

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
RULING ON AN
CONDONATION
PRACTICE DIRECTION 61



MAIN DIVISION, WINDHOEK
APPLICATION FOR

Case Title: CATERPILLAR FINANCIAL SERVICES SOUTH AFRICA PROPRIETARY LIMITED // KAMUVARE ASSETS MANAGEMENT COMMERCIAL (PTY) LTD	Case No: HC-MD-CIV-ACT-CON-2022/05168
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE ANGULA, DEPUTY JUDGE-PRESIDENT	Date of hearing: 16 MAY 2023
	Delivered on: 6 JUNE 2023
Neutral citation: <i>Caterpillar Financial Services South Africa Proprietary Limited v Kamuvare Assets Management Commercial (Pty) Ltd</i> (HC-MD-CIV-ACT-CON-2022/05168) [2023] NAHCMD 297 (6 June 2023)	
The order: Having heard Ms Ngurimuje-Katire , the director acting in person on behalf of the applicant and Ms Maritz , on behalf of the respondent and having read the documents filed of record: IT IS ORDERED THAT: 1. The application for condonation is refused with costs. 2. The matter is postponed to the 20 June 2023 at 08:30 for a Status Hearing. 3. The parties must file a joint status report on or before 14 June 2023 , indicating the way forward.	
Following below are the reasons for the above order:	
<u>Introduction</u>	

[1] I have before me an application for condonation by the applicant (defendant in the main action) seeking condonation for failure to comply with a case plan order issued on 7 February 2023 to file an opposing affidavit to the respondent's (plaintiff in the main action) application for summary judgment. In terms of the order, the applicant ought to have filed its opposing affidavit on or before 15 March 2023.

[2] The applicant is represented by its sole director, Ms Ngurimuje Katire (Ms Katire, who is acting in person that is without the defendant company being represented by a legal practitioner. The respondent is represented by Ms Maritz from the law firm, Koep & Partners.

History of litigation

[3] As mentioned earlier herein, by order of 7 February 2023, the applicant was ordered to file its opposing affidavit to the application for summary judgment on or before 15 March 2023. The matter was postponed to 28 March 2023 for a status hearing. In its status report dated 27 March 2023, the applicant indicated that it would seek leave to file a condonation application for its failure to file its opposing affidavit to the summary judgment application. When the matter was called on 28 March 2023, the applicant moved for an order to be granted an opportunity to file its condonation application, which the court granted and postponed the matter to 4 April 2023 for a status hearing.

[4] When the matter was called on 4 April 2023, the applicant had filed its 'Condonation Affidavit' of 4 April 2023. The affidavit was not accompanied by notice of motion setting out the relief sought as prescribed by rule 65(1) of the rules of this court. There was thus non-compliance.

[5] On 4 April 2023, the respondent indicated it wanted to oppose the application for condonation and to that end it needed an opportunity to file an opposing affidavit. Accordingly, the matter was again postponed to 9 March 2023 for a status hearing. The respondent was ordered to file its opposing affidavit to the condonation application on or before 19 April 2023.

[6] When the matter was called on 9 March 2023, the respondent had filed its opposing affidavit. The matter was then postponed to 16 May 2023 for hearing of the condonation application. The parties were ordered to file their respective heads of argument, in the meantime.

Founding affidavit

[7] Ms Katire deposed to the applicant's condonation affidavit. She deposed that on 10 March 2023 'a request for settlement statement' was forwarded to the legal practitioner for the respondent. I should interpose here to say it is not clear from the papers before me, what is a 'settlement statement'. According to the deponent the legal practitioner for the respondent responded on 13 March 2023 stating that the applicant's request has been conveyed to the respondent and that the legal practitioners would revert to the applicant as soon as possible.

[8] Ms Katire went on to say that following the exchange of those correspondence, she was hence forth under the impression that the respondent's response would be positive to the settlement proposal. According to her, she reasoned that since the request was made prior to 15 March 2023 – the date she out to have file the opposing affidavit – there was no need any more to file the opposing affidavit to the application for summary judgment.

Opposing affidavit

[9] The application is opposed by the respondent. Mr Hlulani Ire-Jesse Shihlomule, a director of the respondent, deposed to the answering affidavit. The deponent points out that no valid application for condonation has been filed due to the fact that no notice of motion accompanied the 'condonation affidavit'. He further points out that no explanation has been placed before court as to what steps were taken to prepare and file an opposing affidavit to the application for summary judgment. Furthermore, that the applicant failed to deal with the issue of the prospects of success in opposition to the summary judgment application if condonation was granted. Finally, the deponent denies that any impression was created from the respondent side that, that the respondent would not persist with the application for summary judgment.

