

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON THE CONDONATION APPLICATION

Case Title: Alta van Wyk Gerhard van Wyk JR Michelle van Wyk Liani van Wyk v Harvey Eric Boulter SX Investments One (Pty) Ltd	First Plaintiff Second Plaintiff Third Plaintiff Fourth Plaintiff First Defendant Second defendant	Case No: HC-MD-CIV-ACT-DEL-2022/00801
Heard before: Honourable Justice Sibeya		Division of Court: High court (Main Division)
		Heard: 8 September 2023 Delivered: 21 September 2023
Neutral citation:	<i>Van Wyk v Boulter</i> (HC-MD-CIV-ACT-DEL-2022/00801) [2023] NAHCMD 584 (21 September 2023)	
The order:	1. The plaintiffs' application for condonation for late filing of the notice to amend the particulars of claim in default of the court order of 11 May 2023 is granted and the applicable bar is uplifted. 2. The time limit to file the plaintiffs' notice to amend the particulars of claim is extended to 16	

June 2023.

3. The first and second defendants must, jointly and severally, the one paying the other to be absolved, pay the plaintiffs' costs of the application for condonation including costs of one instructing and one instructed legal practitioner, subject to rule 32(11).
4. The defendants must file their objections, if any, to the notice to amend on or before 28 September 2023.
5. The matter is postponed to 5 October 2023 at 08:30 for a status hearing.
6. The parties must file a joint status report on or before 2 October 2023.

Reasons

SIBEYA J:

Introduction

[1] The court is seized with an application for condonation for failure by the plaintiffs to file their notice of intention to amend their particulars of claim as ordered by the court. The application is opposed by the defendants.

Parties and their representation

[2] The first plaintiff is Alta van Wyk, an adult female. The first plaintiff will be referred to as 'Ms A van Wyk'.

[3] The second plaintiff is Gerhard van Wyk Jr, an adult male. The second plaintiff will be referred to as 'Mr G van Wyk'.

[4] The third plaintiff is Michelle van Wyk, an adult female. The third plaintiff will be referred to as 'Ms M van Wyk'.

[5] The fourth plaintiff is Liani van Wyk, an adult female. The fourth plaintiff will be referred to as 'Ms L van Wyk'.

[6] The plaintiffs, who previously resided at Farm Kaross 237, Kamanjab, Namibia, withheld their full and further particulars due to alleged safety concerns.

[7] The first defendant is Harvey Eric Boulter, an adult businessman, a shareholder and director of the second defendant, whose place of residence is Farm Kaross 237, Kamandjab, Namibia. The first defendant will be referred to as 'Mr Boulter'.

[8] The second defendant is SX Investments One (Pty) Ltd, a company duly incorporated in according to the laws of the Republic of Namibia, with its principal place of business situated at Farm Kaross 237, Kamandjab, Namibia. The second defendant will be referred to as 'SX'.

[9] The plaintiffs are represented by Mr van Vuuren while Ms Amupanda appears for Mr Boulter and Mr Amoomo for SX.

Relief sought

[10] The plaintiffs seek the following relief:

1 Condoning the late filing of the plaintiffs' amendments to the particulars of claim, in so far as it relates to the prescribed times in the Order of the Honourable Judge Sibeya dated 11 May 2023.

2 Extending the time limits prescribed for filing of the plaintiffs' amendments to the particulars of claim, to 16 June 2023.

3 Directing the defendants to pay the cost of this application, only in the event that the defendants oppose this application.

4 Granting the plaintiffs further and/or alternative relief.'

Background

[11] The plaintiffs instituted action proceedings against the defendants. The defendants raised an exception to the particulars of claim. On the date of hearing of the exception, 11 May 2023, the plaintiffs informed the court of their intention to amend the particulars of claim and tendered wasted costs for the exception. The court, thereafter, ordered the plaintiffs to file their notice to amend the particulars of claim on or before 5 June 2023, which the plaintiffs failed to do. It was further ordered that the defendants must file their objections, if any, on or before 19 June 2023, and the plaintiffs were ordered to pay the defendants' wasted costs.

[12] The plaintiffs filed an application for condonation on 16 June 2023, which is the subject of this matter. In attempt to comply with rule 32(9), the plaintiffs report in the rule 32(10) report, that in response to their rule 32(9) correspondence, the first defendant's legal practitioners stated that they will vigorously oppose the application.

