

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

<b>Case Title:</b> STANLEY KUHANGA // JEANETH KUHANGA & ANOTHER	<b>Case No:</b> HC-MD-CIV-MOT-REV-2022/00580
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE MR JUSTICE PARKER, ACTING	<b>Date of hearing:</b> 18 July 2023
	<b>Delivered on:</b> 16 August 2023
<b>Neutral citation:</b> <i>Kuhanga v Kuhanga</i> (HC-MD-CIV-MOT-REV-2022/00580) [2023] NAHCMD 502 (16 August 2023)	
<b>Order:</b>  1. The application is dismissed with costs.  2. The matter is finalised and removed from the roll.	
<b>Reasons for the above order:</b>	
PARKER AJ:  [1] In the instant application instituted on 6 December 2022, the applicant seeks an order to review and set aside the decision of the second respondent (the Master of the High Court) made on 13 November 2020 and consequential declaratory orders. At the relevant time the applicant was represented by legal practitioners.	

[2] The first respondent has moved to reject the application and has taken three preliminary objections to the application. The first is the unreasonable delay in bringing the application. The second is that the applicant has not attached the impugned decision to his founding papers. The third is that the matter is not suited for motion proceedings because there are numerous disputes of facts and the applicant is aware of such disputes of facts as can be gathered from the papers filed of record.

[3] While the applicant was represented by counsel, on 19 April 2023 the matter was set down for hearing on the set-down date of 19 June 2023. On that date, counsel for the applicant appeared as a gesture of courtesy to inform the court that counsel had withdrawn as the applicant's counsel by a notice of withdrawal dated 30 May 2023. The notice shows that the applicant was personally served therewith.

[4] The applicant had had at least 18 days to obtain the services of a legal practitioner for the hearing scheduled for 19 June 2023. On that date he informed the court that he needed a couple of days to employ the services of a new legal practitioner. Mr Tjiteere, counsel for the first respondent, was magnanimous in not objecting to a postponement. The court granted his request and postponed the hearing to 18 July 2023. The following relevant orders were made postponing the hearing:

‘3. The applicant must make his own arrangements at his own expense for the assistance of an interpreter during the hearing.

4. The matter shall proceed as set down whether or not the applicant has secured the services of a legal practitioner.’

[5] On the new set down date, the applicant appeared in person without legal representation. He said he had consulted two law firms but they all declined to take his case. After hearing him and Mr Tjiteere, I decided to hear the application so that the first respondent, who has been dragged to court by the applicant, is not seriously prejudiced further by a further postponement of the hearing. Besides, the applicant had been forewarned in para 4 of the aforesaid 19 June 2023 order. I did not think this court should set at naught its own order. More important, as I said in *Stephanus v Kuutondokwa*<sup>1</sup> ‘a postponement of a matter or an adjournment of proceedings ought to be allowed only if in the court's view it is expedient in the interest of justice.’ There is no justice where a postponement would seriously

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<sup>1</sup> *Stephanus v Kuutondokwa* 2022 NAHCMD 622 (16 November 2022) para 10.

prejudice the right of the respondent (or defendant), who has been dragged to court by the delaying applicant unjustifiably, to have the matter disposed of expeditiously. Mr Tjiteere's submission was along those lines. Such dilatoriness that is detrimental to due administration of justice ought not be tolerated or encouraged.

[6] On 19 June 2023, when the hearing was to have taken place, as explained previously, I invited the parties to address the court on the first point in limine being the issue of unreasonable delay. Where a preliminary point on unreasonable delay is taken, it stands to reason that it is heard at the threshold before all else.

[7] The Supreme Court tells us that 'the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time that it took the litigant to institute the proceedings was unreasonable. If the court concludes that the delay was unreasonable, then the question arises whether the court should, in an exercise of its discretion, grant condonation for the unreasonable delay.'<sup>2</sup> The 'enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion.'<sup>3</sup>

[8] It should also be remembered that in considering whether there has been unreasonable delay, it has been 'held that each case must be judged on its own facts and circumstances';<sup>4</sup> and 'so what may be reasonable in one case may not be so in another'.<sup>5</sup> It is important to note that the issue is not just any delay simpliciter but unreasonable delay. The epithet qualifying the noun 'delay' is 'unreasonable'.

[9] From the applicant's replying papers wherein he replied to the first respondent's first point in limine on unreasonable delay, I find that the applicant became aware of the first respondent's decision in March 2021, but, he launched the instant application on 6 December 2022, that is some 22 months thereafter.

[10] I do not find in the replying affidavit that he has given a sufficient and an acceptable explanation why it took him as long as 22 months to bring the application. In that regard, it should be remembered that at the relevant time the applicant was legally represented.

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<sup>2</sup> *Keya v Chief of the Defence Force and Others* 2013 (3) NR 770 (SC) para 21.

<sup>3</sup> *Loc cit.*

<sup>4</sup> *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others* 1997 NR 129 (HC) at 132.

<sup>5</sup> *Keya v Chief of the Defence Force and Others* footnote 2 para 21.

[11] The fact that his legal practitioners instituted action first before realizing that the appropriate procedure should be motion proceedings and did an about turn is not a satisfactory explanation for the unreasonable delay. The legal practitioners' apparent lack of knowledge of the rules cannot assist the applicant. It cannot constitute good grounds to condone the unreasonable delay in bringing the application. The legal practitioner was required to familiarize himself or herself with the rules to decide the appropriate procedure to follow. If she or he did not, the court cannot come to the aid of the applicant and condone the unreasonable delay in instituting the present application.<sup>6</sup> The unreasonable delay is inexplicable.

[12] Another explanation relied on by the applicant is that it took him some considerable time to obtain forensic evidence from the Namibian Police Forensic Institute, which he required to support the application. According to the applicant, he requested the evidence in March 2021 and the forensic report was ready on 3 June 2021 and was available to him as on that date. This explanation, too, is rejected. Like the first explanation, this explanation, too, is extremely poor.

[13] The applicant, who was legally represented at the relevant time, as I have said more than once, did not apply for the condonation of the unreasonable delay. Nevertheless, I considered the explanation for the delay contained in his founding affidavit. Having done that, I find that the explanations for the unreasonable delay are so egregious that a consideration of the merits was not warranted.<sup>7</sup>

[14] Based on these reasons, I uphold the first point in limine taken by the first respondent. There is no application properly before the court. Therefore, there is no need to consider the rest of the points in limine taken by the first respondent.

[15] In the result, I order as follows:

1. The application is dismissed with costs.
2. The matter is finalised and removed from the roll.

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<sup>6</sup> *Maia v Total Namibia (Pty) Ltd* 1998 NR 303 (HC).

<sup>7</sup> *South African Poultry Association and Others v Minister of Trade and Industry and Others* 2018 (1) NR 13 (SC) paras 55-56.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondents</b>
S Kuhanga In Person	M Tjiteere Of Dr Weder, Kauta & Hoveka Inc., Windhoek