

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: Olivia-Aline Tuyakula Kangandjela vs Hollard Insurance Company of Namibia Limited	Case No: HC-MD-CIV-ACT-CON-2021/01626
	Division of Court: High Court (Main Division)
Heard before: Honourable Justice Schimming-Chase	Date of hearing: 28 June 2023
	Date of order: 19 July 2023
Neutral citation: <i>Kangandjela v Hollard Insurance Company of Namibia Limited</i> (HC-MD-CIV-ACT-CON-2021/01626) [2023] NAHCMD 411 (19 July 2023)	
Results on the merits: Merits not considered.	
IT IS HEREBY ORDERED THAT: 1. The plaintiff's application for condonation dated 29 April 2022 is granted. 2. The plaintiff must pay the defendant's costs in the condonation application,	

which costs are capped in terms of rule 32(11).

3. The taxing master is granted leave to tax the defendant's costs in the condonation application before finalisation of the matter.
4. The parties must file a joint case management report on or before **31 August 2023 at 15h00**.
5. The matter is postponed to **4 September 2023 at 15h30** for a Case Management Conference Hearing.

SCHIMMING-CHASE J:

[1] This is an application for condonation launched in April 2022, finally heard more than one year later, following a sad state of affairs in the prosecution of this action.

[2] The plaintiff's action is premised on a motor vehicle accident that occurred on 25 July 2020, at Windhoek. The plaintiff submitted a claim to her insurer, the defendant, which claim was repudiated by the defendant on 17 August 2020. The plaintiff instituted action, which action the defendant opposed, and the matter proceeded to judicial case management.

[3] On 4 February 2022, the court granted the parties the opportunity to file witness statements and the joint proposed pre-trial report.

[4] The witness statements for the plaintiff were due on 7 March 2022, while the statements for the defendant were due on 25 March 2022. The plaintiff failed to file any statements, while the defendant filed on time.

[5] On 24 April 2022, the court ordered the plaintiff to file an application for condonation on 29 April 2022, and the defendant to file opposing papers on 9 May 2022.

[6] The defendant filed her application for condonation on 29 April 2022 at 16h22.

[7] The plaintiff in her founding affidavit avers that her legal practitioner – at that stage – Ms Ndilula-Ndamanomhata, contacted her during January 2022 to put her in funds to attend to the drafting of the witness statements. She avers, at this stage, the bill was already in arrears, and while part of it was settled in January 2022, she only managed to settle the remainder of the bill during April 2022. She avers the difficulty in drafting the statements was further compounded by the fact that one of the witnesses was unavailable, due to their employment in the Public Service, but an appointment was eventually set for consultation.

[8] It is noted that at the time of filing the condonation application, the witness statements were about 20 days out of time, and statements have not been filed to date.

[9] As to prospects of success, the plaintiff avers the defendant's opposition to her claim – the basis of the defendant's repudiation, is that the defendant avers the driver of the vehicle – owned by the plaintiff, left the scene of the accident before the arrival of the police. The plaintiff denies this and avers she enjoys prospects as the police officer who attended to the scene confirms the driver was at the scene, and only left the scene after the paramedics had arrived, and which version will be corroborated by the witnesses, once their statements are filed. The plaintiff states that the witness statement filed on behalf of the defendant was produced by a person who did not personally attend to the scene on the day of the accident, as such, the evidence the defendant will rely on at trial amounts to inadmissible hearsay evidence.

[10] The defendant opposes the condonation application, averring the explanation tendered by the defendant is not reasonable, and that despite their agreement that a pre-trial report be filed first before the witness statements by January 2022, the plaintiff was in default of sharing a report and when the defendant shared a draft, the version of the plaintiff changed that she now wants to file witness statements first. The defendant avers the plaintiff is disingenuous as it is now clear from the application that the change in front was occasioned not to incur any further legal costs.

[11] On 16 May 2022, the court postponed the matter for assignment of a hearing date and for the plaintiff to file her replying affidavit on or before 1 June 2022.

[12] The replying affidavit was filed on 3 June 2022.

