

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Practice Directive 61

RULING

Case Title: Magdalena Maryna Van Zyl and Jurgen Brendel Brencor Properties CC Irmgard one hundred and twenty CC	Applicant First Respondent Second Respondent Third Respondent	Case No: HC-MD-CIV-MOT-GEN- 2021/00455(INT-HC-CONS- 2023/00222)
		Division of Court: High Court, Main Division
Coram: HONOURABLE JUSTICE CLAASEN		Heard: 11 July 2023
		Delivered: 28 July 2023
Neutral citation: <i>Van Zyl v Brendel</i> (INT-HC-CONS-2023/00222) [2023] NAHCMD 453 (28 July 2023)		
Order: 1. The court grants condonation for the late filing of the respondent's heads of arguments		

and no costs shall follow.

2. The application for condonation in respect of the applicant's replying affidavit is dismissed with costs, such costs to be capped in terms of rule 32(11).
3. The matter is postponed to 23 August 2023 at 08:30 for a Case Management Conference Hearing.
4. Parties shall file a joint case management report on or before 17 August 2023.

Ruling:

CLAASEN J :

Introduction

[1] At the outset, counsel for the respondent filed a condonation application for the late filing of its heads of argument, in respect of this interlocutory application, which was not opposed by the applicant. Counsel for the applicant asked for he wasted costs for the late perusal of the respondent's heads of argument. The respondent filed its heads of argument 3 days late. Considering that the applicant did not oppose the late filing, and the applicant had 5 days to consider the respondent's arguments, condonation is granted for the late filing of the respondent's heads of arguments and there shall be no order as to costs in respect of the latter.

[2] This is an interlocutory application, seeking condonation for the applicant's non-compliance with rule 66(2) of the Rules of this Court and to enable her to file a replying affidavit. In the main application, the notice of motion prays for several orders namely:

- a) Compelling the respondents to transfer four specified immovable properties into the applicant's name;
- b) Compelling the first respondent to allow the applicant to fetch her pet animals from a certain farm in Mariental;
- c) Compelling the first respondent to allow the applicant to fetch her movable property from a specified farm in Mariental;
- d) Finding the first respondent guilty of contempt of court; and
- e) Costs on a scale as between attorney and own client, which costs include one instructing and one instructed counsel.

Condonation Application

[3] The applicant, a business women, deposed to the founding affidavit which was supported by a confirmatory affidavit by her current legal practitioner. The founding affidavit portrays a prolonged history between the parties, which I will endeavor to summarise. The founding papers in the main application, were lodged during November 2021 and the answering affidavit was due on 30 March 2022. According to Ms Van Zyl, the respondents answering affidavit was only filed on 5 July 2022, and they did so without having obtained any leave from the court. Condonation was eventually granted for it on 06 October 2022. Ms Van Zyl also deposed that she was advised '...that I was supposed to file my replying affidavit on or before 27 October 2022.'

[4] She furthermore states that the parties attempted to settle the dispute during the months of June 2022 and that the respondents' legal practitioner send her an e-mail on 15 August 2022 which inter alia contained a request that she hold off on a replying affidavit to avoid the incurrance of additional costs. Thereafter the parties were aggressively exchanging settlement proposals resulting in her and her legal practitioner focusing more on that rather than attending to the replying affidavit.

[5] Her explanation also divulges that she had to renovate certain properties for it to be suitable for rental, that she needed money to pay her legal practitioners for the condonation application and replying affidavit and also that she had to travel to South Africa to take care of her elderly mother. Her legal practitioner informed her that he had been attending to other pressing matters for which she gave a list of tasks that cover the period from 27 September 2022 until 26 October 2022.

[6] Eventually during the month of November 2022, she requested her files from that legal practitioner and attempted to obtain a new legal practitioner. She approached Mr Metcalfe during

November 2022, but that was not successful. During January 2023 she handed her file to Delport Legal Practitioners to attend to the condonation application, replying affidavit and further communication regarding possible settlement of the main dispute.

[7] Finally, as for the prospects of success, the applicant points out the relief she seeks in the main application is based on a settlement agreement which was made an order of court. In terms of that order the first respondent had certain responsibilities, such as to transfer certain properties to her and settle outstanding mortgage bonds, amongst others. She listed the properties that had to be transferred as (a) 49 Smit Street Pioneerspark Windhoek (b) 50 Smit Street, Pioneerspark Windhoek, (c) Flat No 1 Hochlandview, Windhoek, (d) 10 Second Avenue Swkopmund and (e) 2 Zeerust Republic of South Africa. He failed to do so, which prompted her to institute the current application. The applicant also avers that the first respondent refused her access to the farm, from which she wanted to collect more movable properties and pets.

