

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON THE APPLICATION FOR CONDONATION AND UPLIFTMENT OF BAR

PRACTICE DIRECTION 61

Case Title: TUKONDJA TJIVIKUA 1st APPLICANT KOKUWA TJIIKUA 2nd APPLICANT and VICTORINE NGUMERITIZA TJIVIKUA 1 st RESPONDENT MASTER OF THE HIGH COURT 2nd RESPONDENT TUISANE TJIVIKUA 3rd RESPONDENT UNDJEE JACKY TJIVIKUA 4th RESPONDENT ANNA KAMATUUA TJIVIKUA 5th RESPONDENT MARCELLA UEJAA ZERAUA 6th RESPONDENT MERCIA KATUPOSE 7th RESPONDENT	Case No: HC-MD-CIV-ACT-OTH-2017/04498 (INT-HC-RECOD-2023/00121)
Heard before: Honourable Justice Sibeya	Division of Court: High Court (Main Division)

	Heard on: 26 October 2023 Delivered on: 16 November 2023
Neutral citation: <i>Tjivikua v Tjivikua</i> (HC-MD-CIV-ACT-OTH-2017/04498) [2023] NAHCMD 749 (16 November 2023)	
The order: <ol style="list-style-type: none">1. The applicant's application for condonation for late filing of the replying affidavit and upliftment of the bar is refused, the replying affidavit will not be considered.2. Mr Tjizo must personally pay the fourth and fifth respondents' costs of opposing the application on a party-party scale, subject to rule 32(11).3. The matter is postponed to 7 December 2023 at 08:30 for a Status Hearing to determine the further conduct of the matter.4. The parties must file a joint status report on or before 29 November 2023.	
Reasons: SIBEYA J Introduction <p>[1] Before court is an application for condonation and upliftment of the bar, whereby the applicants seek an order condoning their non-compliance with the court order dated 10 August 2023, for the late-filing of the replying affidavit. The applicants further seek an upliftment of the bar in order to be allowed to file further papers.</p> Representation	

[2] Mr Tjizo, appears for the applicants, while Ms Hans Kaumbi appears for the respondents.

Background

[3] The applicants on 28 April 2023, filed a rescission application seeking the following relief:

'1 Condoning applicants' non-compliance with the rules, and in particular condoning Applicants' late filing of this application for rescission of judgment, to the extend deemed necessary;

2. Rescinding and/or setting aside the court order dated 23 October 2022, making the settlement agreement between the 1st, 4th and 5th respondents in the absence of the applicants, an order of court as contemplated in Rule 103 of the Rules of this Honourable Court;

3. In the alternative, rescinding and/or setting aside the court order dated 23 October 2022, making the settlement agreement between the 1st, 4th and 5th respondents and in the absence of the applicants, an order of court as contemplated in Rule 16 of the Rules of this Honourable Court;

4. Granting leave to the Applicants to join the main action instituted by the 1st Respondent either as plaintiffs or defendants as they may elect;

5. An order waiving Applicants' requirement to pay Security for Cost;

6. In the further alternative, an order granting leave to the Applicants to substitute Adv Y. Campbell as defendants in their own right as provided for under Rule 43 of the rules of the High Court.

7. Cost;

8. Further and/or alternative relief.'

[4] The rescission application stems from a settlement agreement that was made an order of court on 23 October 2022. The agreement was entered into between the first

respondent, and the fourth and fifth respondents. The applicants contend that they were excluded from inheriting from their biological father's estate because of the agreement mentioned above.

[5] After several court appearances, the court, on 10 August 2023, issued the following order:

'1 The respondents must file their answering affidavits, if any, on or before 1 September 2023.

2 The applicant must file a replying affidavit on or before 14 September 2023.

3 The parties must file a joint case management report on or before 25 September 2023.

4 The case is postponed to 28 September 2023 at 08:30 for a Case Management Conference hearing (Reason: Documents Exchange).'

