

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case number: HC-MD-CIV-ACT-CON-2023/01976

In the matter between:

TRANSNAMIB HOLDINGS LIMITED

PLAINTIFF

and

ARIS STONE PRODUCTS CC

DEFENDANT

Neutral citation: *TransNamib Holdings Limited v Aris Stone Products CC*
(HC-MD-CIV-ACT-CON-2023/01976) [2024] NAHCMD 65
(21 February 2024)

Coram: DE JAGER AJ

Heard: 31 January 2024

Delivered: 21 February 2024

Flynote: Practice – High Court r 54(3) – Failure to deliver pleading timely, ipso facto barred ex lege – Rule 56 – Court may, on application for relief from adverse consequence of default, supported by evidence, on good cause shown, condone non-compliance – To apply for condonation without delay – To succeed with condonation application, required to meet two requirements of good cause

– Reasonable and acceptable explanation and satisfying court there is reasonable prospect of success - Explanation must be full, detailed and accurate – Balancing exercise of two requirements and factors.

Statute – Interpretation – High Court r 56(2) – Application must be supported by evidence – Not interpreted to mean applicant must prove its reasonable prospect of success or provide evidence for it – Court has discretion to condone non-compliance – Court exercising its discretion must be satisfied there is reasonable prospect of success.

Condonation – Effect of mediation referral on duty to launch condonation application without delay – High Court r 38(3) – No further proceedings must take place until an order based on mediator's report – Matter is only referred to mediation at the mediation referral proceedings, not at the initial mediation referral proceedings – Statute – Interpretation – Rule 38(3) – Interpreted to mean as from the mediation referral order, no further proceedings must take place – In this instance, without deciding a condonation application is a proceeding under r 38(3), proceedings suspended from 7 August 2023 to 18 September 2023 – Periods that require explanation together with explanation for default – Explanations for default and delay in launching application considered and weighed as well as prospect of success and relevant factors – On conjunctive weights case made for relief sought.

Practice – High Court r 32(11) applies to condonation application even though r 32(9) and (10) do not – Rationale for r 32(11) rings true in condonation application – To limit opposition to condonation application, thereby limiting opposed interlocutory proceedings and costs in litigation and facilitating speedy disposal thereof – Party succeeding in defence to condonation application considered successful party under r 32(11).

Summary: The plaintiff seeks condonation for its failure to comply with a court order, upliftment of the bar operative against it, an extension of time to file its pleadings and costs. The defendant opposed the application because the plaintiff failed to show good cause. It said the plaintiff failed to explain why the pleadings were not filed by the due date, and the application was delayed

without adequate explanation. The main reason for the delay in launching the application is that the matter was referred to mediation. According to the defendant, the mediation referral was irrelevant. The defendant further said that the plaintiff does not have a bona fide defence in reconvention and contended the plaintiff required an evidential basis for its conclusions on its prospects of success. The parties were ad idem that High Court r 32 (9) and (10) did not apply to the condonation application, but the defendant said that, as a result, r 32(11) should also not apply.

Held that High Court r 54(3) provides that where a party fails to deliver a pleading timely, that party is in default and barred ex lege by that very fact.

Held that under r 56, the court may, on application for relief from the adverse consequence brought about by r 54(3), supported by evidence, on good cause shown, condone the plaintiff's non-compliance with the court order of 21 June 2023.

Held that upon non-compliance, a condonation application should be launched without delay, and to succeed, it is required to meet the two requirements of 'good cause' by establishing a reasonable and acceptable explanation and satisfying the court that there is a reasonable prospect of success. The explanation must be full, detailed, and accurate for the court to understand the reasons for it clearly, and the balancing exercise of the two requirements is a question of deciding what weight to attach to each factor and not an equation of the factors.

Held that the provision in r 56(2) that an application for relief must be 'supported by evidence' should not be interpreted to mean that an applicant must 'prove' that it has a reasonable prospect of success or provide evidence for it. The court has the discretion to condone the non-compliance, and the court exercising its discretion must be satisfied that there is a reasonable prospect of success.