[13] On the same date, Ms Ndilula-Ndamanomhata filed an explanatory affidavit deposed by her candidate legal practitioner, averring she attended to upload the affidavit on 1 June 2022, but she did not click submit. On 3 June 2022, when she checked the file, she noticed she did not upload the replying affidavit, and uploaded the same then, with her explanatory affidavit.

[14] On 8 June 2022, the court barred the plaintiff from filing a replying affidavit, and postponed the matter for the plaintiff to address the court on how she intends to proceed in light of the bar.

[15] On 12 July 2022, the parties filed a joint status report wherein the plaintiff recorded her intention to file a second condonation application and the defendant persisted in its attempt to obtain dates for the first condonation application.

[16] The matter was, again, on 17 July 2022 postponed for the parties to address the court on the way forward, and to attempt to find common ground, or formally address the court.

[17] On 1 August 2022, the court recorded the order of 8 June 2022 to reflect that the defendant receive wasted costs for the hearing of 6 June 2022. The court also uplifted the bar and accepted the plaintiff's replying affidavit in the first condonation application, and postponed the matter to 13 September 2022 for hearing of the application for the failure to file witness statements.

[18] The plaintiff was ordered to file heads of argument on or before 6 September 2022, while the defendant was ordered to file heads on or before 8 September 2022.

[19] The defendant filed its heads on 8 September 2022, while the plaintiff filed her heads on 12 September 2022 at 16h40.

[20] On 13 September 2022, the court struck the application for condonation for failure to file witness statements. The matter was postponed for the parties to file a status report on the further conduct of the matter.

[21] The parties filed a joint status report that the plaintiff intends to bring an application for the reinstatement of her condonation application. The matter was

again postponed to 17 October 2022.

[22] On 13 October 2022, the plaintiff filed her application for reinstatement.

[23] Ms Ndilula-Ndamanomhata deposed to the affidavit averring she was inundated with work as she had an arbitration, and while she attended to all her other work earlier or by delegation, she misdiarised the dates for filing of the heads of argument, hence the late failing leading to the application for condonation being struck.

[24] The defendant did not oppose the application.

[25] On 17 October 2022, the court reinstated the application for condonation, and postponed the matter to 5 December 2022, for hearing of the condonation application for failure to file witness statements.

[26] On 15 November 2022, Ms Ndilula-Ndamanomhata filed a notice of withdrawal as legal practitioner of record.

[27] On 5 December 2022, the court postponed the matter, for Ms Ndilula-Ndamanomhata to explain her failure to comply with the provisions of rule 44(6) and (7), the failure in those circumstances to appear in court, the reason why the court should not order that the wasted costs of 5 December 2022, and why these costs should not be paid *de bonis propriis*, alternatively why she should not be held in contempt of court for the above-mentioned conduct.

[28] Ms Ndilula-Ndamanomhata filed an affidavit explaining she filed the withdrawal ahead of time and during the week of 5-7 December 2022, she was scheduled for a continuation of arbitration in Ondangwa, as such, she could not attend court on 5 December 2022. She stated that all her matters were left with Mr Amoomo to deal with, but he could not attend to the hearing as he was before Justice Coleman, and they requested the legal practitioner of the defendant at the time – Mr Titus to stand in for them. Mr Amoomo deposed to a confirmatory affidavit.

[29] On 9 December 2022, the court ordered Ms Ndilula-Ndamanomhata pay the defendant's wasted costs for the appearance of 5 December 2022 *de bonis propriis*, as her withdrawal was not rule compliant and for her subsequent failure to appear in court insufficiently explained. The matter was postponed for allocation of hearing

dates in the application for condonation for failure to file witness statements.

[30] On 16 January 2023, Ms Ndilula-Ndamanomhata filed a return of non-service, and on 13 February 2023, the matter was postponed for hearing of the application.

[31] The hearing date of 12 April 2023 was vacated by the court. The matter was then postponed for hearing on 28 June 2023.

