

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**EX TEMPORE RULING**

Case number: HC-MD-CIV-MOT-GEN-2022/00211

In the matter between:

**NAMIBIA BUS AND TAXI ASSOCIATION (NABTA)**

**APPLICANT**

and

**LAZARUS MHATA**

**FIRST RESPONDENT**

**MARTIN ELIFAS KENNEDY**

**SECOND RESPONDENT**

**VESPA MUUNDA**

**THIRD RESPONDENT**

**Neutral citation:** *Namibia Bus and Taxi Association (NABTA) v Mhata* (HC-MD-CIV-MOT-GEN-2022/00211) [2024] NAHCMD 101 (11 March 2024)

**Coram:** DE JAGER AJ

**Heard:** 24 January 2024

**Delivered:** 24 January 2024

**Released:** 11 March 2024

**Flynote:** Condonation – Failure to file answering affidavit in counter application – Requirements for condonation restated – Explanation not

supported by record – Explanation not frank – Unreasonable and insufficient explanation – No explanation for the substantial delay of five months before seeking condonation – The applicant failed to seek condonation until so directed by the court – Prospects of success in the counter application not dealt with – No facts in support of condonation sought in the interest of justice – No case made for condonation – No case made for exemption from r 32(11).

**Summary:** On 9 May 2023, the court, amongst others, ordered the applicant to file an answering affidavit in the counter application on 9 June 2023. The applicant failed to file an answering affidavit. Instead, on 9 June 2023, the applicant filed a notice of intention to oppose the counter application, and it was stated, in the notice, that the applicant would file an answering affidavit within a period of fourteen days from 9 June 2023 or as directed by the court and that it would apply for condonation for not complying with the previous court order. The fourteen-day period referred to in that notice of intention to oppose had come and gone, and nothing was filed. The applicant's legal practitioners withdrew on 5 July 2023. The notice of withdrawal was served on the applicant. Representatives of the applicant subsequently appeared in court. On 25 October 2023, it was recorded that a new legal practitioner would come on record for the applicant. The condonation affidavit was filed on 27 November 2023. The explanation for the non-compliance is that the applicant's practitioners withdrew a day before the date for filing the answering affidavit.

*Held that* the explanation for the non-compliance is not supported by the documents filed of record, the applicant was not frank in its explanation, and the explanation was not reasonable or sufficient.

*Held that* the five-month delay in launching the condonation application is not minimal, and the period of delay was not explained.

*Held that* the applicant failed to deal with its prospects of success to the counter application.

*Held that* no facts were presented to the court on the basis of which the court could grant the applicant condonation in the interests of justice.

*Held that* the applicant had to show good cause by providing a reasonable and sufficient explanation for the non-compliance and that it had prospects of success in the counter application, and it failed to do so.

*Held that* no case was made for a cost order uncapped by r 32(11).

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**ORDER**

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1. The applicant's condonation application for its failure to have filed an answering affidavit in the respondents' counter application is dismissed with costs capped in terms of the provisions of r 32(11).
2. The parties shall deliver a case management report on or before 15 February 2024.
3. The matter is postponed to 21 February 2024 at 08:30 for a case management conference.

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**RULING**

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DE JAGER AJ:

[1] I will refer to the parties as they are in the main application, which was instituted on 12 May 2022.

[2] Before me is a condonation application following the court order of 15 November 2023, which postponed the matter to today for the applicant's condonation application after directions were given for compliance with r 32(10), the filing of opposing papers, replying papers, and heads or argument.

[3] The applicant filed a condonation affidavit on 27 November 2023 and refers to a notice issued by the court on 9 May 2023 whereby the court ordered the parties:

(a) for the respondents to file supplementary affidavits and the counter application on 22 May 2023;

(b) for the applicant to file a replying affidavit and answering affidavit in the counter application on 9 June 2023;

(c) for the respondents to file a replying affidavit on 29 June 2023;

and there was an order for a case management report also to be filed.

[4] In particular, the condonation application before me today is for failing to file the answering affidavit in the counter application, which was due on 9 June 2023.

[5] The relevant timeline in this matter is as follows.

(a) The counter application was filed pursuant to the court order of 9 May 2023 on 22 May 2023.

(b) On 9 June 2023, instead of filing the answering affidavit to the condonation application, the applicant filed a notice of intention to oppose in respect of the counter application, and it stated that it 'will' file the answering affidavit within a period of fourteen days from the date of that notice or a date as directed by the court and that it will apply for condonation for not complying with the previous court order. The fourteen-day period referred to in that notice of intention to oppose had come and gone, and nothing was filed.

(c) On 5 July 2023, by which time that fourteen-day period referred to in the notice of intention to oppose had long passed, and then only, the applicant's legal practitioners filed a notice of withdrawal as legal practitioners for the applicant.