Requirements for a compliant application for condonation

[10] Rule 65(1) provides, *inter alia*, that an application must be brought on a notice of motion supported by an affidavit containing facts upon which the applicant relies for the relief sought.

[11] As regards the requirements for an application for condonation to succeed, the principles are now well established. I do not intend to repeat them in detail save to highlight the necessary parts that guide the court to the determination of the present matter. In the first place, the applicant is required to give a reasonable and acceptable explanation for the non-compliance. Secondly, there must be reasonable prospects of the main matter succeeding on the merits should condonation be granted. It is also an accepted principle that there may be interplay between the obligation to provide a satisfactory explanation for the non-compliance and the reasonable prospects of success on the merits.¹

[12] It is against that background of the foregoing requirements and principles that the present application is to be considered.

Determination

[13] It is common cause that the application did not comply with the requirement of rule 65(1) of this court, in that not notice of motion accompanied the 'condonation affidavit'. In this regard, I take note that Ms Katire who have been appearing in person on behalf of the applicant is a lay person. However from the papers filed on behalf of the applicant, I gain the impression that she is being assisted by someone in the background with practical knowledge about the pleadings. For instance, she filed a condonation affidavit and thereafter she filed heads of argument. The format of these documents are those prescribed by the rules.

[14] I subscribe to the view that there cannot be two standards when it comes to compliance with the requirements set out in the rules. By this I mean, a standard for lay litigants and a standard for litigants represented by legal practitioners. All litigants must be treated equal and must comply with the rules of the court. It has been stated in this regard that rules are there to ensure a fair and expeditious resolution of disputes in the interest of all

¹ *Road Fund Administration v Scorpion Mining Company (PTY) LTD* (38 of 2016) [2018] NASC 398 (13 July 2018).

litigants and of the administration of justice.² It has also been held that courts should not condone non-compliance with the rules by lay litigants where non-compliance would render the proceedings unfair and unduly prolonged³, I am in fully agreement with those sentiments.

[15] It follows thus for that due to the applicant non-compliance with rule 65(1), the application should be struck from the roll.

[16] There is a further reason why the application is non-compliant and that is this: The applicant failed to set out a full, detailed and accurate explanation for its failure to comply with the court order of 7 February 2023 by which it was ordered to file its opposing affidavit to the application for summary judgment. Ms Katire in her affidavit attempted, in a most unconvincing manner, to blame the legal practitioner for the applicant's failure to file its opposing affidavit. In this regard, Ms Katire alleges that, as I understand her, because she asked for a settlement statement from the respondent's legal practitioner before the date for the filing of the opposing affidavit by the applicant, was due, she expected a positive response and therefore she did not file the opposing affidavit.

[17] In my view, Ms Katire's feeble attempt to shift blame to the legal practitioner for her failure to comply with the court order is unconvincing, lacks candidness and forthrightness. Her conduct is nothing else than flagrant and inexplicable disregard of the court's orders of both the 7 February 2023 and 28 March 2023. For this reason, the application stands to be refused.

[18] There is a further reason why the application should be refused and that is because the applicant failed to deal with the requirement regarding the prospect of success on the merits in the event that condonation is granted. According to the particulars of claim applicant being sued by the respondent for the breach of an instalment sale agreement in respect of Caterpillar Excavator in that it failed to pay the agreed monthly instalment of N\$89 729.71. The respondent is praying for the cancellation of that agreement and inter alia the return of the excavator.

[19] An applicant is required to show good cause and a *bona fide* defence to the respondent's claim. In other words the applicant must state the facts upon which his or her

² Petrus T Damaseb: Court –Managed Civil Procedure of the High Court of Namibia First Edition, p 119.

³ *Salomon v De Klerk* 2009 (1) NR 77 (HC).

defence would be based so much that if such facts are proved it would constitute a defence to the claim. However in the present application, nowhere on the papers filed or correspondence exchanged, does the applicant indicate what defence it would put up, or advance if condonation is granted and what are the prospects that such defence would succeed.

[20] For all the reasons and considerations, set out hereinbefore, the inevitable conclusion I have arrived at is that the application for condonation is to be refused with costs.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
MS NGURIMUJE-KATIRE The Director who is acting in person	C MARITZ <i>of</i> Koep & Partners, Windhoek