Held that a matter is referred to mediation at the mediation referral proceedings, not at the initial mediation referral proceedings, and r 38(3) should be

interpreted to mean that no further proceedings must take place as from the mediation referral order, not the initial mediation referral order.

Held that in this instance, without deciding that a condonation application is a proceeding under r 38(3), the proceedings were suspended from 7 August 2023 to 18 September 2023, and the periods from 14 July 2023 to 7 August 2023 and 18 September 2023 to 9 November 2023 require explanation together with explanation for the default.

Held that the explanation for the default is poor and little weight is attached, the explanation for 14 July 2023 to 7 August 2023 is weak and due to the relatively short period little weight not weighing too much against the plaintiff is attached, the explanation for 18 September to 9 November 2023 is not unreasonable or unacceptable and a relative amount of weight is attached.

Held that whereas the plaintiff intends to amend its particulars of claim, and based on the facts before the court, the plaintiff has a reasonable prospect of success, and a considerable amount of weight is attached.

Held that a trial date is only likely to be set for the end of the second term, and some weight is attached against the plaintiff, but the effect of a refusal of the application on the plaintiff is much worse than the effect of the non-compliance and the granting of the application on the defendant, and a substantial amount of weight is attached.

Held that on the conjunctive weights attached to the two requirements and the relevant factors, a case is made for the relief sought.

Held that r 32(11) applies to condonation applications even though r 32(9) and (10) do not, and the rationale of rule 32(11) rings true in condonation applications to limit opposition, thereby limiting opposed interlocutory proceedings and costs in litigation and facilitating the speedy disposal of such applications.

ORDER

1. The plaintiff's failure to comply with the court order dated 21 June 2023 is condoned.
2. The bar operative against the plaintiff regarding its replication in convention and plea in reconvention is lifted.
3. The plaintiff is granted an extension of time to file its replication in convention and plea in reconvention on a date determined by the court at a further case planning conference.
4. The parties are ordered to file a joint further case plan on or before 7 March 2024.
5. The matter is postponed to 13 March 2024 at 08:30 for a further case planning conference.
6. The plaintiff shall pay the defendant's costs occasioned by the condonation application, including the costs of one instructing and one instructed legal practitioner, limited to r 32(11).

RULING

DE JAGER AJ:

Introduction

[1] The plaintiff seeks condonation for its failure to comply with the court order dated 21 June 2023, upliftment of the bar operative against it, an extension of time to file its plea in reconvention and costs.

[2] On the hearing date, the plaintiff moved for an amendment to prayer three of its notice of motion to include an order for an extension of time to file its

replication in convention. The defendant had no objection to the amendment sought. The amendment sought is granted.

[3] The defendant opposed the application because the plaintiff failed to show good cause. The defendant contended that the application was delayed without explanation. It said the plaintiff failed to explain why the pleadings were not filed by the due date, and the plaintiff's explanation that the matter was referred to mediation is irrelevant. According to the defendant, the plaintiff has no bona fide defence in reconvention.

[4] The defendant is not persisting with its contention that the plaintiff failed to comply with High Court r 32 (9) and (10). It, however, contended that if those rules do not apply, r 32(11) should also not apply, and the application should be dismissed with costs uncapped by r 32(11). The defendant is also not persisting with its contention that the plaintiff's deponent lacked authority to launch the application.

The facts

[5] The claim in convention is for an order that the written lease agreement for immovable property concluded between the parties on 27 July 2016 be terminated, that the defendant be evicted from the property and that the plaintiff be paid arrear rental and utility charges.

[6] The claim in reconvention seeks a declarator that the lease agreement is invalid and unenforceable; alternatively, if it is valid and enforceable, the clause creating an obligation for the defendant to pay utility charges should be declared void for vagueness and unenforceable. The defendant further claims payment of damages arising from a claim for unjustified enrichment.

[7] On 21 June 2023, the plaintiff was ordered to deliver its plea in reconvention and replication in convention by 14 July 2023. The court order included an initial mediation referral order, and the parties were directed to file a draft mediation referral order on or before 3 August 2023. The matter was postponed to 9 August 2023 for mediation referral.

[8] The plea in convention and claim in reconvention were filed timely, and both parties made discovery, albeit late. The plea in reconvention and the replication in convention were not filed. On 2 August 2023, a joint r 32(10) report was filed.