(d) From the record, it appears that the notice of withdrawal of the legal practitioners was served on the applicant, and there is also a return of service filed of record from which it appears that there was service of that notice on the applicant.

(e) In the court order of 12 July 2023, a representative of the applicant was warned to appear in court, and the matter was postponed to 9 August 2023.

(f) According to the court order itself, on 9 August 2023, the applicant's president sent a certain Sakkie Malima to inform the court that the applicant needs to engage a legal practitioner. The court then ordered a joint status report on the legal representation request and the way forward, gave dates for those steps, and postponed the matter to 20 September 2023.

(g) At the next appearance, according to the court order itself, the applicant's secretary general informed the court that the applicant needed more time for legal representation. The applicant at that stage failed to participate in a joint status report, and the court noted repeated withdrawals of the applicant's legal practitioners which delayed the matter and resulted in costs to the respondents. Based on that court order, the applicant's representative was informed of the obligations on litigants set out in r 19 and that consequences may arise for non-compliance with those obligations. The applicant was then ordered to show cause in an affidavit for its failure to comply with a certain court order. The condonation affidavit referred to therein was filed on 12 October 2023, and in a further status report, the applicant again failed to participate in the joint report. I am not blaming the applicant for failing to participate in a status report. I am simply repeating what the record indicates. That fact is, however, not entirely relevant to today's proceedings.

(h) In the court order of 25 October 2023, it was recorded that a new legal practitioner would come on record for the applicant, and the respondents would not pursue 'wasted costs for the previous time'.

(i) Then, on 15 November 2023, the matter was postponed to today.

[6] A notice of motion was not filed together with the condonation affidavit on 27 November 2023, but the affidavit that was filed on 27 November stated, at the top of page 2, that the applicant sought 'upliftment of automatic bar for non-compliance'. The affidavit does not say which non-compliance is the subject matter of the condonation application, but the parties are ad idem that it is the answering affidavit to the counter application. The point that relates to the notice of motion not having been filed with the condonation application, was abandoned earlier this morning.

[7] An opposing affidavit to the application now before the court was filed on 6 December 2023, and two points in limine were taken. The first, which I just referred to, was abandoned. The second related to non-compliance with rules 32(9) and (10), which point was also abandoned earlier this morning. Therefore, I am not going to deal with those points.

[8] On 18 November 2023, another notice of motion and affidavit was filed for condonation for the failure to file the notice of motion for today's application together with the condonation application. The reason was that there was an oversight when the papers were loaded onto e-justice, and the notice of motion was not loaded together with the affidavit.

[9] I will first address the merits of the condonation application based on the affidavit filed in support of it, and if necessary, I will address the issue regarding the notice of motion, particularly the condonation relating thereto.

[10] I now turn to the merits of the condonation application.

[11] The affidavit in support of today's application was deposed to by the applicant's secretary general. The reason for the non-compliance is contained in one paragraph. It is numbered 4.1, and it states that the applicant's 'legal representation' withdrew from representing the applicant a day before the date for filing the replying affidavit and the answering affidavit to the counter application by the respondents. The affidavit further states that the non-compliance was not wilful or deliberate, and it is also stated that the delay is minimal and did not cause the applicant prejudice, alternatively, substantial

prejudice. It is concluded in the affidavit that a full and reasonable explanation was given. In one sentence, it is stated that the applicant has reasonable prospects of success in the application filed by it, which must mean the main application that the applicant filed.

[12] The explanation provided is not supported by the documents filed of record. In the heads of argument, an attempt was made to explain the filing of the notice of intention to oppose instead of the affidavit, but this argument, too, does not appear to assist the applicant in its case. The facts are the following. The notice of intention to oppose was filed on 9 June 2023, and as stated before, the answering affidavit would have been delivered together with the condonation application within fourteen days from 9 June 2023, being the date of that notice. That was, however, done in disregard of the court order, but if one then takes the fourteen days, which is stated in the notice of intention to oppose, it comes to an end on 29 June 2023. The notice of withdrawal of the applicant's legal practitioners was only filed on 5 July 2023, and that is not only one day before the affidavits had to be filed, as explained in paragraph 4.1 of the affidavit in support of today's application.

[13] The applicant was not frank in its explanation to the court in that affidavit, nor was the explanation provided reasonable or sufficient if regard is had to the facts and circumstances of this matter.

[14] The delay involved herein is not minimal, as stated therein. Five months passed from June 2023 to November 2023 when the court ordered the applicant to file a condonation application. Before that, the applicant appears not to have done anything to file a condonation application or take the matter forward. It was the duty of the applicant after its legal practitioners withdrew to take the matter forward and not sit idly by. Such duty falls on all litigants in this court. What is problematic is that there is no explanation for that five-month period.

[15] The court was invited to look at the record and take judicial notice of it. I do not make a determination on the invitation to take judicial notice of it, save to state that what the court is invited to do is not something that the court can take

judicial notice of. But the court can, of course, take notice of the court orders that were made and the timeline that goes with them.

