

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
*EX TEMPORE* [RULING ON SANCTIONS]

<b>Case Title:</b> BCCJ Investment Close Corporation Plaintiff  and  The Stampriet Village Council Defendant	<b>Case No:</b> HC-MD-CIV-ACT-CON-2022/02453
<b>Heard before:</b> Honourable Justice Sibeya	<b>Division of Court:</b> High court (Main Division)
	<b>Heard on:</b> 30 March 2023 <b>Delivered on:</b> 30 March 2023
<b>Neutral citation:</b> <i>BCCJ Investment Close Corporation v The Stampriet Village Council</i> (HC-MD-CIV-ACT-CON-2022/02453) [2023] NAHCMD 313 (12 June 2023)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The defendant's condonation application is granted and defendant is permitted to file its amended plea.</li><li>2. The defendant's legal practitioner must pay the wasted costs <i>de bonis propriis</i>, occasioned by the default of failure to file the amended plea by 17 February 2023,</li></ol>	

subject to rule 32(11).

3. The plaintiff must file its replication on or before 13 April 2023.
4. The parties must file a joint status report on or before 20 April 2023.
5. The case is postponed to 27 April 2023 at 08h30 for a status hearing (Reason: Documents Exchange).

SIBEYA J

#### Introduction

[1] On 30 March 2023, this court conducted a sanctions hearing against the defendant for failure to file an amended plea on 17 February 2023 as ordered by the court. The application for condonation was opposed by the plaintiff.

[2] The court was, therefore, seized with the determination of the propriety of the said application.

#### Representation

[3] Mr Liebenberg appeared for the plaintiff while Mr Tibinyane appeared for the defendant.

#### The merits and arguments

[4] The plaintiff, in the main action, seeks orders to have the agreement concluded with the defendant declared null and void and claims repayment based on unjustified enrichment.

[5] The defendant, having filed a plea earlier and after the plaintiff raised an exception to the said plea, sought to amend its plea.

[6] On 25 January 2023, when the court was due to hear the plaintiff's exception, the defendant submitted that it intended to amend its plea and tendered wasted costs for the plaintiff. As a result, the court ordered that:

‘1 The plaintiff must indicate its objection to the notice to amend the defendant's plea, if any, on or before 03 February 2023.

2 The parties must file a joint status report on or before 06 February 2023.

3 The defendant is ordered to pay the plaintiff's wasted costs for the exception on an attorney and client scale. The Legal Practitioner of the defendant is exempted from paying costs *de bonis propriis* as his client only gave correct instructions to him on 14 December 2022 (as he submitted in court on 25 January 2023).

4 The case is postponed to 09 February 2023 at 08:30 for status hearing.

5 A copy of this order must be provided to the defendant.’

[7] The parties thereafter filed a joint status report where the plaintiff stated that it will not object to the amendment sought by the defendant. As a result, the court on 6 February 2023 ordered that:

‘1 The defendant must file its amended plea on or before 17 February 2023.

2 The plaintiff must replicate to the amended plea on or before 24 February 2023.

3 The parties must file a duly signed case management report together with a draft order on or before 27 February 2023.

4 The case is postponed to 02 March 2023 at 08:30 for Case management conference hearing (Reason: Agreement By Parties).'

[8] On 23 February 2023, the plaintiff filed a unilateral status report where it stated that the defendant failed to file the amended plea on or before 17 February 2023 as ordered by the court. The plaintiff called on the court to place the defendant under sanctions for the said failure.

[9] On 1 March 2023, the defendant filed an application for condonation seeking the uplifted of the automatic bar occasioned by the failure to comply with a court order of 6 February 2023 as per rule 54(3) and condonation for the late filing of the amended plea.

[10] In the founding affidavit deposed to by Mr Bartholomeus Junior April in support of the condonation application and filed of record on 1 March 2023, he states that although the court ordered the defendant on 6 February 2023, to file its plea on or before 17 February 2023, Mr Tibinyane, the legal practitioner of record for the defendant, misread the court order that the plea was to be filed on 27 February 2023. Mr April further deposed that the failure to file the plea by 17 February 2023 was an oversight on the part of Mr Tibinyane. Mr Tibinyane filed a confirmatory affidavit, *albeit* belatedly on 30 March 2023 and without obtaining the leave of court, where he confirmed the allegations made by Mr April in the founding affidavit that relates to him.

[11] The court observed that the defendant in this matter, is in continuous default. Not long ago, on 25 January 2023, there was a costs order made against the defendant. Mr Tibinyane argued that the failure to file the plea on 17 February 2023 was a human error worthy to be condoned. He argued further that in the present matter, the defendant has made out a case for condonation to be granted.

[12] Mr Liebenberg argued that the defendant failed to show sufficient good cause for condonation to be granted and filed a confirmatory affidavit without complying with the

Court rules. Mr Liebenberg further argued that there was no due care and diligence made by the defendant's legal practitioner to comply with the court order. He further argued that the defendant did not offer a reasonable explanation for condonation to be granted. He called for the application for condonation to be refused.

### Analysis

[13] It is apparent in this matter that defendant failed to comply with the order of 6 February 2023, in that it failed to file its amended plea which was due on the 17 February 2023 as ordered. The main reason behind the default as per the condonation application, and particularly the affidavit deposed to by Mr April is that Mr Tibinyane misread the order of 6 February 2023, in that instead of the due date to file the amended plea being 17 February he misread it to mean 27 February 2023.

[14] Reference is made to previous default by the defendant. In an order of this court of 25 January 2023 it was found that the defendant was in default for not filing its amended plea, and as a result, wasted costs were awarded against the defendant.

[15] There is no doubt that in the present circumstances the defendant defaulted and failed to comply with the court order for which, in my view, appropriate sanctions must follow.

[16] I hold the view that to refuse the condonation in total will literally shut the doors of the court to the defendant. This is a matter where, in my view, the blame must be laid on the legal practitioner of the defendant. In the premises, I am going to condone the application with an adverse cost order to follow on the party that is to blame for the default.

### Conclusion

[17] In view of the conclusions and findings made above, I find that the defendant will be permitted to file the amended plea. As for the default that was committed by the legal

practitioner of record for the defendant, it is only fair in my view that an adverse costs order be awarded in favour of the plaintiff *de bonis propriis* against the legal practitioner of the defendant.

Order

[18] In the result, judgment is granted in favour of the plaintiff against the defendant in the following terms:

1. The defendant's condonation application is granted and defendant is permitted to file its amended plea.
2. The defendant's legal practitioner must pay the wasted costs *de bonis propriis*, occasioned by the default of failure to file the amended plea by 17 February 2023, subject to rule 32(11).
3. The plaintiff must file its replication on or before 13 April 2023.
4. The parties must file a joint status report on or before 20 April 2023.
5. The case is postponed to 27 April 2023 at 08h30 for a status hearing (Reason: Documents Exchange).

**Judge's signature:**

Note to parties:

**For the plaintiff:**

**For the defendant:**

<p>P Liebenberg Of Ellis Shilengudua Inc, Windhoek</p>	<p>L Tibinyane Of the Office of the Government Attorney, Windhoek</p>
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