

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case No: HC-MD-CIV-ACT-CON-2023/04783

In the matter between:

BARNES FENCING INDUSTRIES (PTY) LTD

PLAINTIFF

and

**BH SPARES AND ACCESSORIES EQUIPMENT AND
TECHNOLOGIES CC**

DEFENDANT

Neutral Citation: *Barnes Fencing Industries (Pty) Ltd v BH Spares and Accessories Equipment and Technologies CC* (HC-MD-CIV-ACT-CON-2023/04783) [2024] NAHCMD 218 (8 May 2024)

Coram: MASUKU J

Heard: 17 April 2024

Delivered: 8 May 2024

Flynote: Civil Procedure – Summary judgment in terms of rule 60 – Whether the standard is higher in relation to the defence in the summary judgment application and the condonation application in relation to prospects of success – Condonation application – Opposing papers filed two hours after

close of business – Condonation application opposed by the plaintiff – Prejudice suffered by the plaintiff.

Summary: The plaintiff filed an application for summary judgment on liquidated amounts against the defendant, for payment of N\$715 197,25, N\$817 182,57 and N\$236 106,03 in respect of the first claim and N\$54 813,99, in respect of the second claim. The plaintiff avers that on 12 April 2022, in Windhoek and Johannesburg, respectively, the parties entered into a verbal agreement in terms of which the plaintiff would, from time to time, sell and deliver steel products to the defendant at the latter's special instance. The plaintiff avers further that contrary to the oral agreement concluded, as stated above, the defendant breached the terms of the agreement in that it failed to make payment of the goods sold and delivered to it by the plaintiff.

The defendant filed its opposing papers two hours after close of business and applied for condonation. The defendant deposes that the amounts claimed by the plaintiff are not payable by the defendant because there was a verbal agreement entered into by the parties and which effectively replaced the original oral agreement on which the plaintiff sues. According to the defendant, the latter agreement served to extinguish the rights and obligations of the defendant in relation to the claims contained in the particulars of claim.

Held: Litigation is and must be regarded as a process where fairness and propriety must exude every action and position.

Held that: Where a party is in default of filing a document by a few hours and some plausible explanation is proffered, to oppose condonation in those circumstances, is tantamount to point-taking that serves to unnecessarily run up costs and judicial time and resources on issues that should ideally be settled by the parties in terms of rule 19(g).

Held further that: In issues of condonation, especially where a drastic order like summary judgment is sought, it must be remembered that condonation is essentially a matter largely between the errant party and the court.

Held: That unreasonable objections on peripheral matters, which have the potential to waste judicial time and resources, not to mention escalating costs unnecessarily and where there is very little or no prejudice shown by the opposing party, must be avoided at all costs.

Held that: Courts should not unnecessarily be bogged down by meritless objections to applications for condonation, which divert the court's attention to the real and important issues in dispute.

Held further that: Where an application for summary judgment is coupled with an application for condonation of the late filing of the opposing affidavit regard may be had to the facts deposed to in the application for summary judgment beyond the facts alleged in the opposing affidavit. This will, however be rare.

Held: That in the instant case the defendant has shown that it has prospects of success at trial in respect of the condonation application and has contemporaneously satisfied the court that it has a bona fide defence to the plaintiff's claim.

Application for condonation granted and summary judgment refused with costs.

ORDER

1. To the extent necessary, the application for condonation of the defendant's late filing of the opposing affidavit in respect of the summary judgment, is granted.
2. The application for summary judgment is refused.
3. The plaintiff is ordered to pay the costs of the application subject to the provisions of rule 32(11).

4. The matter is postponed to **23 May 2023** at **08h30** for a case planning conference.
5. The parties are ordered to file a joint case plan, together with a draft case planning order on or before 20 May 2023.

RULING

MASUKU J:

Introduction

[1] The all-important question that arises for determination in this ruling acuminates to this – is this a matter in which it is appropriate for this court to grant summary judgment against the defendant in favour of the plaintiff?