[9] On 1 and 2 August 2023, a mediation reservation note and a draft mediation referral order were filed. On 7 August 2023, the mediation referral order was made in chambers absentia the parties, and the matter was postponed to 20 September 2023 for a status hearing.

[10] The mediation conducted on 28 August 2023 failed, and after the parties failed to file a status report by 14 August 2023, the court, on 18 September 2023, in chambers absentia the parties, made an order for the filing of witness statements (28 September 2023 for the plaintiff and 10 October 2023 for the defendant) and expert witness 'statements' and reports (17 October 2023), and for the filing of a proposed pre-trial order (20 October 2023). The matter was postponed to 25 October 2023 for a pre-trial conference.

[11] In a status report dated 25 September 2023, the plaintiff reported its view that the court perhaps ordered the parties to deliver witness statements without being apprised by the plaintiff's intended interlocutory applications and prayed that the 14 September 2023 court order be varied and that the matter be postponed for three weeks for a status hearing. The defendant disagreed. Its position was that the plaintiff was ipso facto barred regarding the plea in reconvention and replication in convention. A varied court order was issued. It postponed the matter to 25 October 2023 for a status hearing on the plaintiff's intended interlocutory applications and ordered the parties to file a status report on or before 18 October 2023.

[12] A status report was filed on 19 October 2023. The plaintiff sought a two-week postponement to enable it to inform the court of the further conduct of its intended interlocutory applications as its instructed counsel was out of the country. The defendant was opposed to any further postponements and was of the view that the matter should be struck for lack of prosecution.

[13] On 25 October 2023, the plaintiff was ordered to pay the defendant's wasted costs of the day and to file its r 32(10) report regarding its condonation application and the application itself on or before 9 November 2023. The order included further directions for filing affidavits and a status report, and the matter was postponed to 29 November 2023.

[14] The application was filed on 9 November 2023. On 28 November 2023, the matter was postponed to 31 January 2024 to hear the condonation application.

The relevant law

[15] Rule 54(3) provides that where a party fails to deliver a pleading within the time stated in the case plan order, as in the matter before the court, that party is in default of filing such pleading and is, by that very fact, barred.

[16] The plaintiff is in default of delivering two pleadings, the plea in reconvention and the replication in convention, and ex lege, barred.

[17] Under r 56, the court may, on application for relief from the adverse consequence brought about by r 54(3), supported by evidence, on good cause shown, condone the plaintiff's non-compliance with the court order of 21 June 2023. Rule 56(1) outlines various circumstances the court would consider in the application.

[18] In *Solsquare Energy (Pty) Ltd v Lühl*¹, the Supreme Court dealt with the approach in condonation applications. It said it was trite that 'once there has been non-compliance, an applicant should without delay apply for condonation and comply with the rules'. With reference to *Balzar v Vries*², it referred to the settled position that to succeed with a condonation application, it is required to meet the two requirements of 'good cause', and those entail establishing a reasonable and acceptable explanation and satisfying the court that there are reasonable prospects of success. The Supreme Court also referred to *Beukes*

¹ *Solsquare Energy (Pty) Ltd v Lühl* 2022 (3) NR 899 (SC) paras 62 to 68.

² *Balzar v Vries* 2015(2) NR 547 (SC).

*and Another v South West Africa Building Society (SWABOU) and Others*³, where it explained an applicant has to make a case 'on the papers submitted' to explain the delay and failure to comply with the rules and the explanation must be full, detailed and accurate for the court to understand clearly the reasons for it. Regarding the factors relevant to determining a condonation application, it referred to *Arangies t/a Auto Tech v Quick Build*⁴, wherein the position was summarised as follows:

[5] The application for condonation must thus be lodged without delay, and must provide a full, detailed and accurate explanation for it. This court has also recently considered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. They include — "the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice."

These factors are not individually determinative, but must be weighed, one against the other. Nor will all the factors necessarily be considered in each case. There are times, for example, where this court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been "glaring", "flagrant", and "inexplicable".'