[6] The respondents filed their answering affidavit on 1 September 2023, as ordered. The applicants, on the other hand, failed to file their replying affidavit timeously. Mr Tjizo subsequently filed a condonation application, deposed to by himself, on 21 September 2023, to condone the non-compliance with the court order and further filed the replying affidavit without leave from this court. The replying affidavit was due to be filed by 14 September 2023. It should be made clear that it is irregular to file a replying affidavit contrary to an order of court, without having the applicable bar uplifted and without obtaining leave from court to prior to filing same. The court is currently faced with the application for condonation and upliftment of the bar, which is opposed by the respondents.

Applicants' case

[7] It is the applicants' case that the cause for the delay to file their replying papers, as provided for in the supporting affidavit deposed to by Mr Tjizo was because of the theft of Mr Tjizo's computer. Mr Tjizo stated that on 10 September 2023, he parked his motor

vehicle in Werner List Street, situated at the back of his office in order to attend to his office. Upon return to his vehicle, he realised that it was broken into and his laptop bag where his lap top and diary were placed, were stolen. This, Mr Tjizo stated, deprived him of the opportunity to monitor his matters on the e-justice system.

[8] Mr Tjizo deposed further that in order to gain access to ejustice, he attended to the office of Advocate Rukoro on 15 September 2023. It was then that he realised that the replying affidavit was due to be filed on 14 September 2023. He stated that, together with Adv Rukoro, they drafted the said affidavit. Mr Tjizo stated further that there is little or no prejudice caused to the respondents as a result of failure to file a replying affidavit.

[9] The applicants conceded that they did not comply with rule 32(9) and (10) of the rules of this court, but contended that, in condonation applications, a party need not comply with rule 32(9) and (10). The applicants relied on several authorities including *Langer Heinrich Uranium (Pty) Ltd v Flook*,¹ where it was remarked that where a party seeks condonation, despite the fact that such an application will be interlocutory in nature, it is not strictly necessary to comply with rule 32(9) and (10).

[10] The applicants, in their papers, emphasised further that the court is the upper-guardian of the children and must take precaution where children are involved and alluded that the applicants were minors when the concerned settlement agreement which forms the subject of the main rescission application was made an order of court. The applicants termed it that the first respondent by virtue of the settlement agreement 'disinherited' the applicants.

Respondents' case

[11] The respondents came out guns-blazing in their opposition to the applicants' application for condonation and upliftment of the bar. Ms Hans Kaumbi firstly stated that the provisions of rule 32(9) and (10) were not complied with and that it was vital to comply

¹ *Langer Heinrich Uranium (Pty) Ltd v Flook* (HC-MD-LAB-MOT-GEN- 2020/00282) [2021] NAHCMD 34 (3 August 2021).

therewith, because the applicants did not only seek a mere condonation, but also sought the upliftment of the bar operating against them.

[12] It was further the respondents' case that for condonation to be granted, there must be a reasonable explanation for the delay and the applicants must demonstrate reasonable prospects of success. The respondents contend that the applicants' application lack both of the said requirements of a condonation application.

[13] It was the respondents' case further that the applicants were majors at the time when the settlement agreement was made an order of court. The respondents further contend that the first respondent has the right to contract, and that the portion of the estate which she bound in the settlement agreement belonged to her by virtue of her marriage being in community of property.

Condonation affidavits deposed to by legal representatives

[14] In the present matter, the applicants' legal representative (Mr Tjizo) deposed to the affidavit and failed to attach any supplementary affidavits to strengthen the applicants' case, especially where mention was made of other people's involvement. When the court enquired into whether the applicants were aware of the default that they find themselves in for failure to file the replying affidavit when due as ordered by the court and the purported late filing of the replying affidavits, Mr Tjizo answered in the positive. Mr Tjizo could, however, not substantiate why there were no supplementary affidavits or at the very least confirmatory affidavits filed from the applicants. This has a chilling effect that the possibility exists that the applicants may not be aware of this condonation application.

[15] The court further enquired from Mr Tjizo why he should not be held personally liable to pay the costs of the application, in the event that the court finds against the applicants. He answered that he had no issue to pay such costs *de bonis propriis*.