[2] As would be predictable, the parties have arrived at different conclusions on this question. With the discordant answers returned to this question, it now falls within the court's remit to employ its adjudicative machinery to arrive at a decision. Regrettably, both parties may not be correct on this question. Following below will be the consideration of the relevant issues, findings and decision on the important question.

The parties and their representation

[3] The plaintiff is Barnes Fencing Industries (Pty) Ltd, a company duly incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business situate at 4 Prevett Road, Spartan Extension 1, Kempton Park, Johannesburg. The defendant, on the other hand, is BH Spares and Accessories Equipment and Technologies CC, a close corporation duly registered in terms of the relevant laws of Namibia. Its principal place of business is situated at corner of Tal Street and Sam Nujoma Drive, Windhoek.

[4] Barnes Fencing Industries (Pty) Ltd will be referred to as 'the plaintiff', whereas BH Spares and Accessories Technologies CC, will be referred to as 'the defendant'. Where reference is made to both the plaintiff and the defendant, they shall be collectively referred to as 'the parties'.

[5] Mr Dicks, appeared for the plaintiff, whereas Mr Ntinda, appeared for the defendant. The court records its indebtedness to both counsel for the assiduous assistance they rendered to the court in the determination of this matter.

The pleadings

[6] In its particulars of claim, the plaintiff avers that on 12 April 2022, in Windhoek and Johannesburg, respectively, the parties entered into a verbal agreement in terms of which the plaintiff would, from time to time, sell and deliver steel products to the defendant at the latter's special instance. The parties were duly represented during the conclusion of the oral agreement.

[7] The plaintiff avers further that contrary to the oral agreement concluded, as stated above, the defendant breached the terms of the agreement in that it failed to make payment for the goods sold and delivered to it by the plaintiff. As a result, the plaintiff filed two claims in this regard, for payment of N\$715 197,25, N\$817 182,57 and N\$236 106,03 in respect of the first claim and N\$54 813,99, in respect of the second claim. The amounts claimed include interest on the aforesaid amounts and costs. It is the plaintiff's case that it sold and delivered goods in the amounts mentioned above and that the defendant failed to keep its part of the bargain and is thus liable therefor.

[8] It being apparent that the amounts claimed by the plaintiff are liquidated, it applied, as it is entitled to, in terms of the rules of this court, for summary judgment at the case planning stage of the proceedings. In this regard, a director of the plaintiff, Mr Irwin Mark Lipworth, deposed to the affidavit in support of the application for summary judgment. In this affidavit,

the allegation is made that the defendant has no bona fide defence to the plaintiff's claim and it has filed the intention to defend for no other purpose than to delay the plaintiff's early enjoyment of the fruits of its judgment, as it were.

[9] The defendant, as it is also entitled to, filed an opposing affidavit in which it sets out grounds on which this court should refuse summary judgment. The pith of this affidavit is that it has a bona fide defence to the claims. It thus denies that it has defended the matter merely for dilatory purposes. It is after considerations of these affidavits that the court will be perfectly placed to decide whether the summary judgment is meritorious or not.

Application for condonation

[10] Before dealing with the question whether or not this is a proper case in which to grant summary judgment, there is one issue that needs to be determined. It is the question of a condonation application by the defendant for the late filing of its opposing affidavit. This application is opposed by the plaintiff, which submits that there is no proper and detailed explanation of why the defendant failed to comply with the order of court regarding the filing of the opposing affidavit. Furthermore, the defendant has no prospects of success of the summary judgment application, the plaintiff contends.

[11] In its application for condonation, the defendant deposes that it failed to file the affidavit on time but did so two hours after close of business on 2 February 2024. It is the defendant's case that the affidavit was filed timeously but it later came to light that the wrong affidavit had been signed by him. This required Mr Hauwanga, the defendant's director, to return to the defendant's legal practitioners' office to sign the correct affidavit. This affidavit was only uploaded on eJustice at 18h15 on 2 February 2024.