First defendant's heads of argument

[13] On 27 July 2023, the court ordered the plaintiffs to file their heads of argument by 31 August 2023, and the defendants by 4 September 2023, regarding the condonation application. The plaintiffs and SX filed their heads of argument as ordered by the court. Mr Boulter filed his heads of argument on 5 September 2023, and thus out of time. Mr Namandje deposed to an affidavit in support of Mr Boulter's condonation application. Mr Namandje explained that Mr Boulter's aforesaid default was occasioned by his (Mr Namandje) loss of a close friend on 30 August 2023 and he was preoccupied with memorial and funeral arrangements.

[14] At the commencement of the hearing, Ms Amupanda applied for condonation of late filing of Mr Boulter's heads of argument. The court condoned the late filing of the heads of argument, and Ms Amupanda argued the merits of the plaintiff's' condonation application.

The merits of the plaintiff's application for condonation and arguments

[15] In the founding affidavit filed in support of the condonation application deposed to by Ms A van Wyk, on behalf of the plaintiffs, the plaintiffs' failure to file the notice to amend by 5 June 2023, is explained. Ms A van Wyk states that such failure was occasioned by court commitments of the plaintiffs' chosen legal practitioners and counsel, both based in South Africa. She also explains that there was further a miscommunication and an administrative error at the offices of the plaintiffs' legal practitioners. She further stated that the plaintiffs could not appoint other legal practitioners due to financial constraints.

[16] Ms A van Wyk contends that the plaintiffs have reasonable prospects of success in the matter. She further contended that the defendants suffered no prejudice as a result of the default sought to be condoned.

[17] Mr Boulter, who deposed to the answering affidavit on his own behalf and on behalf of SX, contends that the delays were caused by the plaintiffs and the plaintiffs' explanation of the alleged miscommunications offers no excuse. The defendants allege that the default of the plaintiffs prejudiced them. Mr Boulter contends further that the condonation application falls to be dismissed on the basis that the amendments sought do not cure the complaints raised earlier in the exception. It was further contended by SX that the plaintiffs failed to comply with rule 32(9) before instituting the condonation application.

[18] During arguments, Mr van Vuuren submitted that the plaintiffs complied with rule 32(9) and (10). He argued that the plaintiffs, acknowledged their errors, explained the cause for the default and proffered sincere apologies, while the defendants failed to point out the prejudice caused by the default.

[19] Ms Amupanda argued that the plaintiffs do not seek an upliftment of the bar and therefore ought to be stopped in their tracks. She argued further that when one has regard to the history of the matter, this is not the first time that the plaintiffs have delayed the prosecution of their claim, and this should count against them and result in the refusal of condonation.

[20] Mr Amoomo was not to be outdone. He argued that the plaintiffs failed to comply with rule 32(9). He further argued that the plaintiffs failed to offer a reasonable explanation for their default, as the alleged miscommunications were not fully explained in order to be appreciated. He called for the dismissal of the condonation.

Analysis

[21] Rule 54(3) of the Rules of this court reads:

'Where a party fails to deliver a pleading within the time stated in the case plan order or within any extended time allowed by the managing judge, that party is in default of filing such pleading and is by that very fact barred.'

[22] Rule 55, on the other hand provides that:

(1) The court or the managing judge may, on application on notice to every party and on good cause shown, make an order extending or shortening a time prescribed by these rules or by an order of court for doing an act or taking a step in connection with proceedings of any nature whatsoever, on such terms as the court or managing judge considers suitable or appropriate.

(2) An extension of time may be ordered although the application is made before the expiry of the time prescribed or fixed and the managing judge ordering the extension may make any order he or she considers suitable or appropriate as to the recalling, varying or cancelling of the consequences of default, whether such consequences flow from the terms of any order or from these rules.' (My emphasis)

[23] In respect of the alleged non-compliance with rule 32(9), I hold the view that the plaintiffs' intention to apply for condonation for the late filing of the notice to amend was laid bare in the correspondence where they further set out reasons for the default, and further annexed the intended application for condonation to the correspondence, demonstrates substantial compliance with rule 32(9). The stance, however, adopted by the Mr Boulter that the condonation application will be vigorously opposed throws turmoil to attempts to

meaningfully engage in an exercise to seek an amicable solution to the impasse between the parties. With the stance taken by the defendants, it is inconceivable that an amicable solution could be envisaged. As a result, I opine that the argument of non-compliance with rule 32(9) lacks merit and falls to be rejected, as I hereby do.

[24] In *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*,¹ Damaseb JP discussed late amendments and remarked as follows at para 49:

‘The unchanged position under the rules of court at the time the matter was argued and now is that an amendment may be granted at any stage of the proceeding and that the court has discretion in the matter, to be exercised judicially. The common law position that a party may amend at any stage of the proceedings as long as prejudice does not operate to the prejudice of the opponent remains, save that, like every other procedural right, it is also subject to the objectives of the new judicial case management regime applicable in the High Court. That includes the imperative of speedy and inexpensive disposal of causes coming before the High Court.’