[19] The Supreme Court in *Telecom Namibia Ltd v Nangolo and Others*⁵ said that the balancing exercise of the two requirements is a question of deciding what weight to attach to each factor, not an equation of the factors.

The explanations, the effect of r 38(3) and application of the law

[20] The court now considers the plaintiff's explanations, the effect of r 38(3) on the application (if any) and applies the legal principles on condonation.

³ *Beukes and Another v South West Africa Building Society (SWABOU) and Others* NASC SA 10/2006 (5 November 2010).

⁴ *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC).

⁵ *Telecom Namibia Ltd v Nangolo and Others* 2015 (2) NR 510 (SC) para 21.

[21] The main explanation for why a condonation application was not brought immediately after the default on 14 July 2023 is that the matter was referred to mediation, and to curb costs and in hopes that the matter would settle, the application was not launched at the time. The founding affidavit stated that the failure of the mediation resulted in the plaintiff's persistence with the application. The defendant argued that the mediation referral was irrelevant because it postdated the default. Two issues arise from those arguments. Firstly, the mediation referral's effect (if any) on the application. Secondly, if the mediation referral impacted the application, when was the matter referred to mediation?

[22] The court asked the parties what effect (if any) the mediation referral had on the plaintiff's duty to launch the application without delay. The plaintiff relied on r 38(3) and contended that it would be unconscionable to shoot each other while busy with mediation proceedings. It said no further proceedings should occur during that period, and a condonation application is a 'proceeding' as envisaged in r 38(3). The defendant's position was that the mediation referral did not relieve the plaintiff from its duty to launch the application without delay. The answering affidavit stated that no court order suspended the filing of pleadings pending the mediation outcome.

[23] Rule 38(3) provides that:

'(3) No further proceedings must take place until an order by the managing judge is made in respect of such ADR procedure based on the report of the conciliator or mediator.'

[24] The word 'proceedings' in r 38(3) is not defined in the High Court rules, and apart from what is set out in paragraph [22] above, the parties did not address its meaning. In the circumstances, based on the arguments before the court, and in this instance, the court will deal with the matter as if a condonation application is a 'proceeding' as envisaged in r 38(3). The court does not make a finding whether a condonation application is indeed a 'proceeding' as envisaged in r 38(3).

[25] The mediator's report was filed on 1 September 2023 and the subsequent court order was that of 18 September 2023. On 18 September

2023, the court recorded that the mediation failed, and the parties did not 'upload' a status report on the way forward. Having noted that pleadings were exchanged, the court ordered the parties to file witness statements and postponed the matter for a pre-trial conference. The court finds that the court order of 18 September 2023 is the 'order by the managing judge' envisaged in r 38(3).

[26] As of 18 September 2023, the plaintiff, no doubt, had a duty to deliver its application without delay, and the period from 18 September 2023 to 9 November 2023 requires explanation. What about the period before the matter was referred to mediation, and when was the matter referred to mediation?

[27] Note 3 of the registrar's notes issued in terms of practice direction 65 sets out the process for mediation referral. The stage when the court is approached to refer a matter to mediation is the 'initial mediation referral proceedings'. Upon such request, the court must postpone the matter 'so to be referred' to enable the parties to identify the mediator and make a mediation reservation. The order made during the initial mediation referral proceedings is called 'the initial mediation referral order'. Note 3(6) lists four items the initial mediation referral must state. They are the type of mediation for which the matter 'will be referred', the identity of the legal practitioners who will accompany each party, details concerning the use of an interpreter and the date and time of the next court appearance referred to as 'the mediation referral proceedings'. The phrases 'so to be referred' in note 3(3) and 'will be referred' in note 3(6) indicate that a matter is not referred to mediation at 'the initial mediation referral proceedings'. A matter is only referred to mediation at 'the mediation referral proceedings'. That interpretation is supported by the example of a court-connected mediation referral order in example 1 to the registrar's notes. Paragraph 1 of the example order states that the 'matter is hereby referred for court-accredited mediation'.

[28] With regard to the wording of r 38(3), read with r 38(1) and (2) and note 3, r 38(3) should be interpreted to mean that, as from the mediation referral order, no further proceedings must take place until an order is made based on the mediator's report.

