

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title:	Case No:
Burmeister & Partners (Pty) Ltd	HC-MD-CIV-ACT-CON-2023/00595
Plaintiff	Division of Court:
and	Main Division
Namibia Industrial Development Agency (previously the Namibia Development Corporation)	Heard on:
1st Defendant	3 April 2024
Ministry of Agriculture, Water and Forestry	
2 nd Defendant	
Heard before:	Delivered on:
Honourable Lady Justice Rakow	10 May 2024
Neutral citation: <i>Burmeister & Partners (Pty) Ltd v Namibia Industrial Development Agency (previously the Namibia Development Corporation)</i> (HC-MD-CIV-ACT-CON-2023/00595) [2024] NAHCMD 223 (10 May 2024)	
Order:	
<ol style="list-style-type: none">1. The late filing of the plea of the defendants is hereby condoned and they are also granted leave to file their counterclaim.2. Costs awarded to the defendants but capped in terms of rule 32(11).3. The defendants to file their counterclaim on or before 28 May 2024.4. The plaintiff to plea on or before 18 June 2024.5. The defendants to the file replication, if any, on or before 28 June 2024.6. Matter postponed for a case management conference hearing on 16 July 2024 at 15h30.7. Parties to file a joint case management report on or before 11 July 2024.	
Reasons for order:	
RAKOW J:	

Introduction

[1] The plaintiff is Burmeister & Partners (Proprietary) Limited, a company with limited liability, duly registered and incorporated in accordance with the company laws applicable in the Republic of Namibia. The first defendant is Namibia Industrial Development Agency (NIDA) (previously, the Namibia Development Corporation), a state-owned enterprise established in terms of the Namibia Industrial Development Agency Act 16 of 2016 ("NIDA Act"). The second defendant is Ministry of Agriculture, Water and Forestry.

[2] The plaintiff originally contracted with the Namibia Development Corporation ("NDC"), in 2009, which was a former state-owned enterprise established in terms of the Namibia Development Corporation Act 18 of 1993 ("NDC Act"), but which entity since ceased to exist by virtue of the promulgation of the NIDA Act, which repealed the NDC Act. All assets, rights, liabilities and obligations of the NDC was incorporated into NIDA as a result of the latter substituting the former. The plaintiff received a letter of appointment from the NDC. The first defendant is referred to as the Implementing Agent for the second defendant and the second defendant as the client, in the letter of appointment. The second defendant was however, responsible for the payment of all invoices by agreement between the parties.

[3] In terms of the letter of appointment, the first defendant employed the plaintiff as its Project Management Consultant in order to render services as Principal Agent, Multi-disciplinary Professional Engineers and Project Manager to co-ordinate a project team consisting of Fresh Produce Market Specialists, Architects, and Quantity Surveyors in respect of the project known as: Fresh Produce Marketing Infrastructure at Windhoek, Rundu and Ongwediva. The project proceeded but at some stage delays were experienced due to a shortage of funds. This project already started in 2009.

[4] The plaintiff has various claims for fees not paid where services were rendered by them.

The condonation application

[5] The defendants applied for condonation for the late filing of their plea as well as introduction of a counterclaim. The Executive Director of the Ministry of Agriculture, Water and Forestry, Ndiyakupi Nghitumamata explains in detail the problems they experienced in this

matter. Being a project coming from 2009 and having most of the people who worked on the project no longer being employed by the defendants, made it extremely difficult to trace all the relevant documentation. Persons who were assigned to deal with the matter further had to travel out of the country for employment purposes and were on leave for the month of September 2023, making it impossible to provide their legal representative with the necessary information.

[6] It further transpired that Mr Ilovu who initially dealt with the matter, became overburdened and Ms Monika Angula was appointed to deal with the matter on 11 September 2023. She had to acquaint herself with the matter and consult with the two staff members who were not available. The plea in terms of the court order were to be filed by 2 October 2023 but was only filed by 4 October 2023.

[7] The affidavit further deals with prospects of success and points out that there are good prospects of success on the side of the defendants, as they found duplications of fees charged and amounts which vary substantially to the amounts stipulated in the contract, resulting in the overpayment of various invoices that were submitted by the plaintiff.