[25] The explanation tendered by the plaintiffs that their legal practitioners and counsel were engaged in urgent court matters and that due to financial constraints they could not instruct new legal practitioners, coupled with the fact that by the sixth court day out of time they engaged the defendants in terms rule 32(9), renders their explanation reasonable in my view. By the seventh court day from the date on which the notice to amend was due, the plaintiffs filed the condonation application. Their promptness demonstrates an addition to the bona fide of their explanation.

[26] The defendants, however failed to show how the default of the plaintiffs prejudiced them. The contention raised by the defendants that the plaintiffs did not seek upliftment of the bar is correct, but standing alone, it appears to be a technical approach aimed at nothing but technically throwing-out the condonation application, while it is apparent from the condonation application that the plaintiffs seek condonation for late filing of the amendment and extension of time limits to file the amendment. Once the court grants the extension, it follows as a matter of

¹ *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).

consequence that, the applicable bar must be uplifted.

[27] Rule 55, cited above, allows the court on good cause shown to extend the time prescribed by the rules or an order of court for doing an act or taking a step. In my view, the condonation application of the plaintiffs fits hand and glove with the provisions of rule 55. The fact that the condonation application does not refer to upliftment of the bar should, in my view, not shut the doors of condonation in the plaintiffs' faces, particularly where it is found that they proffered a reasonable explanation, the period of the default is negligible and there is no prejudice demonstrably suffered by the defendants. It should further be pointed out that the intention by the defendants to raise an exception to the amendment sought is an issue that is not ripe for determination. The intended exception will only become ripe after the amendment of the particulars of claim is permitted. I, therefore, decline the invitation to consider the intended exception at this stage.

[28] As I approach the finishing line on the issues involved in this matter with equanimity I find comfort in the old words expressed in *Whittaker v Roos*² as follows:

'This court has the greatest latitude in granting amendment, and it is necessary that it should have. The object of the court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time that mistakes are made in pleadings, and it will be a very grave injustice, if for a slip of the pen, or error in judgment, or misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. This would be a gross scandal. Therefore, the court will not look to technicalities, but will see what the real position is between the parties.'

[29] Having found that the explanation proffered by the plaintiffs for the default is reasonable and bona fide, and brought timeously, I hold the view that they are dispositive of the matter.

² *Whittaker v Roos* 1911 TPD 1092 at p. 1102.

Conclusion

[30] In view of the findings and conclusions made hereinabove, and in the exercise of my discretion, I opine that the plaintiffs' application for condonation is merited and stands to succeed. Condonation will, therefore, be granted.

Costs

[31] It is established law that costs follow the result, and no basis was laid for the court to find otherwise. It should be noted that the stance adopted by the defendants to vigorously oppose the plaintiffs' condonation application is unfortunate, more so when the period of the default is negligible, no prejudice is demonstrated and the defendants sought condonation of their own for not filing heads of argument in time. This attitude, in my view, calls for an adverse costs order against the defendants subject to rule 32(11) by virtue of the fact that these are interlocutory proceedings. I shall accordingly so order.

Order

[32] In the result, it is ordered that:

1. The plaintiffs' application for condonation for late filing of the notice to amend the particulars of claim in default of the court order of 11 May 2023 is granted and the applicable bar is uplifted.
2. The time limit to file the plaintiffs' notice to amend the particulars of claim is extended to 16 June 2023.
3. The first and second defendants must, jointly and severally, the one paying the other to be absolved, pay the plaintiffs' costs of the application for condonation including costs of one instructing and one instructed legal practitioner, subject to rule 32(11).
4. The defendants must file their objections, if any, to the notice to amend on or before 28 September 2023.

<p>5. The matter is postponed to 5 October 2023 at 08:30 for a status hearing.</p> <p>6. The parties must file a joint status report on or before 2 October 2023.</p>	
Judge's signature:	Note to parties:
<p style="text-align: center;">O S SIBEYA JUDGE</p>	
<p style="text-align: center;">For the plaintiffs: J Van Vuuren Instructed by Metcalfe Beukes Attorneys, Windhoek</p>	<p style="text-align: center;">For the first defendant: T Amupanda Of Sisa Namandje & Co Inc, Windhoek</p>
	<p style="text-align: center;">For the second defendant: K Amoomo Of Kadhila Amoomo Legal Practitioners, Windhoek</p>