[29] The 21 June 2023 court order included an initial mediation referral order. It contained the details listed in note 3(6). That court order did not give directions concerning the terms of reference, where and how or by whom the mediation should be conducted, nor did it stipulate when the mediation should be conducted or when the mediator's report should be submitted. The intention illustrated by the court order dated 21 June 2023 is the parties should exchange pleadings and make discovery before the mediation.

[30] The court finds that:

(a) The 21 June 2023 court order was the 'initial mediation referral order', and the matter was not referred to mediation on 21 June 2023.

(b) The subsequent court order dated 7 August 2023 was the 'mediation referral order', and that is when the matter was referred to mediation.

(c) In this instance, the 'proceedings' were suspended from 7 August 2023 to 18 September 2023.

(d) The periods from 14 July 2023 (when the pleadings were due) to 7 August 2023 (when the matter was referred to mediation) and 18 September 2023 (when an order was made based on the mediation report) to 9 November 2023 (when the application was launched) require explanation together with an explanation why the pleadings were not delivered on 14 July 2023.

[31] The court first considers the explanation for the default.

[32] On 14 July 2023 (the due date for the pleadings), the plaintiff's legal practitioner telephonically approached the defendant's legal practitioner. The inability to deliver the pleadings on 14 July 2023 was expressed. An engagement followed regarding an extension of time, a condonation application to file the pleadings, and an intended amendment and exception. The plaintiff relied on a letter dated 18 July 2023 attached to the founding affidavit. Both parties' counsel submitted that the court should have regard to that letter.

[33] In the letter dated 18 July 2023, the reason for the engagement on 14 July 2024 was that the plaintiff's legal practitioners were still awaiting outstanding documents from the plaintiff. The plaintiff did not explain why the engagement only happened on the due date.

[34] The court finds that the explanation for the default to deliver the pleadings on 14 July 2023 is poor, and little weight is attached.

[35] The court now considers the delay in launching the application.

[36] It is further stated in the 18 July 2023 letter that, upon receipt of the outstanding documents on 18 July 2023, the plaintiff's legal practitioners realised that they would be unable to file the pleadings as the plaintiff intended to apply for rectification of the lease agreement and amend its papers and that, having considered the claim in reconvention, 'it also further became apparent' that it is excipiable. There is a contradiction between the founding affidavit and the 18 July 2023 letter. According to the founding affidavit, the engagement for the amendment and exception happened on 14 July 2023. According to the 18 July 2023 letter, the need for an amendment and the exception only came to light after 14 July 2023. Due to the short period of time between 14 and 18 July 2023 and the wording of the founding affidavit, the court finds that, for the purpose of determining the condonation application, not much turns on that contradiction.

[37] In the 18 July 2023 letter, a meeting was requested. If a response was not received by 21 July 2023, the plaintiff's legal practitioners would launch 'the envisaged interlocutory applications on an unopposed basis'.

[38] A meeting was held on 27 July 2023. It was resolved that the defendant would oppose the 'envisaged application'. The parties filed a r 32(10) report. It was reported that the plaintiff's counsel engaged the defendant's counsel on 14 July 2023 for an extension of time and condonation 'to file' on 18 July 2023, which engagement was followed by formal correspondence on 18 July 2023 and a meeting on 27 July 2023. It was resolved that the plaintiff would file a condonation application and an application to rectify the lease agreement. It

was also resolved that the plaintiff intended to raise an exception to the claim in reconvention, and the defendant would oppose the envisaged applications.

[39] The application was only launched on 9 November 2023, almost four months after the default.

[40] The plaintiff's deponent explained the delay in launching the application as follows. It was firstly because the parties, at the meeting of 27 July 2023, to curb costs and in hopes of a settlement, agreed 'to first attempt to mediate the matter' before launching the application. The defendant's deponent answered that the agreement to mediate had nothing to do with a failure to comply with a court order. The plaintiff's first explanation for the delay in launching the application is contradicted by the joint r 32(10) report dated 1 August 2023 whereby it was reported that the parties resolved the plaintiff would, amongst others, file a condonation application, which it did not do at the time.