Question of law

[8] In response to the condonation application, the plaintiff filed a question of law which reads as follows:

‘1. In the matter of *Stipp and Another v Shade Centre and Others*¹ the Supreme Court held that, as a general rule an applicant in motion proceedings must set out its cause of action and supporting evidence in the founding affidavit. In other words, the applicant must make out its case in the founding papers – this principle has become known as the Stipp principle.

2. It is also trite law that a party seeking condonation and upliftment of the bar (as a species of condonation) must provide a reasonable, acceptable and bona fide explanation for the non-compliance with the rules of court. The party is also expected to satisfy the court through its founding papers, that there are reasonable prospects of success (both in defending the main action and the proposed counter claim) should the condonation application be granted. The application must be launched without delay. Where condonation is sought for delay, the explanation must cover the entire period of the delay. The sum of these requirements equate to the demonstration of “good cause”.

3. In addition, the applicant will need to satisfy the requirements of rule 56 which provide that in an

¹ *Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC).

application such as this one a court will consider all the circumstances, including:

- “(a) whether the application for relief has been made promptly;
- (b) whether the failure to comply is intentional;
- (c) whether there is sufficient explanation for the failure;
- (d) the extent to which the party in default has complied with other rules, practice directions or court orders;
- (e) whether the failure to comply is caused by the party or by his or her legal practitioner;
- (f) whether the trial date or the likely trial date can still be met if relief is granted;
- (g) the effect which the failure to comply has or is likely to have on each party; and
- (h) the effect which the granting of relief would have on each party and the interests of the administration of justice.”

4. In doing so the applicant is obliged to set out the facts (supported by evidence) relied upon to discharge its onus, as rule 56(2) provides that an application for relief (condonation and the upliftment of the bar) must be supported by evidence.

5. In turning to consider the respondents' supporting affidavit it becomes abundantly clear that, despite applying for condonation, the applicant does not:

- 5.1. Sufficiently explain the default in respect to the late counter claim.
- 5.2. Does not deal with applicant's prospects of success in defending the main action and more importantly in prosecuting the counter claim.
- 5.3. Sufficiently (or at all) deal with the time elapsed between 2 October 2023 and 1 December 2024, and thus the delay in launching this application.
- 5.4. Does not deal with the proposed counter claim at all and whether it enjoys any prospects of success. There are no allegations that demonstrate what the proposed cause of action is.
- 5.5. In fact, the entire explanation (as it appears in the founding affidavit) demonstrates that the respondent does not have sufficient documentation and or a sufficient factual matrix at hand to prove its claim. This much is admitted in paragraph 4.4 of the founding papers. In the result, the applicant has simply not made out a case - in the founding papers - for the granting of condonation (and other relief sought). The applicant has specifically failed to demonstrate that the application (more particularly as it relates to the counter claim) is bona fide.

6. Having further regard to the founding affidavit, the provisions of rule 56(1) have also not been complied with, in that:

- 6.1. The application for condonation was not made promptly.
- 6.2. There is no sufficient explanation proffered for the failures.
- 6.3. The applicant has not dealt with previous non compliances with timelines and court orders.
- 6.4. In respect to the proposed counter claim, the aspect of prejudice generally and more importantly the effect on the administration of justice has not been dealt with especially in the context of what is stated by

the applicant in paragraph 4.4 of the founding affidavit.

7. The result is that there has not been sufficient compliance with the provisions of either rules 55 or 56.

8. In addition, the applicant does not provide any explanation as to why no extension of time was sought during the period between 2 October 2023 and 1 December 2024.

9. Generally, a consideration of the founding papers shows that - in respect of the counter claim sought to be introduced - the applicant has failed to satisfy the “good cause” requirement in its founding papers, and in this regard Rule 56(3) provides that:

“The managing judge may [only], on good cause shown, condone a non-compliance with these rules, practice directions or court order.”

10. This presupposes that in the absence of any “good cause” being demonstrated or the requirements of rule 56 not being met in the founding affidavit, a court cannot determine the bona fides of the application, and has no discretion to condone the non-compliance and uplift the bar - against filling the counter claim - as applied for by the applicant.’

