

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING IN TERMS OF PRACTICE DIRECTION 61

<b>Case Title:</b>  Albert Werner Boesak  and  Reagen Ockert Kooper	Plaintiff	<b>Case No:</b> HC-MD-CIV-ACT-OTH-2023/00797
		<b>Division of Court:</b> Main Division
		<b>Heard on:</b> 16 October 2023
<b>Heard before:</b> Honourable Lady Justice Rakow		<b>Delivered on:</b> 14 November 2023
<b>Neutral citation:</b> <i>Boesak v Kooper</i> (HC-MD-CIV-ACT-OTH-2023/00797) [2023] NAHCMD 733 (14 November 2023)		
<b>Order:</b> <ol style="list-style-type: none"><li>1. The application for condonation is granted with costs and the defendant has leave to file his answering affidavit.</li><li>2. The answering affidavit to be filed on or before 5 December 2023.</li><li>3. The matter is postponed to 16 January 2024 at 15:30 for fixing of a date for hearing the summary judgment application.</li></ol>		
<b>Reasons for order:</b>		
RAKOW J:  <u>Introduction</u>		
[1] On or about 6 May 2021 at Windhoek the parties, acting in their respective personal		

capacities, concluded a written lease agreement for the property described as 515 Brukkaros, Kleine Kuppe. The plaintiff and defendant orally agreed on or about 31 December 2021 for the extension of the rental period on a month-to-month basis commencing on 1 January 2022 and which agreement persisted until 30 November 2022, on the same terms as stipulated in the original agreement. One of these terms was that the defendant would be liable for municipal fees. The plaintiff alleges that the defendant failed to comply with the terms of the oral agreement by failing to pay arrear rental and municipal rates and taxes in the amount of N\$29 000. The plaintiff alleged further that he suffered damages, due to defendant's failure to effect timeous payment of arrear rental and municipal charges and thereby incurring a municipal debt in the amount of N\$28 068.71.

#### This application

[2] The matter became opposed and the plaintiff applied for summary judgment. The defendant had to file its opposing papers by 01 September 2023, which he failed to do. The defendant then filed a condonation application which reads as follows:

- '1. Condoning the non-compliance with the court order dated 31 July 2023, which required the applicant to file his answering affidavit on or before 1 September 2023.
2. Pursuant to the aforesaid relief in paragraph 1 above, order an upliftment of the bar and granting the applicant leave to serve and file his answering affidavit.
3. Directing the further exchange of pleadings as the Honourable Court may deem fit;
4. Costs in the event that this application is opposed.
5. Such further and/or alternative relief as the court may deem appropriate.'

[3] This application was supported by an affidavit of the defendant's legal practitioner, Mr Ray Silungwe, who explained that he had a high fever and sore throat on 1 September 2023 which worsened over the weekend and he consulted a doctor on 4 September 2023 who booked him off until 6 September 2023. Due to his illness, he could not file the papers as per 31 July 2023 court order's instruction.

[4] The deponent of the affidavit also dealt with prospects of success in offering various defenses available to the defendant in the summary judgment application. He claims that he paid rental until the last month which he did not pay but is set off against the deposit he paid. He also claims that the parties did not agree that he would be liable for water consumption and municipal charges. The written lease agreement is further not stamped.

### Arguments by the parties

[5] In limine, the plaintiff raised the point that, the defendant's attorney is not duly authorised to have launched this condonation application on behalf of the defendant, his client. It must be clear that from the said application, no affidavit has been rendered by the defendant himself, even in the form of a confirmatory or supporting affidavit. So, despite the fact that defendant's attorney protests that he is the attorney of record, it does not grant him the powers or authority to launch an application on behalf of his client on his own. On behalf of the plaintiff, it was further raised that the defendant did not comply with rule 32(9) and 32(10).