[12] The long and short of it, as the defendants state, in their condonation application, is that there is a reasonable explanation for the delay, which is in

any event minimal. The defendant further deposes that there is no prejudice suffered by the plaintiff as a result of the late filing of the opposing affidavit.

[13] Regarding the prospects of success, the defendant deposes that the amounts claimed by the plaintiff are not payable by the defendant because there was a verbal agreement entered into by the parties and which effectively replaced the original oral agreement on which the plaintiff sues. According to the defendant, the latter agreement served to extinguish the rights and obligations of the defendant in relation to the claims contained in the particulars of claim. The defendant prayed that the contents of the opposing affidavit be incorporated and read with the affidavit filed in relation to the condonation application. I will deal with the latter issue later as the ruling unfolds.

[14] The plaintiff, in its answering affidavit, opposed the application for condonation. First, it took issue with the time stated by the defendant by which it alleges it ought to have filed the opposing affidavit in respect of the summary judgment application. Pertinently, the plaintiff points out that the defendant should have filed the affidavit by 15h00. This is indeed correct as can be seen from rule 2(1). In this respect, it is only notices to oppose or to defend that may be filed by 16h00. To this extent, the plaintiff is correct.

[15] On the issue of the actual filing of the affidavit, the plaintiff contends that the defendant was late and decided to give priority to a meeting he was attending before attending to the corrected affidavit. This, it is deposed, was casual, deliberate and wilful defiance of an order of court. The court was thus importuned not to condone the delay.

[16] Turning to the prospects of success, the plaintiff alleges that when regard is had to this particular enquiry, the granting of leave to the defendant to defend the action, would be a waste of time. It is submitted in this regard, that the alleged oral agreement, which extinguished the agreement sued upon by the plaintiff, does not exist. In this regard, it is denied that there ever was a

discussion of the set-off of dividends between the plaintiff and the defendant, as alleged in the opposing affidavit.

[17] It is specifically stated that the financial records of the company show that in 2021, it made a loss and for that reason, the issue of a set-off, is a non-starter. It is further stated in this regard that in the 2022 financial year, no dividends were declared. For that reason, the version deposed to by the defendant, cannot be correct. It is further deposed that the version by Mr Hauwanga, is unconvincing and questionable and that there is no legal mechanism by which Mr Doron Barnes could enter into a legally binding oral agreement as alleged. In any event, the plaintiff further deposes, Mr Barnes, flatly denies this oral agreement was ever concluded.

[18] In a nutshell, the plaintiff submitted that there is no proper explanation for the late filing of the affidavit in question and furthermore, the defendant failed to show that it has any prospects of success at trial. The referral of the matter to trial, so contended the plaintiff, would result in massive prejudice to the plaintiff, who would have to expend massive costs on the defendant's case that is still-born, so to speak. Mr Lipworth, summed up the plaintiff's entrenched position as follows:

'I am advised that, under the circumstances, it would be a travesty of justice to allow the Defendant to enter a plea and force the Plaintiff into an extended process of exchanging pleading and subsequent trial, which would take years to be completed. That in fact would constitute massive prejudice for the Plaintiff, which is not fair or legally supported by the facts.'

[19] The defendant did not file a replying affidavit to deal with the issues raised in the answering affidavit filed by the plaintiff. I now propose to go ahead and deal with the application for condonation and where necessary, make appropriate findings and conclusions, based on the information before court. I proceed to do so below.

[20] First and foremost, I must state upfront that litigation is and must be regarded as a process where fairness and propriety must exude every action and position. The approach that every slip, regardless of how minor, must result in a forfeit, should not be allowed to take root. When regard is had to the overriding objectives of judicial case management, it becomes plain that the parties must commit themselves to resolving the real issues in dispute justly, efficiently and cost effectively.¹ This triumvirate of considerations, are key and must generally guide the approach to litigation, including any interlocutory skirmishes that might present themselves during litigation in this jurisdiction.