[41] The proceedings were suspended from 7 August 2023 to 18 September 2023. As a result, the court finds that, for the purpose of determining the condonation application, not much turns on the contradiction referred to in the preceding paragraph. The court further finds that the explanation for 14 July 2023 to 7 August 2023 is weak, and little weight is attached. That period was, however, relatively short, and the weak explanation does not weigh too much against the plaintiff in the balancing exercise of the relevant factors.

[42] The plaintiff's deponent further explained that during mid-September 2023, it sought the availability of instructed counsel and managed to secure counsel during late September 2023. Shortly after accepting the brief, counsel had a bereavement in the family and was unavailable for two weeks in October 2023. On 25 October 2023, the plaintiff was directed to deliver the application on 9 November 2023. A meeting was had with instructing and instructed counsel on 30 October 2023.

[43] The court finds that the explanation for 18 September to 9 November 2023 could be better, but it is not unreasonable or unacceptable. A relative amount of weight is attached.

Prospects of success

[44] The court now turns to the prospects of success requirement.

[45] It is the defendant's case that the lease agreement is invalid and unenforceable and that it was paying rental to a third party (the owner of the property) in the exploitation of its mining rights arising from mining claims. The defendant claims that the rental payments of N\$843 787,20 paid to the plaintiff were made under the bona fide mistaken belief that the plaintiff was the property owner. As a result, the plaintiff was unduly enriched in that amount.

[46] The plaintiff's position is as follows. The plaintiff has a perpetual usufruct registered over the Remainder of Portion 1 of Portion A of Farm Krumhuk number 30 (Portion 1). Due to a bona fide mistake, the parties inserted the leased premises on the lease agreement as the Remainder of Portion 9 of that property (Portion 9) instead of Portion 1. The plaintiff's right to the portion of land is documented in the deed of transfer attached to the claim in reconvention. The defendant is operating its mining activities on the plaintiff's portion of land over which it enjoys a usufruct. The lease agreement was concluded concerning Portion 1. The lease period terminates December 2026. All rental payments received were correctly received. The unjustified enrichment claim is unfounded.

[47] The deed of transfer reflects that Twenty-One Krumhuk for Agriculture and Social Development, an incorporated association not for gain, is the owner of Portion 1 subject to a perpetual usufruct in favour of the plaintiff to 'use, work, mine, develop and exploit the quarry on the property'.

[48] The particulars of claim and the lease agreement refer to Portion 9 instead of Portion 1 as the leased property. The plaintiff's intended amendment and rectification relate to that.

[49] The defendant claimed it leases Portion 9 from Twenty-One Krumhuk for Agriculture and Social Development. The plaintiff contended that the defendant leased Portion 1 from the plaintiff.

[50] According to the defendant, the amounts claimed by the plaintiff in convention prescribed. The plaintiff disagreed. It said prescription was interrupted by the defendant's acknowledgements of indebtedness to the plaintiff. The defendant contended that the reference to interruption of prescription is of no moment, and the plaintiff, apart from drawing broad conclusions of law, presents no evidential basis for reliance on interruption of prescription.

[51] The defendant contended that the plaintiff's reliance on an alleged bona fide mistake is irrelevant as the plaintiff did not plead it, and it constitutes a reference to the mooted rectification relief it would seek as far back as 18 July 2023. It said that the plaintiff's prospects of success must be referenced to its pleaded case. The court does not uphold the defendant's argument. The defendant appears to lose sight of the application for condonation to file a plea in reconvention. Naturally, the plaintiff has not pleaded its defence just yet, and it is telling the court its prospects of success in its defence to be put up against the claim in reconvention. In addition, the plaintiff told the court that it intends to amend the particulars of claim and rectify the lease agreement. The court cannot ignore that.

[52] The defendant complained that the plaintiff only said that it is the holder of a usufruct and argued that it required evidence in the founding affidavit, otherwise, how will the court decide on its prospects of success? When asked about the test that the court should employ in determining whether the plaintiff has prospects of success, the defendant argued that the test is 'not that far as to prove'. Still, so it said, the plaintiff can only rely on a legal conclusion with something sufficient to arrive at such conclusion. The plaintiff argued that the court should not investigate the legal issues and that the test should not be 'too far-fetched'.

