

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

PRACTICE DIRECTION 61

Case Title: FIRST NATIONAL BANK NAMIBIA LIMITED // SUE-ANN ROJEANNE MOUTON & ANOTHER	Case No: HC-MD-CIV-ACT-CON-2023/03503
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: PARKER, AJ	Heard on: 4 DECEMBER 2023
	Delivered on: 13 DECEMBER 2023
Neutral citation <i>First National Bank Namibia Limited v Mouton</i> (HC-MD-CIV-ACT-CON-2023/03503) [2023] NAHCMD 822 (13 December 2023)	
Order:	
<ol style="list-style-type: none">1. The defendants' condonation application is refused and no order as to costs is made in respect thereof.2. Summary judgment is granted in favour of the plaintiff against the first and second defendants jointly and severally, the one paying the other to be absolved, with costs, including costs of one instructing counsel and one instructed counsel on the scale as between attorney (legal practitioner) and own client.3. The matter is finalised and removed from the roll.	
Reasons:	
PARKER AJ:	

[1] The instant action was instituted as long ago as July 2023. The case plan had alerted the defendants that the plaintiff would bring a summary judgment application. The application was launched on 1 November 2023 and it was set down to be heard on 14 November 2023. The court ordered that the defendants should file opposing papers on or before 20 September 2023. The defendants failed to comply with the court order.

[2] Consequently, they filed an application to condone their non-compliance with the 20 September 2023 order on 14 November 2023, the very set down date for the hearing of the summary judgment application. The plaintiff has moved to reject the condonation application and has moved the court to grant summary judgment.

[3] As respects such condonation application –

‘It is well settled that an application for condonation is required to meet the two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success’¹

[4] It has also been held that ‘the application for condonation must thus, be lodged without delay, and must provide a full, and accurate explanation for it (ie the delay)’.² As I have said previously, the order was made on 20 September 2023, and the defendants launched their condonation application on 14 November 2023, the very day the application for summary judgment was set to be heard, thus offending *Balzer v Vries*.³

[5] Furthermore, in the instant application the only meaningful explanation that has been given for the non-compliance with the said 20 September 2023 order is this lone and naked explanation:

‘At the outset, I unreservedly apologize for the Applicants failure to comply with the rules of court. The non-compliance was not intentional but was due to an oversight to the fact that the filing dates for the objection were not diarized.’

[6] Doubtless, the defendants’ explanation is a far cry from the requisite of ‘a reasonable

¹ *Balzer v Vries* 2015 (2) NR 547 (SC) para 20.

² *Ibid* para 21.

³ *Loc cit*.

and acceptable explanation' laid down by the Supreme Court in *Balzer v Vries*.⁴ Robin Cook, an American physician and author, said, 'If it looks like a duck, quacks like a duck, it's a duck.'⁵ The defendants' explanation does not look like a reasonable and acceptable explanation, and it does not quack like a reasonable and acceptable explanation. It is not a reasonable and acceptable explanation at all.

[7] Furthermore, the defendants have failed to address sufficiently and satisfactorily their prospects of success with regard to the summary judgment application. Failure to address their prospects of success is fatal.⁶ The question of prospects of success in condonation application is so vital that in *Namibia Power Corporation (Pty) Ltd v Michael Kaapehi*,⁷ the Supreme Court laid it down that good prospects of success may lead to a condonation application being granted even if the explanation for non-compliance with a rule is not entirely satisfactory.

[8] The conclusion is inescapable that in the exercise of my discretion, I cannot grant the condonation sought by the defendants without offending the aforementioned authorities.

[9] The refusal of the condonation application has resulted in the following consequences, as I demonstrate, with regard to the plaintiff's application for summary judgment.

[10] The purpose of an order in terms of rule 60 of the rules of court is to enable a plaintiff to obtain a summary judgment swiftly without trial, if the plaintiff has a clear case and if the defendant is unable to set up a bona fide defence, which is good in law, or raise an issue against the claim which ought to be tried.⁸

[11] In order to resist a summary judgment order, the defendant bears the onus of satisfying the court that he or she has set up a bona fide defence which is good in law or that he or she has raised an issue which ought to be tried. To establish these requisites, the defendant must fully disclose the nature and grounds of the defence and the material facts upon which that defence is founded, in the sense that there 'need to be' factual material placed before the

⁴ *Balzer v Vries* footnote 1 loc cit.

⁵ *Sumaili v Nakatana* [2021] NAHCMD 594 (17 December 2021) para 1.

⁶ *Marén Brynard De Klerk v Johan Andre Penderis and Others* Case No. SA 76/2020 para 49.

⁷ *Namibia Power Corporation (Pty) Ltd v Michael Kaapehi* Case No. SA 41/2019 (29 October 2020) para 19.

⁸ *Namibia Wildlife Resorts Limited v Maxuilili-Ankama* [2023] NAHCMD 94 (7 March 2023); *First National Bank of Namibia v Yeung Tai Foodstuff & Trading CC* [2022] NAHCMD 143 (28 March 2022).

court sufficiently placing in doubt that the plaintiff's claim is unanswerable.⁹

[12] In the instant proceeding, the defendants have not placed any factual material before the court to establish that they have a bona fide defence which is good in law; neither have they raised a triable issue and, thus, 'sufficiently placing in doubt that the plaintiff's claim is unanswerable'.¹⁰

[13] It appears to me that the delivery of notice to defend was done solely as a mere delaying tactic amounting to an abuse of the process of the court.¹¹ As to costs, since the failure of the condonation application has a weighty bearing on the success of the summary judgment application, I think it is just and reasonable to make no order as to costs in respect of the abortive condonation application.

[14] Based on these reasons, I conclude that the plaintiff has succeeded in resisting the condonation application and has made out a case for the granting of summary judgment. In the result, I order as follows:

1. The defendants' condonation application is refused and no order as to costs is made in respect thereof.
2. Summary judgment is granted in favour of the plaintiff against the first and second defendants jointly and severally, the one paying the other to be absolved, with costs, including costs of one instructing counsel and one instructed counsel on the scale as between attorney (legal practitioner) and own client.
3. The matter is finalised and removed from the roll.

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

⁹ *Radial Truss Industries (Pty) Ltd v Aquatan (Pty) Ltd* [2019] NASC (10 April 2019) para 37.

¹⁰ *Loc cit.*

¹¹ See *First National Bank of Namibia v Yeung Tai Foodstuff & Trading CC* footnote 7 para 19.

Counsel:	
Plaintiff/Respondent	Second Defendant/Applicant
I Strydom Instructed by Theunissen, Louw & Partners, Windhoek	M S Mouton In Person (for the defendants)