[16] This court, time without number, has cautioned legal practitioners to refrain from

deposing to affidavits on behalf of their clients. Legal practitioners should stay in their lanes and remain officers of the court. In condonation applications, especially if no supplementary affidavits or confirmatory affidavits are filed, and there is no explanation why a legal practitioner deposed to the affidavit instead of the party, the court will not take the legal practitioner's stance lightly.

Analysis

[17] I have taken into account the authorities cited by the parties in establishing whether there was a need to comply with rule 32(9) and (10) in this matter. In this instance, I agree that there exists two schools of thought on whether or not rule 32(9) and (10) is strictly to be complied with when dealing with condonation applications. In the normal cause of events, I subscribe to the school of thought that states that rule 32(9) and (10) is not necessary in condonation applications. However, in the present matter, I agree with Ms Hans Kaumbi, that this is not just a mere condonation application, but it includes an application for the upliftment of the bar and as such rule 32(9) and (10) is vital to the application.

[18] Where a party is barred, the innocent party is entitled to take steps to proceed with the matter on the premise of the applicable bar. In my view, if the defaulting party intends to apply for the upliftment of the applicable bar, it is only fair and just that the innocent party must be engaged and heard on the subject accordingly and the parties may just resolve the matter amicably. This is one way in which the parties may avoid unnecessary litigation and costly exercises. The applicants, in *casu*, ought to have complied with rule 32(9) and (10). The application falls to be struck on this ground alone of failure to comply with rule 32(9) and (10).

[19] In addition, the requirements of condonation have not been met. The order which was not complied with is for 10 August 2023. Mr Tjizo's motor vehicle was broken into on 10 September 2023. The court is not satisfied that there is a reasonable explanation proffered why no replying affidavit was filed after 1 September 2023, after the respondents'

affidavit was filed. No reasonable explanation is further provided for the inactivity between the periods of 1 to 10 September 2023. Even if it is accepted that Mr Tjizo's motor vehicle was broken into, there is no explanation from the applicants why Mr Tjizo could not access his ejustice account from anywhere else where he could just lay his hands on a computer with internet connectivity or a cellular phone. Mr Tjizo could approach the Registrar's office for assistance to gain access to his ejustice account, this he did not do. In any event, there is an instructed counsel on this matter who has access to the ejustice system. No explanation is provided why the said instructed counsel could not assist and ensure that the replying affidavit is filed timeously.

[20] I find that The applicants failed to place before the court a reasonable explanation for the delay and proffered no prospects of success, let alone reasonable prospects. Both these elements were not sufficiently addressed by the applicants and still hangs in limbo. I mention in passing that I express no comments on the merits of the case as that is still pending before this court and not necessarily part of the present application.

[21] The principles and the requirements of condonation have been cited in this court and have firmly been established, I have no intention of regurgitating such authorities.

Conclusion

[22] In view of the finding that the applicants failed to comply with rule 32(9) and (10) and further failed to provide a reasonable explanation for the delay and failed to demonstrate reasonable prospects of success, I find that the applicant's application falls to be dismissed.

Costs

[23] It is a well-established principle of our law that costs follow the result. The respondents will therefore, be awarded costs. In the exercise of my discretion, I find that costs shall be awarded on a party-party scale against Mr Tjizo.

Order

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

1. The applicant's application for condonation for late filing of the replying affidavit and upliftment of the bar is refused, the replying affidavit will not be considered.
2. Mr Tjizo must personally pay the fourth and fifth respondents' costs of opposing the application on a party-party scale, subject to rule 32(11).
3. The matter is postponed to 7 December 2023 at 08:30 for a Status Hearing to determine the further conduct of the matter.
4. The parties must file a joint status report on or before 29 November 2023.

Judge's signature:	Note to parties:
O S SIBEYA JUDGE	
For the applicant: J Tjizo Of Jerhome Tjizo & Company Incorporated, Windhoek	For the respondent: A Hans Kaumbi Of Ueitele & Hans Inc., Windhoek