[53] As stated in *Vaatz: In re Schweiger v Gamikaub (Pty) Ltd*⁶, an applicant 'must show cause, in the sense of satisfying the Court, that there is a prospect of success'. The court referred to *Darries v Sheriff, Magistrate's Court, Wynberg*

⁶ *Vaatz: In re Schweiger v Gamikaub (Pty) Ltd* 2006 (1) NR 161 (HC) para 10.

*and Another*⁷, where the following was said about the prospects of success requirement:

‘. . . . When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. See *Meintjies's case supra* at 265C-E; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131E-F; *Moraliswani v Mamili* 1989 (4) SA 1 (A) at 10E.’

[54] The court finds that the provision in r 56(2) that an application for relief must be ‘supported by evidence’ should not be interpreted to mean that an applicant must ‘prove’ that it has a reasonable prospect of success or provide evidence of its prospect of success. The court has the discretion to condone the non-compliance⁸. The court further finds that the court exercising its discretion in any given condonation application must only be satisfied that there is a reasonable prospect of success; the plaintiff need not prove the prospect, nor is evidence of it required.

[55] The defendant's argument that an evidential basis is required for reliance on the interruption of prescription is not upheld. The plaintiff is not required to prove the interruption of prescription, nor to provide evidence of it.

[56] At the hearing, the plaintiff reiterated and was open about its intention to amend the particulars of claim. Seeing that the plaintiff intends to amend the particulars of claim, and based on the facts provided by the plaintiff, the court finds that it has a reasonable prospect of success in the claim in convention and its defence to the claim in reconvention. A considerable amount of weight is attached.

[57] The plaintiff further submitted the following. The non-compliance was not intentional. The plaintiff complied with the rest of the 21 June 2023 court order orders. The matter is in the first stage of the exchange of pleadings. No trial date has been set. The defendant did not suffer prejudice; if it did, it was not ‘severe’ considering that if the plaintiff had not defaulted, the parties would still

⁷ *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) 40G-41D.

⁸ *Supra*.

be engaged in case management. The plaintiff would be severely prejudiced if the application was refused. It said the defendant has been operating from the plaintiff's property without fulfilling its rental obligations since 2016, and the plaintiff is deprived of the use and enjoyment of its property. It would be in the administration of justice to place the plaintiff's case before the court.

[58] The defendant made the following submissions in response to the plaintiff's submissions in the preceding paragraph. To say that the non-compliance was unintentional is evasive and fails to address the condonation requirements imposed by law. The plaintiff failed to engage in terms of r 32(9) and to file its r 32(10) notice. The condonation application was served one day late. It is irrelevant that no trial date was set. The defendant is prejudiced as there would have to be a revised case plan order directing the exchange of further pleadings, further consultations, and supplementary discovery, and a cost order limited to r 32(11) would not address the defendant's prejudice. The plaintiff is not a mineral rights holder. The pleadings do not support its complaint of being deprived of use and enjoyment. The rules of court are there for the expeditious disposal of matters on their real merits fairly to both parties. It is unknown what the plaintiff intends to do with its intended exception and rectification claim and how it would further frustrate the orderly management of the case.

[59] In considering the circumstances set out in the two preceding paragraphs on the facts before the court, and apart from the findings already made, the court further finds that:

(a) It cannot be said that the non-compliance was intentional. No weight is attached to that factor.

(b) Even though compliance with r 32(9) and (10) was not required, the plaintiff did engage the defendant in terms of r 32(9), and it did file a r 32(10) notice on 2 August 2023. No weight is attached to that factor.

(c) On 25 October 2023, the plaintiff was ordered to 'file' its condonation application no later than 9 November 2023. Whereas, in terms of r 1(a), 'file'

means 'to file with the registrar' and, in terms of r 2(1), the registrar's office hours for filing any document ends at 15:00, the application was 'filed' one day late. That non-compliance was negligible, and no weight is attached to that factor.

(d) Had it not been for the non-compliance, a trial date could have been set on 25 October 2023 when the matter would have returned to court for a pre-trial conference, and such a date could have been set for the first term of 2024. Due to the non-compliance, a trial date will likely only be set towards the end of the second term. Some weight is attached to that factor against the plaintiff.