Opposing Affidavit

[8] Mr Jurgen Brendel, the first respondent and a businessman is the sole member of the second respondent and claims that the applicant unlawfully and without his consent acquired 100% member's inters in the third respondent. In his opposing affidavit, he started out by drawing attention to the fact that the applicant indicated her intention to apply for condonation as early as 26 January 2023 but only did so by 19 April 2023. He questioned the relevance of the applicant's reference to events that preceded the filing of the answering affidavit and was of the

opinion that the affidavit fails to meet the requirements for condonation.

[9] He alluded that the explanation comprises of vague excuses and that the fact that she visited her mother and the reference to renovations which are to be made, flies in the face of her claiming that she first had to gather money to pay her legal practitioner. He also criticized the engagements of the applicant's legal practitioner which did not specifically address the time periods of 1 to 6 October 2022, 15 to 19 October 2022 and 21 to 25 October 2022.

[10] He agrees to the basis as to how the previous court order came about, but pointed out that at the time when the parties agreed to the settlement agreement which was made a court order, the parties were ignorant of some practical issues. He mentioned aspects such as that the applicant fails to mention that although the transfer of the Hochland property took place in October 2022, she already got the keys for it in April 2021, rented out the property and that the transfer was delayed because of municipal processes. In respect of the Swakopmund property he states that the applicant took possession of the property since June 2021 and that the applicant refuses or neglects to make the property in 49 Smit Street Pioneerspark compliant for

the City of Windhoek's requirements. He also states that the property of no 50 Smit Street in Windhoek is no longer in dispute and that it was the applicant's relatives who failed to do the necessary steps for transfer of the Zeerust property.

[11] He deposed that he settled the outstanding mortgage bonds and complied with the order insofar as it provided that he was responsible to pay the transfer and conveyancing costs for the immovable properties. He states that he is under no obligation to give the applicant access to his farm, but that she in any event received her pets. He furthermore states that apart from a bed, all other movable property of the applicant has been transported to Windhoek and await in a container but that the applicant failed to take possession thereof. He concluded to state that although the two properties await transfer, the delay for that is not of his own making and that the applicant enjoys undisturbed possession of all the properties.

Summary of Arguments

[12] Counsel for the applicant, Mr Boonzaaier, attributed the cause of this application to the respondents' failure to comply with rule 66(1)(b) of the High Court Rules and filed its answering affidavits only on 7 July 2022, even though the respondent had not obtained condonation for its non-compliance. Subsequently, the court, on 6 October 2022 granted condonation, but did not provide directions with regard to the filing of the applicant's replying affidavit. He further argued that rule 66(2) contemplates delivery of an answering affidavit and since the defendant did not serve the said affidavit, the time periods did not come into effect. Therefore, strictly speaking it

was not necessary for the applicant to bring a condonation application, it was merely done out of caution.

[13] He nevertheless proceeded to argue the requirements for condonation, in the event that the court is not swayed by the first argument. The explanation proffered relies on the extensive settlement negotiations between the parties, the withdrawal of the respondents' erstwhile legal practitioners and that the applicant needed funds to procure the services of new legal practitioners, the request from the respondent's legal practitioners to hold back in filing the replying affidavit, and that there was also talks of a supplementary answering affidavit by the respondent.

[14] As for prospects of success, he argues that there are fairly good prospects and that the application (for contempt of court) became necessary because of the respondent's non-compliance. In relation to costs, the applicant argues that it should be awarded her costs for this application and that the respondents are to be blamed for unnecessarily escalating the costs,

and should accordingly be mulcted with costs. He cited the legal authority of *Balzer v Vries*¹ as to the requirements for condonation and *Shilungudwa v The Prosecutor General*,² wherein condonation was granted despite being in default for approximately five months.