[6] On behalf of the defendant, the court was referred to *Mall (Cape) (Pty) Ltd v Merino Ko-Operasie Bpk*<sup>1</sup> where the court made a distinction between a case where the litigant is a natural person who institute proceedings and where he is doing so on behalf of a juristic person. The court held that in the case of a natural person, where a notice of motion is complete and regular on the face of it and purports to be signed by an attorney, the court may presume, in the absence of anything that shows that the applicant has not in fact authorised the attorney to issue the notice of motion on his behalf, that the attorney has been authorised. The court however stated that in the case of an artificial person, evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance.

[7] It was further argued on behalf of the defendant, that the delay was occasioned by the fact that the applicant's legal practitioner's unavailability on the scheduled day in which the day the answering affidavit was supposed to be drafted and filed. Specifically, Mr Ray Silungwe fell ill. Following the failure to file, the applicant was barred from filing the answering affidavit and he at the earliest possible time sought directions from this court to bring a condonation application. The non-compliance was rectified immediately, thereby reducing the likelihood of prejudice. The degree of non-compliance is minuscule in the circumstances. It was further argued that, the plaintiff does not state, in detail, in his answering papers, what prejudice he has suffered. Mr Silungwe submits that no prejudice is suffered by the plaintiff and if any, it is nothing which cannot be met with a cost order.

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<sup>1</sup> *Mall (Cape) (Pty) Ltd v Merino Ko-Operasie Bpk* 1957 (2) SA 347 (C).

### Legal considerations

[8] In the matter of *Minister of Urban and Rural Development v Witbooi* where the court stated as follows at paras 13 and 14 regarding compliance with rule 32(9) and 32(10):

[13] It must be recalled that condonation is an application brought by the errant party to the court, which must make the final decision. In this regard, it must be made plain that all that the parties to the matter can do is, even if the party not on the wrong side of the rules agrees, is not to oppose the application when eventually filed. The court is not bound by whatever agreement the parties come to in respect of the condonation as the power to condone resides in the court and the court alone.

[14] Accordingly what the parties may do is to agree about the other party not opposing the application and advise the court accordingly. Having done so, the errant party should still file the application for condonation and which the court will decide, based on the merits. In this regard, although the view of the parties may be considered, ultimately it is the court that has to decide the matter, based on the papers before it. In the premises, it is strictly not necessary for parties to comply with rule 32(9) and (10) in applications for condonation.'

[9] In *Standic BV v Kessels*<sup>2</sup>, the court stated that, the tendency of the court is to grant a Condonation application where:

- (a) the applicant has given a reasonable explanation of his delay;
- (b) the application is bona fide and not made with the object of delaying the opposite party's claim;
- (c) there has not been a reckless or intentional disregard of the Rules of Court;
- (d) the applicant's action is clearly not ill-founded and
- (e) any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs. Factors of prospect of success by itself is never conclusive.

### Conclusion

[10] The court is satisfied with the explanation offered by the deponent of the defendant's affidavit in support of the application for condonation. The defendant indeed could not have explained these facts to the court as it was the legal practitioner himself who took ill and had to explain that. There is further sufficient information regarding the delay as well as Mr Silungwe dealt with the prospects of success. There is further no indication of any prejudice which will be

<sup>2</sup> *Standic BV v Kessels* (A 289-2012) [2015] NAHCMD 197 (24 August 2015).

suffered by the plaintiff should this application be allowed.

[11] It must further be noted that the court holds the same opinion as in *Minister of Urban and Rural Development v Witbooi*<sup>3</sup> regarding the compliance with rule 32(9) and 32(10) in a matter for condonation as it is the court's discretion to grant or refuse condonation even though the parties had agreed among themselves that it will not be opposed.

[12] In the result, I make the following order:

1. The application for condonation is granted with costs and the defendant has leave to file his answering affidavit.
2. The answering affidavit to be filed on or before 5 December 2023.
3. The matter is postponed to 16 January 2024 for fixing of a date for hearing the summary judgment application.

<b>Judge's signature</b>	<b>Note to the parties:</b>
E RAKOW Judge	Not applicable
<b>Counsel:</b>	
<b>Plaintiff:</b>	<b>Defendants:</b>
W Boesak Instructed by Engelbrecht Attorneys, Windhoek	R Silungwe Silungwe Legal Practitioners, Windhoek

<sup>3</sup> Supra.