Arguments by the parties

[9] For the defendant, it was argued that the principles on condonation, which are supplemented by rule 56 are trite and the Namibian Supreme Court, in the well-known case of *Snyman and Another v Jordaan N.O*, Smuts JA² (Mainga JA and Hoff JA concurring) stated the following:

‘[12] It is well established that applicants for condonation are required to meet the two requisites of good cause before they can succeed in such an application. These firstly entail establishing a reasonable and acceptable explanation for the non-compliance with the rule(s) in question and secondly satisfying the court that there are reasonable prospects of success on appeal.’

[10] The court was further referred to *Andrico Investment Number Sixty-Five CC v Welwitschia Family Clinic CC*³ in relation to condonation applications and stated as follows:

‘[9] To determine whether the applicant has shown good cause for the delay, I am guided by the following factors: the degree of non-compliance, the explanation for it, the importance of the case, the

² *Snyman and Another v Jordaan N.O* (SA 7 of 2015) [2016] NASC 29 (29 November 2016).

³ *Andrico Investments Number Sixty-Five CC v Welwitschia Family Clinic CC (2)* (Reasons for ruling of rescission of judgment) (HC-MD-CIV-ACT-CON 734 of 2017) [2018] NAHCMD 112 (23 April 2018).

prospects of success, the Respondent's interest in the finality of its judgment, and the avoidance of unnecessary delay in the administration of justice.'

[11] It was further argued that the defendants' plea was filed on E-Justice on 4 October 2023 which is a mere two (2) days after the date indicated by this Honourable Court's Order dated 6 September 2023. They submit that the explanation provided is reasonable, honest, acceptable, and transparent and as such, the non-observance of the court order to deliver the plea and counterclaim is not flagrant, glaring, and inexcusable and pray for condonation to be granted. The said application is, therefore, not mala fide and/or deliberate.

[12] On behalf of the plaintiff, it was argued that the plea was filed two days late, however, this is not the issue. The issue is that the condonation application was only filed on 1 December 2023 and this application only dealt with the plea and not the counterclaim. The plaintiff contends that the defendants have simply not made out a case for the relief sought in the founding papers, in other words, the condoning of the late filing of the counterclaim.

[13] It was further argued that the defendants failed to sufficiently explain the default in respect to the late counterclaim. They also do not deal with the applicant's prospects of success in defending the main action and more importantly, in prosecuting the counterclaim. They failed to deal with the time lapsed between 2 October 2023 and 1 December 2023 and thus, the delay in launching this application. The defendants did not deal with the proposed counterclaim at all and whether it enjoys any prospects of success. There are no allegations that demonstrate what the proposed cause of action is. In fact, the entire explanation (as it appears in the founding affidavit) demonstrates that the defendant does not have sufficient documentation and or a sufficient factual matrix at hand to prove its claim. This much is admitted in paragraph 4.4 of the founding papers.

Discussion on condonation application

[14] In dealing with a delay in explanation for an amendment to pleadings, the court in the matter of *Pharmaceutical Society of Namibia v Pharmacy Council of Namibia*⁴ said the following, which is also applicable in condonation applications:

'Having found that the delay was unreasonable, the next question is whether the court should condone it? To begin with, there is no application for condonation and in the absence of such an

⁴ *Pharmaceutical Society of Namibia v Pharmacy Council of Namibia* (HC-MD-CIV-MOT-REV 507-2020/00507) [2022] NAHCMD 588 (27 October 2022).

application, to assist the court, it is extremely difficult for the court to condone the delay as there is no full explanation for the delay.

[39] In *Gecko Salt*⁵ the court said: 'The applicant was under an obligation to give a full and detailed explanation and not hold back any or further reasons or facts that explain the delay, as it appears to have decided in its wisdom. In my view, the explanation suffers from candour and forthrightness to justify an indulgence from the Court.'

[15] Regarding the decision of whether to grant condonation or not, the application must meet two requirements. In the matter of *Telecom Namibia Limited v Mitchell Nangolo & 34 Others*⁶, Damaseb JP identified the following as principles guiding applications for condonation:

- '1. It is not a mere formality and will not be had for the asking. The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.
2. There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.
3. It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.
4. The degree of delay is a relevant consideration;
5. The entire period during which the delay had occurred and continued must be fully explained;
6. There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented. (Legal practitioners are expected to familiarize themselves with the rules of court).
7. The applicant for condonation must demonstrate good prospects of success on the merits. But where the non-compliance with the rules of Court is flagrant and gross, prospects of success are not decisive.
8. The applicant's prospect of success is in general an important though not a decisive consideration. In the case of *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*, Hoexter JA pointed out at 789I-J that the factor of prospects of success on appeal in an application for condonation for the late notice of appeal can never, standing alone, be conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with the rules, should be considered.
9. If there are no prospects of success, there is no point in granting condonation.'

