

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Practice Directive 61

RULING

Case Title: Strydo Construction CC and Jason Defendant	Plaintiff Gurirab	Case No: HC-MD-CIV-ACT-OTH- 2022/02180 Division of Court: High Court, Main Division
Coram: HONOURABLE LADY JUSTICE CLAASEN		Heard: 30 August 2023 Delivered: 13 September 2023
Neutral citation: <i>Strydo Construction CC v Gurirab</i> (HC-MD-CIV-ACT-OTH-2022/02180) [2023] NAHCMD 566 (13 September 2023)		
Order: <ol style="list-style-type: none">1. The application for condoning the defendant's failure to file a plea as ordered in the court order of 26 October 2022 is refused.2. The defendant to pay the plaintiff's costs occasioned by this application, such costs to be capped in terms of rule 32(11).3. The matter is postponed to 4 October 2023 at 08:30 for Status Hearing and parties to file a joint status report no later than 28 September 2023.		
Ruling:		

CLAASEN J :

Introduction

[1] This is an application, seeking condonation and upliftment of the bar for the defendant's failure to file a plea in accordance with the timeline set out for that. The notice of motion prays for the following relief:

'1. Condoning the Defendant's non-compliance with the Court Order dated 26 October and staying the filing of the Defendant's Plea until the final determination of the Application pending under case number HC-MD-CIV-MOT-GEN-2022/00534.

2. Upliftment of the bar in default of the Defendant's failure to file his Plea on or before 16 November 2022.

3. Staying this matter until the final determination of the Application pending under case number HC-MD-CIV-MOT-GEN-2022/00534.'

[2] The defendant abandoned prayer 3 of the notice of motion during the hearing, as the matter has since been determined.

[3] Mr Kasper acts on behalf of the defendant and Mr Olivier on behalf of the plaintiff.

Plaintiff's claim

[4] This matter emanated from a settlement agreement¹ that was made an order of court on 19 August 2019. In that matter the plaintiff sued a company by the name of Erongo Quarry & Civil Works (Pty) Ltd for an amount of N\$936 410,50. The defendant, in the current matter before court, had bound himself as surety and co-principal debtor in that settlement agreement, but failed to perform in terms of the said order.

[5] The defendant inter alia explained in his founding affidavit herein that although a writ of execution was issued after the settlement agreement was made an order of court, no

¹ Strydo Construction Cc vs Erongo Quarry & Civil Works (Pty) Ltd HC-MD-CIV-ACT-CON-2019/00979.

judgment had in fact been given against him and that he was not a party to that case. As such the defendant issued summons in the current matter before this court.

Condonation application

[6] The court order dated 26 October 2022, ordered the defendant to file his plea and counterclaim, if any, on or before 7 November 2022. The eJustice system reflects that the defendant filed the current condonation application on 28 March 2023.

[7] The defendant, a businessman, deposed to the founding affidavit which was supported by a confirmatory affidavit by his current legal practitioner. The relevant portions explains that before the due date of the plea, the defendant's legal practitioner engaged the plaintiff's legal practitioner concerning a writ of execution under case number HC-MD-CIV-ACT-CON-2019/00979 wherein he was the second execution creditor. Thus, the defendant was of the opinion that it is inappropriate for the plaintiff to have issued summons in the present case.

[8] Secondly, he explains that his legal practitioner was involved in a motor vehicle accident on 25 October 2022 on route to Gobabis wherein a pedestrian was injured. He was thus indisposed from 25 October 2022 until 26 October 2022, as he had to attend to the matter concerning the accident on 26 October 2022. The public prosecutor of that district deposed to a confirmatory affidavit in relation to the latter two days.

[9] He further explains that his legal practitioner engaged the plaintiff's legal practitioner on 5 October 2022 and 10 November 2022 regarding its intended application under HC-MD-CIV-MOT-GEN-2022/00534 to have the writ of execution set aside. Therefore, Mr Gurirab opined that his failure to file its plea was *bona fide*. The founding affidavit also states that: 'Further self-explanatory Status Reports have been uploaded by Mr Kasper herein dealing with the said issue, which we humbly ask the above Honourable Court to have regard to.'

[10] As far as prospects of success are concerned the deponent says that he intends to raise a special plea of *res judicata*. In oral submissions, Mr Kasper reiterated that a writ of execution was issued in HC-MD-CIV-ACT-CON-2019/00979 in favour of the plaintiff, and therefore, the settlement agreement in the latter matter could apply to the defendant in which

case *res judicata* would apply.

