

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: I 207/2015

In the matter between:

**JARON NATANGWE IITA**

**PLAINTIFF**

and

**HERTHA NEJUOU ETUHOLE IITA (born ANGULA)**

**DEFENDANT**

**Neutral citation:** *lita v lita* (I 207/2015) [2017] NAHCNLD 118 (04 December 2017).

**Coram:** CHEDA J

**Heard:** 30.10.2017

**Delivered:** 04 December 2017

**Flynote:** A party seeking condonation must give a reasonable and satisfactory explanation for its failure. Where this is lacking – the application cannot succeed. Using its judicial discretion, the court can grant it, if the failure to do so will result in prejudice to applicant.

**Summary:** In a law suit for divorce by respondent, applicant/defendant entered an appearance to defend. The matter was placed under case management. Applicant failed to comply with court rules and orders from court. Applicant was barred and he applied for condonation. The reasons for non-compliance were flimsy. The court was not convinced of the explanation as the legal practitioner who was blamed for

non-compliance did not file an affidavit in support of the application. The parties were married in community of property. She had wanted to file a plea and counter-claim, but spurned all her chances to comply. There is no prejudice as the parties were married in community of property. The estate is jointly owned and therefore there is no prejudice on her part.

### ORDER

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1. The point *in limine* is dismissed.
  2. The application for the upliftment of the bar is dismissed with costs at a higher scale.
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### JUDGMENT

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CHEDA J:

[1] In this matter plaintiff sued defendant for divorce. Plaintiff is a police officer based at Opuwo while defendant is self-employed and lives in Windhoek. The parties were married to each other on the 16 April 1999 in Windhoek. Four children were born out of this union.

[2] During the said marriage, the parties experienced a plethora of problems. Plaintiff in his particulars of claim averred that defendant does not show love and affection for plaintiff, does not respect him and laced plaintiff's food with traditional herbs, commonly referred to as "muti" or love potion, amongst other allegations. Further that she wrongfully, maliciously and constructively deserted plaintiff which desertion still persists.

[3] Plaintiff is represented by Ms Kishi of Dr Weder, Kauta & Hoveka Inc. while defendant is represented by Mr Afrika Jantjies of Siyomunji Law Chambers.

[4] Plaintiff claims divorce, custody of the minor children with defendant having reasonable access and division of the joint state. The parties were married to each other in community of property.

[5] Defendant is not opposed to the divorce, but, takes issue with the distribution of property. That is the gist of this matter. As the matter was opposed it went into the case management system. Defendant, however, failed to comply with the rules of court and the Practice Directions and was therefore automatically barred.

[6] Defendant through her legal practitioner applied for an upliftment of the bar by a notice of motion on the 19 September 2017. The essence of the application was basically to seek condonation for the late filing of defendant's plea and counter-claim.

[7] Defendant, the now applicant, deposed to an affidavit for the said application. In the said affidavit he admits his own omission for failing to comply with the court order of the 01 August 2017. He stated that the failure to comply was due to two reasons, firstly by his instructed legal practitioner Ms Boois and secondly by himself.

[8] His instructed legal practitioners are said to have been dilatory. He confessed that he had also failed to diarise this matter and also failed to make contact with plaintiff's legal practitioners in order to file a Joint pre-trial conference report. This, in my mind is not in many words an admission of negligence.

[9] He went further and submitted that in light of the fact that defendant has always been desirous to defend this action, the matter is matrimonial and that defendant has a good defence which guarantees the success of her plea and counter-claim. The plea and counter-claim was filed on 17 August 2017.

[10] He also submitted that his failure to act was not wilful and the explanation he has given is reasonable and therefore his application should succeed.

[11] On the other hand, Ms Kishi for plaintiff submitted that this application should be dismissed. In support of her opposition she submitted that defendant's legal practitioner was negligent. She stated that applicant was bound by the court order of the 01 August 2017 which reads thus:

- ' (i) the matter is postponed to 18 September 2017 at 10h00 for trial;
- (ii) that defendant must file her plea and counter-claim if any, on or before 11 August 2017;
- (iii) plaintiff must file his plea to the counter-claim, if any, on or before 18 August 2017;
- (iv) that the parties must file their further discoveries on or before 31 August 2017; and
- (v) that the parties must file joint proposed final pre-trial order on or before the 08 September 2017.'