[16] It is trite that in applications of this nature the timing of the condonation application itself is an important factor which the court considers in coming to its decision. As of today, it is more than 8 months from when the applicant was ordered to file the papers and it did not do so to this day. It also did not attempt to present the court with an answering affidavit in its condonation application, thereby asking for an extension of time to file such an affidavit and for the court to accept it as such.

[17] The applicant's argument is that if the court gives condonation, upliftment follows. That is, however, not so. But I do point out that in the supporting affidavit, as I have indicated before, the applicant does make mention of seeking an upliftment of the automatic bar for non-compliance. However, the applicant's problem lies in the fact that the applicant is not seeking an extension of time as to when the answering affidavit could be filed should the court grant it condonation. It is also trite that one obtains condonation for something one did wrong or for something one did not do, and then one needs to make the wrong right as soon as possible. The applicant did not do so.

[18] Instead, the applicant suggests in the notice of motion that the matter be referred to judicial case management to afford the applicant an opportunity to defend the counter application and file an answering affidavit. No indication is given as to when that affidavit could be filed. From a perusal of the rules, the purpose of rule 71, being the rule for judicial case management in motion proceedings, is not for the court to set times for the filing of pleadings in motion proceedings, being the affidavits. By the time a case in motion proceedings gets to judicial case management, the pleadings must have been filed already.

[19] On the invitation to the court to take judicial notice of certain facts, it is not for the court to traverse papers filed in a matter over several months to make sense of an applicant's explanation for condonation. The applicant was given an opportunity to explain to the court, and the authorities are trite on the requirements for such an application. They are twofold. An applicant must show



good cause, and therein are two requirements. The applicant must provide a reasonable and sufficient explanation for the default, and it must show that it has prospects of success in the matter. In the matter before the court, the applicant was required to show that it has prospects of success in its defence to the counter application. Those two requirements are peremptory, and without them, a condonation application cannot succeed.

[20] The affidavit in support of today's application simply states that the applicant has reasonable prospects of success in the application it filed. Apart from being wholly insufficient in providing the court with details as to why the applicant says so, nothing is said about prospects of success in the counter application.

[21] The court was invited to grant the applicant condonation in the interest of justice. The applicant relied on *Witbooi*, which dealt with a condonation application relating to the record in a review application. The court in *Witbooi* held that, in an application for condonation for the late filing of a record in a review application, the normal requirements for condonation do not always apply because the record plays a pivotal role in such matters and assists the court in deciding the review.

[22] It is correct, as submitted by the applicant, that each case is to be decided on its own facts and circumstances, but the nature of the condonation application in *Witbooi* is distinguishable from the applicant's current condonation application, which is for the filling of affidavits, which are pleadings in motion proceedings. *Witbooi* does, therefore, not assist the applicant's case for condonation.

[23] The court cannot simply, for the sake of justice, grant a party condonation without facts being presented to it on the basis of which to do so. In the matter before me, this court shares the sentiment expressed in paragraph 11 of its ruling in *Development Bank of Namibia vs Atomic Matter*<sup>1</sup> that, for a court to exercise its discretion, it must be presented with facts to enable it to do so.

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<sup>1</sup> *Development Bank of Namibia v Atomic Matter* (HC-MD-CIV-ACTCON-2023/01370) [2023] NAHCMD 602 (7 September 2023).

[24] The applicant did not comply with the trite requirements to succeed with the condonation application, and the court, unfortunately for the applicant, was not provided with facts which would enable the court to exercise its discretion in favour of the applicant. The court can only decide what is placed before it, and if sufficient facts are not placed before it, the court's hands are effectively tied. In circumstances where a reasonable explanation is close to absent, but the prospects of success are strong, the court may still exercise its discretion to grant condonation. Unfortunately for the applicant in this matter, neither of those two requirements were complied with for the court to come to the applicant's assistance to grant it condonation.

[25] With it being unnecessary for the court to make a ruling on the condonation application in respect of the late filing of the notice of motion for this condonation application, the court finds that the applicant failed to make out a case for the relief sought. The court further finds that a case has not been made out for a cost order more than that provided for in rule 32(11), and the following order is made:

1. The applicant's condonation application for its failure to have filed an answering affidavit in the respondents' counter application is dismissed with costs capped in terms of the provisions of r 32(11).
2. The parties shall deliver a case management report on or before 15 February 2024.
3. The matter is postponed to 21 February 2024 at 08:30 for a case management conference.

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B de Jager  
Acting Judge

APPEARANCES

APPLICANT:

N Halweendo  
Of Nafimane Halweendo  
Legal Practitioners  
Windhoek

RESPONDENTS:

K Gaeb  
Of Sisa Namandje & Co Inc  
Windhoek