The law

[12] It is trite that where a party seeks indulgence from the court, such applicant must provide a reasonable and acceptable explanation for the delay in complying with the court order or rules of the court, without delay. Secondly, such party should satisfy the court that there are reasonable prospects of success on the merits of the matter.⁵ The Supreme Court has in *Rainer Arangies t/a Auto Tech v Quick Build*⁶ fleshed out these factors as follows:

‘the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the *bona fides* of the application, the prospects of success on the merits of the case, the importance of the case, the respondent’s (and where applicable, the public’s) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice.’

Conclusion

[13] Generally speaking, courts are loath to penalize a litigant because of negligence by his or her attorney, but that does not mean that such legal practitioners can take it for granted that condonation will be granted. In consideration of the above principles, there is something to be said for the manner in which the applicants approached the situation once the default occurred. Instead of starting a conversation about condonation, the proposed status report by Mr Namandje was silent about it. The first step would be to purge the default and then the rest will follow, as applicable. It is thus understandable why Ms Kemp did not subscribe to the proposal for that status report. In addition, I concur that the explanation of having had an urgent

⁴ *Johannes v Nedbank Namibia Ltd* (HC-MD-CIV-ACT-CON-2020/03657) [2022] NAHCMD 196 (13 April 2022).

⁵ *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) p 640 para 10.

⁶ *Rainer Arangies t/a Auto Tech v Quick Build* (SA25-2010) [2013] NASC 4 (18 June 2013) at para 5.

application and a constitutional matter loses its potency if one considers that the practice has several other legal practitioners who could have assisted. However, that is not the only relevant consideration.

[14] It somewhat mitigates the conduct of the legal practitioner who is responsible for the non-compliance, to a certain degree, that he owned up to his mistake and that he engaged the other side's legal practitioner about the issue without delay. This court also accepts that in this matter, the cause for the non-compliance is attributed to the legal practitioner thus he deposed to the founding affidavit. Moreover, this court is not convinced that there is no iota of a prospect of success in the main application. Having considered all the facts and the submissions, the impact of refusal of condonation and the administration of justice in my view pivots towards granting condonation. The respondent equally failed to persuade the court of prejudice that they will suffer which cannot be cured by a cost order. In view of that, the court will afford an opportunity for answering affidavit to be filed within the period provided for in the order.

[15] Accordingly, I make the following order:

1. The application for condonation is granted and the bar is lifted.
2. The applicant in the condonation application must file its answering affidavit to the enforcement main application no later than 2 June 2023.
3. The applicant is ordered to pay the costs of this application, subject to rule 32(11).

4. The matter is removed from the residual roll and it is referred to the Registrar to deal with it in terms of rule 66(4) upon close of pleadings.

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| Judge's signature | Note to the parties: |
| | Not applicable. |
| Counsel: | |
| Applicant | Respondents |
| <p>Mr S Namandje Sisa Namandje & Co Inc. Windhoek</p> | <p>Ms Kemp Metcalf Beukes Attorneys Windhoek</p> |