[21] Added to the mix, are the saving of costs by limiting interlocutory applications to what is strictly necessary, in order to achieve a fair and timely disposal of a cause or matter; ensuring that cases are dealt with expeditiously and fairly, recognising that judicial time and resources are limited and are appropriately allotted to each cause and identifying and limiting issues in dispute to the core ones.²

[22] Parties are not spared either. They must co-operate with the managing judge to ensure the achievement of the overriding objective; assist in curtailing proceedings, use reasonable endeavours to resolve a dispute by agreement between the parties in the dispute, ensure that costs are reasonable and proportionate and to act promptly and without delay, amongst others.³

[23] These duties are not idle requirements. Parties must accordingly ensure that they keep them in the uppermost parts of their mind and practice. If they do so, they will avoid unnecessary point-taking that only serves to dilute issues and takes into account issues that are not germane to the decisions of the true issues in dispute.

¹ Rule 1(3).

² Rule 18(2).

³ Rule 19.

[24] It is perhaps important to add that the Judge President, in his book entitled *Court-Managed Procedure of the High Court of Namibia*,⁴ states that 'The rules now expressly require the court to have regard to the overriding objective in exercising discretion such as granting condonation for non-compliance. The fact that there is no prejudice to the opponent is no doubt a weighty one but is not decisive.'

[25] In the instant case, I do not find that the plaintiff's approach to the condonation, was appropriate. Where a party is in default of filing a document by a few hours and some plausible explanation is proffered, I am of the view that to oppose condonation in those circumstances, is tantamount to point-taking that serves to unnecessarily run up costs and judicial time and resources on issues that should ideally be settled by the parties in terms of rule 19(g).

[26] In issues of condonation, especially where a drastic order like summary judgment is sought, it must be remembered that condonation is essentially a matter largely between the errant party and the court.⁵ In the instant case, I do not find that there was any serious prejudice that inured to the plaintiff by the late filing of the affidavit by some hours. Even then, considering the extent of the delay, the defendant may have applied for directions regarding the late filing and the court may well, in its discretion, and considering the extent of the delay and the palpable absence of prejudice on the plaintiff, have allowed the affidavit to be filed without an application for condonation.

[27] Each case must of course be decided and dealt with on its own merits. I must not, in this connection, be understood to be encouraging parties to be lax in the compliance with court orders. Far from it! On the other hand, unreasonable objections on peripheral matters, which have the potential to waste judicial time and resources, not to mention escalating costs

⁴ Petrus T Damaseb, *Court-Managed Civil Procedure of the High Court of Namibia*, Juta & Co, 2021, at p116.

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unnecessarily and where there is very little or no prejudice shown by the opposing party, must be avoided at all costs.

[28] I interpolate to observe that proper regard being had to the facts of this case, it is abundantly clear, on an objective basis, that the respondents would not suffer any prejudice as a result of the late filing of the opposing affidavit to the application for summary judgment. I say this very peculiarly cognisant of the fact that this is a summary judgment application and in which the plaintiff has no right to file replying affidavit. The plaintiff fails to advance any bases upon which prejudice to its rights or interests can be said or found to exist.

[29] I would, for the foregoing reasons, be inclined, in the exercise of my discretion, to allow the affidavit opposing summary judgment filed by the defendant in this case. I find that the route adopted by the plaintiff, in all the circumstances of the case, was highly fastidious and had no regard for the provisions of the rules mentioned above, which have at their heart and soul, the efficient and inexpensive adjudication of matters on their true merits.

[30] In the instant case, I am not satisfied that there was any real prejudice the plaintiff suffered as a result of the few hours' delay in filing the proper opposing affidavit. Courts should not unnecessarily be bogged down by meritless objections to applications for condonation, which divert the court's attention to the real and important issues in dispute. I accordingly find that the application for condonation meets the test of a reasonable explanation for what is 'no delay' in truth, in this matter.

[31] On the question of reasonable prospects of success, the defendant in part relied on the allegations it made in the opposing affidavit, which is the subject of this condonation application. Strictly speaking, this should not be. If the application is for the late filing of the affidavit to be condoned, one cannot properly have regard to that affidavit and its contents until its late filing has been condoned.