[32] The law on condonation applications is trite. The factors considered in an application for condonation will be based on the surrounding circumstances of the case.¹ The court in *Telecom Namibia Ltd v Michael Nangolo & others*,² restated the settled legal principles and factors that a court will take into account when exercising its discretion notwithstanding that the respondents are not opposed to condonation.³

[33] A party seeking condonation must furnish a satisfactory explanation for the non-compliance, explain the failure to act timeously and show the default was not willful. In *Beukes and Another v South West Africa Building Society (SWABOU) and Others*⁴ this court held that:⁵

‘An application for condonation is not a mere formality; the trigger for it is non-compliance with the Rules of Court. Accordingly, once there has been non-compliance, the applicant should, without delay, apply for condonation and comply with the Rules.... In seeking condonation, the applicants have to make out their case on the papers submitted to explain the delay and the failure to comply with the Rules. The explanation must be full, detailed and accurate in order to enable the Court to understand clearly the reasons for it.’ (Emphasis supplied).

[34] The second leg for condonation as pronounced in *Metropolitan Namibia v Amos Nangolo*,⁶ held that not only shall an applicant provide a reasonable and acceptable explanation for their non-compliance, it must also be shown that the main

¹ *Channel Life Namibia (Pty) Ltd v Otto* 2008(2) NR 432(SC) at 445 para 45.

² *Telecom Namibia Ltd v Nangolo and Others* 2015 (2) NR 510 (SC).

³ *De Klerk v Penderis and Others* (SA 76 of 2020) 2023 NASC 1 (1 March 2023).

⁴ *Beukes and Another v South West Africa Building Society (SWABOU) and Others* (SA 10/2006) [2010] NASC 14 (05 November 2010).

⁵ *Lewis v Draghoender* (HC-MD-LAB-APP-AAA-2021/00042) [2022] NAHCMD 41 (22 July 2022) para 17.

⁶ *Metropolitan Namibia v Amos Nangolo* (CA 03/2015) [2017] NAHCNLD 2 (30 January 2017).

matter has prospects of success in fact and in terms of the applicable law, and that each case will be determined on its merits,⁷ while the court enjoys a very wide discretion.⁸

[35] Having set out the factual matrix and the exposition of law, I am convinced the present matter is one that lends itself to granting of condonation in favour of the plaintiff.

[36] The plaintiff, within 20 days of her failure to comply with the order, brought the first condonation application, explaining the non-compliance was occasioned by financial difficulties, as she could not place her legal practitioner in funds to prepare the witness statements. When the bill of her practitioner fell due and payable, a portion thereof was settled during January 2022, while she could only settle the remainder during April 2022. During oral argument, the plaintiff appeared in person, lamenting she cannot further afford the services of a legal practitioner. I am thus convinced, although not to be taken as a factor in and of itself for the granting of condonation, the financial position of the plaintiff as explained in this matter rendered her unable to comply with the court order and file her statements on time, and that such default was not wilful, as the plaintiff was desirous to settle her legal bill.

[37] The plaintiff raises serious factual disputes and legal issues addressing her prospects of success. If the averments of the plaintiff stand proven and accepted at trial, she may very well properly attack the repudiation of the defendant and succeed in her claim.

[38] While the manner in which the matter has been litigated leaves much to be desired; it is also evident that along the way the defendant had been indemnified for its wasted costs in the delay. It is also in my considered view, apt in the circumstances that any delay occasioned so far in this application may be remedied in favour of the defendant with an order as to costs.

[39] It is thus my considered view, the plaintiff may succeed in her condonation application, as she hereby does, but no reason can be found why the defendant is

⁷ *Prosecutor-General v Paulo (2)* [2020] NASC 19 (24 June 2020) para 22.

⁸ *Lewis v Draghoender* (HC-MD-LAB-APP-AAA-2021/00042) [2022] NAHCMD 41 (22 July 2022) para 18.

not entitled to its costs.

[45] In the circumstances, I make the following order:

1. The plaintiff's application for condonation dated 29 April 2022 is granted.
2. The plaintiff must pay the defendant's costs in the condonation application, capped in terms of rule 32(11).
3. The taxing master is granted leave to tax the defendant's costs in the condonation application before the finalization of the matter.
4. The parties must file a joint case management report on or before **31 August 2023 at 15h00**.
5. The matter is postponed to **4 September 2023 at 15h30** for a Case Management Conference Hearing.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff O Kangandjela In person	Defendant F Pretorius Of Francois Erasmus & Partners, Windhoek