(e) The effect that the refusal of the application would have on the plaintiff is much worse than the effect that the non-compliance and the granting of the application would have on the defendant. A substantial amount of weight is attached to that factor. When the plaintiff amends its particulars of claim, it would be liable under r 52(8) to pay the costs occasioned thereby to the defendant. The defendant would be at large to seek further cost orders against the plaintiff for additional steps to be taken by the plaintiff. Further cost orders could cure the defendant's prejudice complained about.

High Court rule 32(11)

[60] The parties are ad idem that r 32(9) and (10) do not apply to the condonation application. The defendant, however, contended that, as a result, r 32(11) should also not apply.

[61] Rule 32 deals with interlocutory matters and applications for directions. As stated in *Wise v Shikuambi NO and Another*⁹, r 32 contemplates applications for directions in respect of interlocutory applications as well as interlocutory applications themselves.

[62] The court finds that r 32 applies to condonation applications, including the application before the court, but r 32(9) and (10) do not. Despite different views of the court on whether r 32(9) and (10) apply to condonation

⁹ *Wise v Shikuambi NO and Another* 2017 (2) NR 614 (HC) para 21.

applications, the court in *QKR Namibia Navachab Gold Mine (Pty) Ltd v Kwala*¹⁰ concluded that those two rules do not apply to condonation applications. The court's reasoning for that conclusion is sound. That conclusion and its reasoning do not support the defendant's contention that r 32(11) should not apply to the condonation application.

[63] On the contrary, the rationale of r 32(11) as expressed in *South Africa Poultry Association v The Ministry of Trade and Industry*¹¹ rings true in a condonation application context to limit opposition to such applications thereby limiting opposed interlocutory proceedings and costs in litigation and facilitating the speedy disposal of such applications:

'The rationale of the rule is clear: to discourage a multiplicity of interlocutory motions which often increase costs and hamper the court from speedily getting to the real disputes in the case. A clear case must be made out if the court is to allow a scale of costs above the upper limit allowed in the rules.'

[64] Rule 32(11) provides that:

'(11) Despite anything to the contrary in these rules, whether or not instructing and instructed legal practitioners are engaged in a cause or matter, the costs that may be awarded to a successful party in any interlocutory proceeding may not exceed N\$20 000.'

[65] The court finds that, should a party who opposes a condonation application be successful in its defence to such condonation application in that the application is refused, such party would be a successful party as envisaged in r 32(11) and the costs that may be awarded to such party should not exceed N\$20 000.

[66] The court further finds that r 32(11) applies to condonation applications even though r 32(9) and (10) do not.

Conclusion

¹⁰ *QKR Namibia Navachab Gold Mine (Pty) Ltd v Kwala* (HC-MD-LAB-MOT-GEN-2022/00109) [2022] NALCMD 43 (4 August 2022) para 25 to 32.

¹¹ *South Africa Poultry Association v The Ministry of Trade and Industry* 2015 (1) NR 260 (HC) para 67.

[67] Having regard to the weight attached to the requirements and factors above, the court, in conclusion, finds that, taken conjunctively, the plaintiff made a case for the relief sought.

[68] It is ordered that:

(a) The plaintiff's failure to comply with the court order dated 21 June 2023 is condoned.

(b) The bar operative against the plaintiff regarding its replication in convention and plea in reconvention is lifted.

(c) The plaintiff is granted an extension of time to file its replication in convention and plea in reconvention on a date determined by the court at a further case planning conference.

(d) The parties are ordered to file a joint further case plan on or before 7 March 2024.

(e) The matter is postponed to 13 March 2024 at 08:30 for a further case planning conference.

(f) The plaintiff shall pay the defendant's costs occasioned by the condonation application, including the costs of one instructing and one instructed legal practitioner, limited to r 32(11).

B de Jager
Acting Judge

APPEARANCES

PLAINTIFF:

T C Phatela

Instructed by Shikongo Law Chambers

DEFENDANT:

J Diedericks

Instructed by Appolos Shimakeleni Lawyers