[15] Counsel for the respondent, Mr Strydom, accentuated that the condonation application was launched on 18 April 2023, almost 6 months after the replying affidavit was due, and almost 11 months after the applicant had become privy to the content of the answering affidavit which was filed in July 2022. Furthermore that there was no full and frank account for the whole period in question as there are gaps in relation to the periods of 1 to 6 October 2022, 15 to 19 October 2022, 21 to 25 of October 2022 as well as the period subsequent to 11 November 2022 until 18 of April 2023, nor has the papers sufficiently explained the prospects of success. Thus the requirement of rule 56(1) and (2) have not been satisfactorily addressed. He also cited a principle from *Rainer Arangies t/a Auto Tech v Quick Build*³, where it was held that, there are times when the court will not even consider prospects of success which finds application when the non-compliance with the rules had been glaring, flagrant and inexplicable. His view was that the principle finds application in this situation.

¹ *Balzer v Vries* 2015 (2) NR 547(SC).

² *Shilungudwa v The Prosecutor General* (HC-MD-CIV-MOT-GEN-POCA-2018/00140) [2019] NAHCMD 19 (2 February 2021).

³ *Rainer Arangies t/a Auto Tech v Quick Build* (SA25-2010) [2013] NASC 4 (18 June 2013).

[16] On the issue of costs, he argued that the applicant has inordinately delayed the progress of this matter and caused the respondent to incur unnecessary additional legal costs, thus the respondent should be granted the full extent of its costs in opposing the condonation application and not be limited by rule 32(11).

The law

[17] The relevant rule, being rule 66(2) of the rules of the High Court provides that an applicant may, within 14 days of the service on him or her of the affidavit and documents referred to in subrule (1)(b), deliver a replying affidavit.

[18] Furthermore, 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.⁴

⁴ *Petrus v Roman Catholic Archioecese* 2011 (2) NR 637 (SC) p 640 para 10.

Conclusion

[19] I do not subscribe to the contention that the applicant was not in default and thus did not need to ask condonation. It surfaced as an afterthought with no basis in the founding affidavit for the respondent to have addressed the point. Furthermore, it is not a situation where the applicant was blissfully unaware of the answering affidavit when it was filed. The said affidavit was filed on e-Justice, thus the applicant's counsel at the time was privy to the fact that it had been filed. Once condonation was granted by the previous court for that late answering affidavit, which was also visible on e-Justice, the timeline for a replying affidavit became operative. The applicant knew about this, which can be deduced from the founding affidavit wherein she deposed that the due date for the replying affidavit was 27 October 2022.

[20] The majority of the reasons for the delay pertains to things that happened during the period preceding the date on which the replying affidavit should have been filed. The concrete dates for the settlement negotiations were before the clock started ticking for the replying affidavit. The same goes for the request to hold off on a replying affidavit, which was done during August 2022, more than a month before the due date for a replying affidavit. That does not assist the applicant's case herein. The applicant also admits to have been too pre-occupied with

renovations at certain properties and visiting her elderly mother in South Africa. The applicant did not give dates for these two occurrences. Furthermore there was no confirmatory affidavits from the legal practitioners at the other firms that the applicant said she approached. All in all these explanations cannot be said to be complete, full and frank, as it should be.

[21] My understanding of the *Shilengudwa* matter is that the court was swayed by the need for ventilation on a relatively new piece of legislation⁵ even though the reasons proffered were less than satisfactory. Thus the matter is not on all fours with the matter at hand. Another consideration herein is that the impact of refusal to grant the indulgence does not shut the doors in a final fashion for the applicant as the applicant can still fall back on her founding affidavit.

[22] Furthermore a delay of approximately six months, definitely cannot be fit into the requirement that condonation ought to be done 'without delay'. A litigant who idles for 6 months will inevitably face a difficult task to persuade a court, that it is a proper case for condonation. Having considered all the facts and the submissions, I conclude that the applicant's level of

⁵ The Prevention of Organised Crime Act 29 of 2004.

carelessness is quite substantial, so much so that I regard it as one of those instances wherein the alleged good prospects of success do not need consideration.

[23] Accordingly, I make the following order:

1. The court grants condonation for the late filing of the respondent's heads of arguments and no costs shall follow.
2. The application for condonation in respect of the applicant's replying affidavit is dismissed with costs, such costs to be capped in terms of rule 32(11).
3. The matter is postponed to 9 August 2023 at 08:30 for Case Management Conference Hearing.
4. Parties shall file a joint case management report on or before 3 August 2023.

Judge's signature	Note to the parties:
	Not applicable.

Counsel:	
Applicant	Respondents
<p>M Boonzaier Instructed by Theunissen, Louw & Partners, Windhoek.</p>	<p>J A Strydom Instructed by Engling, Stritter & Partners Windhoek</p>