[12] She further submitted that defendant failed to comply with the said order and was therefore barred. Ms Kishi brought to the court's attention a list of failures and/or non-compliances of other orders by applicant/defendant which I list below:

- (a) On 13 February 2017, the court had postponed the matter to 27 February 2017 in order for the legal practitioner of the applicant/defendant to explain by affidavit why he failed to attend to a pre-trial conference on 15 October 2016 at 09h00;
- (b) On 20 March 2017, the matter was postponed to 27 March 2017 and the defendant was ordered to pay the wasted costs of that day;
- (c) On 27 March 2017, there was no appearance on behalf of the defendant. The court noted that the defendant's legal practitioner failed to comply with the rules regarding service and failed to comply with the Rules of Court and case management order;
- (d) On 08 May 2017, the court ordered that the legal practitioner of the defendant/applicant shall continue to represent the defendant until the matter has been finalised and ordered that the defendant's legal practitioner shall pay costs *de bonis propriis* for the hearing of the 27 March 2017;
- (e) On 19 September 2017, the matter was postponed to 02 October 2017, pending the outcome of the condonation application and defendant's legal practitioner was once again ordered to pay plaintiff's wasted costs *de bonis propriis*, occasioned by the postponement on an attorney and client scale. The court had further ordered that the costs be taxed and paid before the matter can proceed to trial.
- (f) Defendant's legal practitioner failed to pay any costs up to the date that his Heads of Argument was prepared. If the costs are not paid by 17 October,

the matter may not proceed and the application for the upliftment of the bar and condonation should be dismissed with costs, which costs should include the costs of one instructing and one constructed counsel.

[13] Mr Jantjies raised a point *in limine* in this matter being that plaintiff's legal practitioner had no *locus standi* and authority to represent him as her affidavit lacked certain averments. I propose to deal with it as follows:

#### ***Locus standi* and authority**

It was Mr Jantjies argument that Ms Kishi has no *locus standi* to act for plaintiff/respondent as she had deposed to an affidavit, wherein, she stated that she was acting for and on behalf of first and second defendants yet in fact there was only one defendant. In response Ms Kishi explained that it was an error on her part and she apologised accordingly. That this was an error, admits of no doubt. In my view this error does not affect the materiality and core of the matter at hand. It is a typing error which does not in any stretch of imagination prejudices applicant. All the documents filed of record refer to only one defendant. The mere mention of first and second defendants cannot and will not confuse any reasonable person. I do not see how it can be said that she had no *locus standi* and therefore had no authority. The legal position as I understand it is that as long as the legal practitioner made it clear for any reasonable person to identify a party whom they are representing, the error should be condoned unless it can be shown that the other party has been prejudiced. The burden of proof on a balance of probabilities that there has been prejudice is on the applicant's shoulders. I find that *onus* has not been discharged.

[14] Ms Kishi further argued that defendant's founding affidavits are not in compliance with rule 131(3) as they are not divided into concise paragraphs that consecutively, numerically numbered. For that reason she urged the court to penalise her by awarding costs against her on the punitive scale.

[15] While the court is entitled to penalise the faulty party, sight should not be lost that respondent's legal practitioner also erred by referring to first and second defendants and that error was condoned. It will only be fair that the court exercises the same discretion and extend it to applicant's legal practitioner. While condonation

is a legal process open for use by litigants there are certain considerations which the courts consider in the determination thereof.

[16] Both parties are guilty of non-compliance and have asked for condonation with regards to the point *in limine* only. Therefore the point *in limine* is dismissed.

### **Condonation**

[17] The general rule is that the courts are usually slow in granting condonation because, invariably, it inconveniences both the other party and the court. In this jurisdiction it goes against the letter, spirit and objectives of case management, see *Hübner v Krieger* 2012 (1) NR 191 (HC) at 192C where the honourable Damaseb JP (as he then was) stated:

‘ The salutary rationale behind the new case management system is to ensure that the court’s time and resources are deployed more productively.’

[18] These courts have time without number laid down the immutable principle regarding condonation. It is that a party seeking condonation must show good cause or give a *bona fide* explanation for its non-compliance and also good prospects of success. In *Beukes & another v South West Africa Society (Swabou) & 5 others* (SA 10-2006) [2010] NASC 14 (5/11/2010) Langa AJA lucidly laid these principles as follows:

‘ An application for condonation is not a mere formality. The trigger for it is non-compliance with the Rules of Court. Accordingly, once there has been non-compliance, the applicant should, without delay, apply for condonation and comply with the Rules. In seeking condonation, the applicants have to make out their cases on the papers submitted to explain the delay and the failure to comply with the Rules. The explanation must be full, detailed and accurate in order to enable the Court to understand clearly the reasons for it.

At para [20], the court reasoned as follows regarding prospects of success:

‘ I have borne in mind that prospects of success are often an element, sometimes an important factor that could influence a decision whether or not to grant condonation in a proper case. It is however also true that, in the jurisprudence of both South Africa and Namibia, although prospects of success would normally be a factor in

considering whether or not condonation should be granted, this is not always the case when non-compliance of the Rules is flagrant and there is glaring and inexplicable disregard of the processes of the court.' (my emphasis)

[19] In a later case the Supreme Court in *Petrus v Roman Catholic Archdiocese* 2011 NR 637 (SC) at para [10] O'Regan AJA remarked:

' In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant's prospects of success on the merits, save in cases of "flagrant non-compliance with the rules which demonstrate a "glaring and inexplicable disregard" for the processes of the court.'