[32] Mr Dicks, in his forceful but measured address, helpfully referred the court to *Bank Windhoek v Kessler*⁶ where the court reasoned that in an application for summary judgment, only three sets of papers are allowed, namely, the particulars of claim, the application for summary judgment and the opposing affidavit filed by the defendant. This includes the notice of intention to defend.

[33] At p 237 of *Kessler*, the court, per Hoff J, reasoned as follows:

‘This is the general rule to which there is an exception. A court may have regard to extrinsic evidence which is properly before court. Where a defendant applies for condonation of the late filing of the opposing affidavit the plaintiff may in his affidavit opposing the application deal with the defence on the merits and may thus file an affidavit in this regard. In *South African Breweries Ltd v Rygerpark Props (Pty) Ltd and Others* 1992 (3) SA 829 (W) at 833A-D, the following is stated:

“In the normal case where the existence of a *bona fide* defence is sought to be shown the respondent is at liberty, in answer, to seek to prove that the applicant has no *bona fide* case. To deny a respondent that opportunity is to deny him a hearing on an essential part of the applicant’s case. The crisp question that arises is whether, in an application for condonation for failure to comply timeously with Rule 32, a Court should decline to allow a plaintiff to go into the merits. Though to allow him to do so would be to permit him to do in the summary judgment condonation proceedings what he is not permitted to do in the summary judgment proceedings, it seems to me that it would be wrong to refuse permission on the basis of Rule 32(4). A defendant cannot call in aid a Rule which only applies if he has brought himself within its terms. If he is not within its terms, he must apply for condonation and this is an indulgence which is in the Court’s discretion. It would be wrong in my view to fetter that discretion by laying down that a respondent is not entitled to found its opposition on proof that the defence alleged to be *bona fide* is not *bona fide* at all. What I think can be said, however, is that, where a respondent in summary judgment condonation proceedings seeks to prove an absence of *bona fides* by filing of affidavits on probabilities, he runs a very real risk that he will be mulcted in costs should the attempt fail. The stage of summary judgment is not an appropriate stage at which to go into the merits. Applicant will accordingly be at considerable disadvantage should

⁶ *Bank Windhoek v Kessler* 2001 NR 234 (HC).

respondent be permitted a full scale reply and I am satisfied that it is only in rare cases that this should be allowed. However, because there may be cases where the *bona fides* of a defence can be effectively destroyed even at the summary judgment state, the right to oppose on this ground cannot in principle be denied a plaintiff.'

[34] As I understand the above quotation, what it conveys is that ordinarily, in summary judgment applications, the papers relied on are the particulars of claim, the notice to defend, the application for summary judgment and the opposing affidavit. Where, however, the defendant, as in the instant case, applies for condonation for the late filing of the opposing affidavit to the summary judgment, the plaintiff is entitled, in the papers it files in opposition to the application for condonation, to engage the *bona fides* of the defence in the condonation application. The court stated that it is in very rare cases though, that this should be allowed. I make no finding whether the instant case is one of those rare cases.

[35] Mr Dicks argued that when regard is had to the affidavit filed by the defendant in the application for condonation, it is plain that there is no *bona fide* defence disclosed. It was his contention that the defendant appears to rely on an oral agreement, to the effect that the amount owed by the defendant to the plaintiff would be set-off against the amounts due to the defendant's members from an entity where the defendant's members and the plaintiff are directors. In this connection, the defendant contends that the dividends due to the defendants from that entity, would be used to pay the defendant's indebtedness to the plaintiff in the current proceedings. This is vehemently denied by the plaintiff.

[36] The plaintiff contends that the said entity made a loss in 2021 and that there were no dividends declared in 2022. This, it is accordingly submitted, goes to show that the defendant has no *bona fide* defence to the plaintiff's claim.

