

REPUBLIC OF NAMIBIA



**IN THE HIGH COURT OF NAMIBIA
(MAIN DIVISION) WINDHOEK**

EX TEMPORE RULING

Case No.: HC-MD-CIV-ACT-CON-2023/01370

In the matter between:

DEVELOPMENT BANK OF NAMIBIA LIMITED

PLAINTIFF

and

ATOMIC MATTER NAMIBIA CC

1st DEFENDANT

NDAMONO NAMUSHESHE INDILA IMENE

2nd DEFENDANT

Neutral citation: *Development Bank of Namibia v Atomic Matter* (HC-MD-CIV-ACT-CON-2023/01370) [2023] NAHCMD 602 (7 September 2023)

Coram: SCHIMMING-CHASE J

Heard: 7 September 2023

Delivered: 7 September 2023

ORDER

1. The applicants' application for upliftment of bar and extension of time is dismissed.
2. The applicants remain barred.
3. The case is postponed to 18 September 2023 at 15:30 for Status hearing.
4. The respondent may exercise any further rights in this matter and must file the necessary rule-compliant documentation on or before 14 September 2023.

EX TEMPORE JUDGMENT

SCHIMMING-CHASE J

[1] Rarely have I encountered an affidavit in support of a condonation and extension of time application that fails completely to comply with the trite principles that govern these types of applications, namely good cause shown and a *bona fide* defence. In fact, on the founding papers, no defence at all to the claim of the plaintiff is disclosed and no justifiable or reasonable explanation is provided for the failure to comply with a court order that set out the dates of filing of pleadings.

[2] The plaintiff's claim against the defendants is for payment of an amount of N\$569,489,25 plus interest and costs. The claim was instituted by the plaintiff in March 2023 and is based on an SME term loan facility made to the first defendant represented by the second defendant. The plaintiff's claim is premised on a written contract which is described as an SME term facility loan agreement which it concluded with the first defendant, and a written agreement of suretyship where the second defendant bound herself as surety and co-principal debtor.

[3] The defendants entered appearances to defend the matter on 30 March 2023 and the matter was referred for judicial case management where the parties were required to file a joint case plan report. The parties agreed upon and filed a joint case plan on 6 April

2023. The case plan included the parties' agreement to the defendants filing their plea by 22 May 2023.

[4] The court issued a case plan order on 14 May 2023 and the defendants were ordered to deliver their plea and counterclaim on or before 23 May 2023. The plaintiff had to replicate on or before 14 June 2023 and both parties were to make discovery on or before 21 June 2023. The defendants failed to file their plea and as a consequence of their failure, they are in default and are *ipso facto* barred resulting in this application before court in terms of rule 55.

[5] In support of the application for upliftment of bar (essentially a condonation application), the second defendant alleges per her founding affidavit that she is a startup entrepreneur financed by the plaintiff to a facility agreement. The first defendant was affected by the Covid-19 pandemic with all lock down regulations in place, noting that it is a startup. The second defendant managed to get investors that were able and willing to finance the affairs and to assist with paying back the amounts claimed.

[6] The second defendant states in her founding affidavit that despite the defendants having a defence, the second defendant states that 'she will plead thereto if need be'.

[7] This sentence on its own is disturbing. No defence is disclosed whatsoever. There is no explanation other than the first defendant is a startup struggling financially to find funds to repay the debt and attempting to settle the matter.

[8] Rule 55(1) provides a discretion to the court on good cause shown to extend the limits of a case plan order and it may allow the defendants to file their plea later than originally ordered even after expiry of the return date. The success of the defendants' application stands or fails on the facts contained in their founding papers.

[9] When a court is approached to exercise its discretion to assist an applicant, such applicant must set out the tried and tested facts in order to enable the court to apply its

discretion. There are simply no averments in the founding papers to enable the court to exercise its discretion in favour of the defendants. The Supreme Court of Namibia in *De Klerk v Penderis N.O.*¹ confirmed the principles as follows:

'The first dictates that an application for condonation must be brought as soon as the non-compliances are detected. Second, the applicant must provide a reasonable and acceptable explanation for his or her non-compliance and show that the main matter has prospects of success. Third, an application for condonation may be refused because the non-compliance with the rules has been glaring, flagrant or inexplicable and fourth the *bona fide* of an explanation that has also been held as a factor to be taken into account in exercising its discretion on whether to grant or refuse condonation.'

[10] My concern here is that in order for me to exercise my discretion I must be presented with facts to enable me to do so and I have not been provided with any such explanation. Therefore there is nothing upon which I can consider any facts to exercise my discretion in favour of the defendants because the defendants have simply not complied with the principles relating to applications of this nature. In light of the foregoing, the application for upliftment of bar and extension to file a plea is dismissed.

[11] Accordingly the following order is made:

1. The applicants' application for upliftment of bar and extension of time is dismissed.
2. The applicants remain barred.
3. The case is postponed to 18 September 2023 at 15:30 for Status hearing.
4. The respondent may exercise any further rights in this matter and must file the necessary rule-compliant documentation on or before 14 September 2023.

¹ *De Klerk v Penderis* (SA 76-2020) [2023] NASC (1 March 2023).

E M SCHIMMING-CHASE
Judge

APPEARANCES:

FOR THE PLAINTIFF:

U Tjavendja
Kinghorn Associates,
Windhoek

FOR THE DEFENDANTS:

V Jackob
Of Nambili Mhata Legal Practitioners,
Windhoek