

REPUBLIC OF NAMIBIA



**IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
PRACTICE DIRECTIVE 61**

Case No: HC-MD-CIV-ACT-CON-2021/02026

In the matter between:

PROFILE INVESTMENTS (PTY) LTD T/A PROFILE CAR HIRE PLAINTIFF

and

THE NAMIBIA STATISTICS AGENCY DEFENDANT

Neutral citation: *Profile Investments (Pty) Ltd t/a Profile Car Hire v The Namibia
Statistics Agency (NSA) (HC-MD-CIV-ACT-CON-2021/02026)
[2024] NAHCMD 127 (22 March 2024)*

Coram: OOSTHUIZEN J

Heard: 19 January 2024

Delivered: 22 March 2024

ORDER

IT IS ORDERED THAT:

1. The plaintiff's late filing of the witness statement of Alfred Clayton is condoned and the witness will be allowed to testify at the trial in the matter.
2. In so far as the defendant finds it necessary, it will be allowed to supplement its evidential affidavits and to do so on or before 12 April 2024.
3. The plaintiff shall pay the wasted costs occasioned to the defendant in opposing the plaintiff's condonation application, which costs will include the costs of defendants' instructing counsel not capped by rule 32(11).
4. The parties shall file a revised joint pre-trial report on or before 25 April 2024.
5. The case is postponed to 29 April 2024 at 15h30 for a pre-trial conference.

RULING

OOSTHUIZEN J:

[1] This matter was already set down for trial on two occasions.

[2] The matter is plagued with non-compliances by the plaintiff.

[3] The first time the matter was set down for two weeks in November 2022 the plaintiff was not ready to proceed and agreed with defendant that it shall pay

defendant's wasted costs and shall file its witness statements for six witnesses on or before 23 January 2023. Such an order was made on 8 November 2022.

[4] Subsequently, the plaintiff failed to pay the wasted costs as agreed and did not file all six witness statements it agreed to file on or before 23 January 2023.

[5] Plaintiff only filed two complete witness statements on 23 January 2023 after hours and another complete witness statement a day or two late. Defendant, at the time, indicated that it will not object the late filing of the three witness statements.

[6] Plaintiff however filed a fourth witness statement (evidentiary affidavit as ordered) a month late on the 24th of February 2023 without timeously applying for extension of time.

[7] This statement was thus filed after the rebuttal witness statements of the defendant.

[8] Non-payment of the agreed wasted costs of the defendant lead to a default judgment against the plaintiff and to questions why the plaintiff could not honour its obligations towards the defendants.

[9] The company secretary for defendant made oath and applied for security of costs of the defendant in defending the action by the plaintiff, in terms of s 11 of the Companies Act 28 of 2004.

[10] The security application caused the new trial dates of the matter from 8 to 17 May 2023, to be vacated. The security for costs application intervened in the hearing of the condonation application and was finalised first.

[11] This condonation application had to be finalised before new trial dates are to be allocated.

[12] In the meantime the application for security by the defendant was successful and the Registrar of the High Court has set security in the amount of N\$650 000.

[13] The security was paid during November 2023 and arguments on this condonation application were heard on 19 January 2024.

[14] Plaintiff's explanation why the evidentiary affidavit of Mr Clayton was filed a month late, reveals a lack of serious preparation and commitment to honour undertakings.

[15] The main case is an action proceeding. The plaintiff claims contractual damages as a result of alleged breaches by the defendant. The defendant's position is that plaintiff's claims are founded on terms and conditions which were not part of the agreement. The witness statements apparently deal with the claims and defences. The evidentiary affidavits will only become evidence in chief once the deponents thereto are sworn in *in curiam* and are subjected to cross-examination and re-examination. For that reason I am not inclined to read and opine on same prior to the commencement of the trial.

[16] Plaintiff's deponent for condonation, the very same Mr Clayton whose evidentiary affidavit was filed late, however, is of the view that the plaintiff has a good case. Defendant however does not share the view of plaintiff.

[17] I shall condone the late filing of Mr Clayton's evidentiary affidavit because there is no fixed trial date at the moment which is at risk.

[18] The defendant has the opportunity to file rebuttal statements on evidence contained in Mr Clayton's witness statements. Defendant will have the opportunity to object to inadmissible evidence at trial.

[19] The costs order against the plaintiff mark my displeasure with plaintiff's lackadaisical approach to court orders and the rules of court.

[20] In the premise, the following orders are made:

1. The plaintiff's late filing of the witness statement of Alfred Clayton is condoned and the witness will be allowed to testify at the trial in the matter.
2. In so far as the defendant finds it necessary, it will be allowed to supplement its evidential affidavits and to do so on or before 12 April 2024.
3. The plaintiff shall pay the wasted costs occasioned to the defendant in opposing the plaintiff's condonation application, which costs will include the costs of defendants' instructing counsel not capped by rule 32(11).
4. The parties shall file a revised joint pre-trial report on or before 25 April 2024.
5. The case is postponed to 29 April 2024 at 15h30 for a pre-trial conference.

G H OOSTHUIZEN
JUDGE

APPEARANCE

PLAINTIFF: S Kahengombe
Kahengombe Law Chambers, Windhoek

DEFENDANT: W van Greunen
Köpplinger Boltman, Windhoek