[37] It must be recalled that this issue arises in respect of the requirement that the applicant for condonation must show that it has prospects of success

on the merits. In this regard, it must not be forgotten what role prospects of success serves in the interplay with the requirement of a reasonable explanation.⁷ In *Telecom Namibia v Nangolo*,⁸ it was stated as follows:

'8. The applicant's prospects of success is in general an important though not a decisive consideration.'

It is thus an important consideration but not a conclusive or decisive one in matters of condonation. This I will keep in the forefront of my mind as I engage the parties' contentions.

[38] A debate raged on regarding which standard is higher in relation to the defence in the summary judgment application and the condonation application in relation to prospects of success. Mr Dicks argued that the standard was higher in the latter as only good prospects of success are required, whereas in summary judgment, only a *bona fide* defence needs to be alleged by the defendant. I did not understand Mr Ntinda to disagree with this proposition. I need not make any finding on this particular aspect though.

[39] What is plain is that the defendant claims that its member, Mr Hauwanga, his daughter and Mr Dorn Barnes, a director and shareholder of the plaintiff, are directors of Namibia Fencing Industries (Pty) Ltd. A shareholders' agreement is attached to the papers. The defendant avers that Mr Barnes was involved in the affairs of Namibia Fencing.

[40] It is stated on oath by the defendant that there was an oral agreement made in 2022 in which Mr Barnes represented the plaintiff and Mr Hauwanga represented the defendant. It was agreed that there are dividends payable to Mr Hauwanga and his daughter Ms Mirjam Hauwanga, by Namibia Fencing for the years ending February 2021 and February 2022. These dividends were, in terms of the agreement, to be paid instead, to the plaintiff, meaning that there was an agreement of set-off in terms of which the money due to Mr

⁷ *De Klerk v Penderis* Case No SA 76-2020 [2023] NASC (1 March 2023), para 22.

⁸ *Telecom Namibia Ltd v Nangolo and Others* (LCA 18/2012) [2012] NALCMD 4 (05 November 2021).

Hauwanga and his daughter in Namibia Fencing, would be paid to the plaintiff to extinguish the debt owed by the defendant to the plaintiff.

[41] As stated earlier, this is vehemently denied by the plaintiff in the answering affidavit filed in the condonation application. It is stated that there was no such agreement and in any event, Namibia Fencing operated at a loss in 2021 and that no dividends were declared in 2022. I am of the considered view that the allegations by the defendant regarding the existence of the oral agreement, cannot be decided in a setting such as the present. This is a matter that cannot be decided on the papers and conclusively dealt with.

[42] The resolution of the question whether the oral agreement alleged was or was not entered into, is a matter that has to be dealt with at trial, meaning that in the context of a condonation application, the defendant may be said to have prospects of success, if the case it has deposed to is proved and that cannot be judged at this stage. Damaseb *op cit*, states that, 'The applicant must show that the facts on which it relies would, if proved, constitute a defence and that the application was not brought merely to delay the proceedings.'⁹ This the defendant has done successfully, in my considered view.

[43] If Mr Dicks' contention is correct that the standard is higher in condonation than summary judgment, this would mean that the court's finding that the defendant enjoys prospects of success at trial, if his defence is established, should result in the court finding that the application for summary judgment should not succeed. In this connection, the defendant, in its opposing affidavit to the summary judgment, alleges that Mr Barnes perpetrated a fraud regarding the transfer of shares of Mr Hauwanga and his daughter in Namibia Fencing. This has resulted in a case by Namibia Fencing seeking to remove Mr Hauwanga and his daughter from the directorship of Namibia Fencing.¹⁰ It is deposed that Mr Hauwanga and his daughter have

⁹ Damaseb PT, *op cit* p 119.

¹⁰ *Namibia Fencing (Pty) Ltd v Dr Weder Kauta & Hoveka* HC-MD-CIV-ACT-CON-2023/02540.

defended the proceedings, alleging their fraudulent removal and a counterclaim in that matter has been launched. It may well be, Mr Ntinda submitted, that these cases may have to be consolidated in the future. I express no opinion but cannot discount that possibility.