Opposition to the application

[11] The plaintiff's answering affidavit, which was deposed to by Mr Gert Strydom, a member of the plaintiff, attacks the condonation application saying that it is fatally defective because of the inordinate delay. The position was lamented that counsel for the defendant failed to participate in the compilation of the case plan, nor did he say why it was impossible to do so. The plaintiff's view is that the affidavit does not disclose the circumstances that gave rise to the plea not being filed timeously nor did the defendant disclose a defence on the merits. That is because the defendant only dealt with a defense conditional to his application in HC-MD-CIV-MOT-GEN-2022/00534.

[12] In relation to the averments pertaining to the defendant position that he was not a party to the case wherein the warrant of execution was issued, the deponent to the answering affidavit states that it represents a complete turnaround from the earlier stance wherein the position was that the defendant was regarded as a co-principal debtor in case number HC-MD-CIV-ACT-CON-2019/00979.

[13] In argument Mr Olivier explained the plaintiff's dilemma as the erstwhile legal practitioners did not join Mr Gurirab as a second defendant in case number HC-MD-CIV-ACT-CON-2019/00979. Thus, the plaintiff could not sit idle in view of the non-payment to the claim because the claim might prescribe, which is why this case was instituted. He argued that had the defendant honoured his undertaking as per the settlement agreement that would have been the end of the matter. He reiterated the views as set out in the opposing affidavit.

The law and application thereof

[14] 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.²

[15] In *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others*³ Langa AJA stipulated the principles applicable to applications for condonation even under the new rules. In dealing with condonation, the learned Judge of Appeal stated the following:⁴

‘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 cases 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.’ My emphasis

[16] It is evident from the record that the non-compliance occurred on 7 November 2022. I have no hesitation to accept Mr Kasper’s explanation regarding the unfortunate turn of events that resulted in him not being able to attend the court on 26 October 2022 at which point the timelines or exchange of pleadings were given. It is the lack of explanation for the period as from 26 October 2022 until the due date that is not explained.

[17] The defendant appears to rely on correspondence to the plaintiff’s legal practitioner about the application in case number HC-MD-CIV-MOT-GEN-2022/00534 and ‘self-explanatory Status Reports’ regarding the matter, but that does not take the place of a condonation application. What was needed herein was for the defendant to have filed a condonation application, without delay. Instead the defendant waits for almost five months before doing so.

[18] What aggravates the situation is that apart from the incident on 26 October 2022, there is no explanation is forthcoming for the remainder of the period until March 2023 at which time signs of a condonation application surfaced. Against that background this condonation application does not meet the threshold of bringing the application, ‘without delay,’ nor did the

² *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) at 640 para 10.

³ *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others* (SA 10-2006) [2010] NASC 14 (5 November 2010).

⁴ *Supra*.

defendant give a full and detailed explanation for the delay. Given the flagrant disregard for the rules, the application thus turns on this leg of the enquiry into condonation.

[19] I nevertheless briefly comment on the prospects of success. As said earlier, the only defence alluded to by the defendant was that of a special plea of *res judica*, with nothing being disclosed in respect of a defense on the merits. Considering the elements required for *res judicata*, prospects of success is questionable given that the defendant deposed under oath herein that he was not a party to the matter in case number HC-MD-CIV-ACT-CON-2019/00979 and furthermore the plaintiff considers the respective causes of action not to be the same.

Conclusion

[20] With the above discussion in mind, I am inclined to agree with the submissions made by the plaintiff in that the defendant failed to meet the requirements for the relief sought.

[21] My order is therefor as follows:

1. The application for condoning the defendant's failure to file a plea as ordered in the court order of 26 October 2022 is refused.
2. The defendant to pay the plaintiff's costs occasioned by this application, such costs to be capped in terms of rule 32(11).
3. The matter is postponed to 4 October 2023 at 08:30 for Status Hearing and parties to file a joint status report no later than 28 September 2023.

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

Counsel:	
Plaintiff	Defendant
J Olivier Of Jan Olivier & Co. C/O Ellis Shilengudwa Inc Legal Practitioners Windhoek	G Kasper Of Murorua Kurtz Kasper Incorporated Windhoek