[20] Condonation can only be granted where there is a satisfactory explanation of the delay, which is also referred to as the reasonable explanation. The applicant's *bona fide* must be shown in his/her desire to contest and defend the matter. Further, the court should consider whether the order can be made without any damage or injury to the plaintiff which injury cannot be remedied by a cost order.

[21] In a more recent case the Supreme Court weighed in and sealed the legal position in the matter of *Teek v President of the Republic of Namibia & others* 2015 (1) NR 51 (SC) at 61G-H where it was stated:

' The court has a duty to consider whether condonation should in the circumstances of the case be granted. In this regard the court exercises a discretion. That discretion must be exercised in the light of all the relevant factors. These factors include the degree of delay, the reasonableness of the explanation for the delay, the prospects of success, the importance of the case, the interest in the finality of litigation and the need to avoid unnecessary delay in the administration of justice. These factors are interrelated and not exhaustive.'

[22] In *casu*, on the 01 August 2017, Angula DJP ordered that the matter be postponed to the 18 September 2017 for trial. In addition, thereto, further, ordered that applicant file documents by certain dates. This, applicant failed to do and is barred, hence this application. Her legal practitioner's explanation is that he was let down by his instructed legal practitioners and also that he forgot to diarise.

[23] He, however, did not furnish the court with an affidavit from Ms Boois admitting her alleged fault in this matter. In my view a party seeking to rely on another party's ineptness, should, as a matter of rule file an affidavit from the defaulting party explaining the part he/she played in the delay. In my view it is important to do so as it is one of the reasons the court should determine applicants *bona fides*. This was not done and therefore, this mere reference cannot help applicant's cause.

[24] On his part Mr Jantjies admits that he was inept in handling this matter in that he forgot to diarise. This is an admission of professional negligence which is not excusable as it results in applicant's prejudice. A legal practitioner is expected to be diligent in handling clients' matters.

[25] In determining the weight and reason for the delay in my view, it is important to weigh all the factors and circumstances surrounding applicant's conduct. Applicant has a litany of non-compliance as pointed out *supra*.

[26] On the 15 October 2016 the matter was postponed as defendant's legal practitioner failed to attend a Pre-Trial Conference. On the 20 March 2017 the matter was postponed to 27 March 2017 and defendant was ordered to pay costs. On the 27 March 2017, there was no appearance on behalf of defendant and defendant had failed to comply with the rules of court and case management order.

[27] On the 08 May 2017, applicant/defendant was ordered to continue representing defendant and was ordered to pay wasted costs *de bonis propriis*. Again on 19 September 2017 defendant's legal practitioner was again asked to pay costs *de bonis propriis*. As if that is not enough, applicant's/defendant's legal practitioner has failed to pay costs as of the 13 October 2017.

[28] In light of the above, taken in totality with all the circumstances surrounding this matter, one can only come to one and only irresistible conclusion that defendant and her legal practitioner adopted a cavalier attitude not only towards the respondent but towards the court as well.

[29] The defendant has not given a reasonable and *bona fide* reason for non-compliance and cannot earn the sympathy of the court where such non-compliance



is nothing, but, a flagrant disregard of the rules of court. Mr. Jantjies admitted that on five occasions the matter could not proceed to trial due to his failure to file both the pleadings and a pre-trial order report. All this was due to his dilatoriness.

[30] Mr Jantjies also raised the question of prejudice on the part of the applicant if she is not allowed to file her plea and counter-claim. Applicant has no one else to blame but her attitude towards the finalisation of this matter.

[31] The parties are married in community of property and the estate is therefore jointly owned. The fact that she wanted to argue and possibly shown that she contributed more is now gone as she did not act within the timelines set by the rules. She should know who to blame and certainly not respondent. This is one of those matters which was not properly handled and applicant/defendant and/or her legal practitioner have not show any enthusiasm to finalise this matter.

[32] It is now time that all matters before the courts must be finalised within a reasonably short period and these courts cannot standby and allow other litigants to frustrate legitimate claims. In this regard the following is the order of the court:

Order:

1. The point *in limine* is dismissed.
2. The application for the upliftment of the bar is dismissed with costs at a higher scale.

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M Cheda  
Judge

APPEARANCES

PLAINTIFF: F. Kishi  
Of Dr. Weder, Kauta & Hoveka Inc., Ongwediva

DEFENDANT: A. Jantjies  
Of Siyomunji Law Chambers, Windhoek