[44] It is therefor plain that there is some relationship between the members and directors of the entities involved in this matter and there are some disagreements, which have culminated in court proceedings other than in the current matter. Considering the nature of the relationships mentioned in the papers, one cannot flippantly discount the defendant's defence as stated in the opposing affidavit as totally unfounded and filed merely to delay the enjoyment of the judgment by the plaintiff. This is a case that on account of the issues raised, including the alleged fraud perpetrated against the defendant's member and daughter, requires to be fully ventilated in a trial. Summary judgment must be thus refused.

[45] In *Mohali v Mohali*¹¹ it was stated that:

' . . . fraud unravels all subsequent transactions . . . [20] It is trite that the effect of fraud is far-reaching. In *Farley (Aust) Pty Ltd v JR Alexander & Sons (Old) Pty Ltd* [1946] HCA 29; (1946) CLR 487 the High Court of Australia, per Williams J, said this:

'Fraud is conduct which vitiates every transaction known to the law. It even vitiates a judgment of the Court. It is an insidious disease, and if clearly proved spreads to and infects the whole transaction.'

[21] And in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) at 712 one finds Lord Denning's well-known remarks:

'No court on this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud unless it is distinctly proved, but once it is proved, it vitiates judgments, contracts and all transactions whatsoever.'

¹¹ *Mohali v Mohali* (39683/2019) [2023] ZAGPJHC 44 (24 January 2023), para 19.

[46] The fact that fraud has been alleged by the defendants, together with the factual matrix on which is claimed to have taken place and detrimentally affected their rights and interests, suggests to my mind that they have met the threshold in terms of providing a bona fide defence to the claim. I may add, these allegations, if proved, would suggest that the defendant enjoys prospects of success at trial.

Conclusion

[47] In the premises, it seems to me that the application for condonation, as previously intimated, must be granted as prayed. This is subject to the observation made earlier that it might not have been strictly necessary for the defendant to move for condonation in the circumstances of this case. This conclusion also leads inevitably to a finding that the defendant has raised a bona fide defence to the plaintiff's claim. Summary judgment should, in the premises, be refused.

Costs

[48] Mr Dicks argued that should the court find that the application for summary judgment must fail, costs should be ordered to be in the cause. On the other hand, Mr Ntinda argued that costs should be granted even at this stage in the defendant's favour.

[49] I have remarked, at the commencement of the judgment, in dealing with the application for condonation, about how unreasonable the plaintiff's stance was on the slight delay in the filing of the defendant's opposing affidavit. I stand by those findings. The application for condonation, on the facts, was strictly not necessary, without the court, after being properly apprised thereof, directing the parties to file such application. What was worse, considering that essentially the condonation application is strictly speaking between the applicant and the court, is that the plaintiff filed a fully-fledged affidavit, opposing condonation on every conceivable front, attempting

in the process, to have the condonation refused without venturing into the merits. This, if acceded to, would have inevitably resulted in the application for summary judgment granted unopposed at condonation stage.

[50] In view of what I have stated above, it is my considered view that the plaintiff acted unreasonably and that its opposition to the condonation application, was not, in objective consideration of all the circumstances and pertinent facts, warranted. The costs must, in my considered view, follow the event, as not only has the application for condonation succeeded but the application for summary judgment has also failed.

Order

[51] Having regard to the foregoing findings and conclusions, it seems that the following order should be granted:

1. To the extent necessary, the application for condonation of the defendant's late filing of the opposing affidavit in respect of the summary judgment, is granted.
2. The application for summary judgment is refused.
3. The plaintiff is ordered to pay the costs of the application subject to the provisions of rule 32(11).
4. The matter is postponed to **23 May 2023** at **08h30** for a case planning conference.
5. The parties are ordered to file a joint case plan, together with a draft case planning order on or before 20 May 2023.

T S MASUKU
Judge

PEARANCES

PLAINTIFF: G Dicks
Instructed by: Ellis & Partners, Windhoek

DEFENDANT: M Ntinda

Instructed by: Andreas-Hamunyela Legal Practitioners, Windhoek