[16] In the matter of *South African Poultry Association and Others v Minister of Trade and Industry and Others*⁷, Smuts JA said the following regarding the granting of condonation:

'[58] In deciding whether or not to grant condonation after finding that a delay is unreasonable, the

⁵ *Gecko Salt (Pty) Ltd v Minister of Mines and Energy* 2019 JDR 1130 (NM) at para 23.

⁶ *Telcom Namibia Limited v Nangolo and Others* (LC 33 of 2009) [2012] NALC 15 (28 May 2012).

⁷ *South African Poultry Association and Others v Minister of Trade and Industry and Others* 2018 (1) NR 1 (SC).

criterion to be applied under the common law is the interests of justice, as was recently reiterated by the South African Supreme Court of Appeal (SCA) in *South African National Roads Agency Ltd v Cape Town City (SANRAL)*.⁸ In determining this question, the SCA reaffirmed that regard should be had to all the facts and circumstances.

[59] The SCA also referred to the decision of the Constitutional Court in *Khumalo and Another v MEC of Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) (2014 (3) BCLR 333; [2013] ZACC 49) para 57, where the latter court stated:

'An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.'

[60] The SCA in *SANRAL* further found that although the delay issue in reviews should first be dealt with before the merits of the review are entertained, this —

“cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictate that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious.”

[61] Further factors would include the prejudice suffered by the administrative functionary — in this case the minister — and the need for certainty, particularly in respect of a trade measure of the kind in question, the extent and cause of the delay, the reasonableness of the explanation for it, the effect on the administration of justice, the importance of the issue raised and the prospects of success. A further factor could be whether the failure to launch the application within a reasonable time was in good faith.

[62] The public interest is plainly served by bringing certainty and finality to administrative action or the exercise of public power of the kind in question — where the minister invokes a power within a statute to regulate trade by way of a restriction upon imports which at the very least can be challenged on legality grounds of not having been taken within the confines of the Act and would thus not be lawful. A decision of this nature in implementing economic policy through legislative powers has wide implications — including budgetary, in the form of balance of payment consequences, and the pursuit of employment creation. The prejudice to NPI would also need to be considered. But as Mr Unterhalter pointed out, much of the investment in setting it up was effected before the notice was published. Nonetheless, there would be some prejudice in a delay to a challenge to the notice, as was investigated in some detail by the High Court.'

⁸ *South African National Roads Agency Ltd v Cape Town City (SANRAL)* 2017 (1) SA 468 (SCA) ([2016] 4 All SA 332; [2016] ZASCA 122) para 80.

Conclusion

[17] In applying the legal principles, it must be clear for the court that an explanation was tendered for the late filing of the plea and the non-filing of the counterclaim, for which condonation is sought. The matter seems to be a complex matter and is quite old with documents that need to be found, as well as persons, who dealt with the matter but are no longer employed by the defendants. I am however, satisfied that there is indeed an explanation for the late filing of the plea and the counterclaim and that there is indeed a defense raised up that has prospects of success.

[18] In the result, I make the following order:

1. The late filing of the plea of the defendants is hereby condoned and they are also granted leave to file their counterclaim.
2. Costs awarded to the defendants but capped in terms of rule 32(11).
3. The defendants to file their counterclaim on or before 28 May 2024.
4. The plaintiff to plea on or before 18 June 2024.
5. The defendants to the replication, if any, on or before 28 June 2024.
6. Matter postponed for a case management conference hearing on 16 July 2024 at 15h30.
7. Parties to file a joint case management report on or before 11 July 2024.

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Plaintiff:	Defendants:
JP Jones Instructed by Leezhel Mouton & Associates Incorporated, Windhoek	M Angula Instructed by Office of the Government Attorney, Windhoek