

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

JUDGMENT

Case No: HC-NLD-CIV-ACT-OTH-2018/00291

In the matter between:

FANNY'S MOTOR REPAIRS AND PANEL BEATING CC APPLICANT/DEFENDANT

and

RUTH AUGUSTA ALBERTO MACHADO

RESPONDENT/PLAINTIFF

Neutral citation: *Fanny's Motor Repairs and Panel Beating CC v Machado* (HC-NLD-CIV-ACT-OTH-2018/00291) [2019] NAHCNLD 37 (1 April 2019)

Coram: CHEDA J

Heard: 26 March 2019

Released: 4 April 2019

Flynote: Application for condonation for non-compliance with court orders - requirements should be fulfilled - condonation applications are becoming too many - These applications should be an exception not a general rule.

Summary: Applicant's legal practitioner failed to comply with a court order which was uploaded on the e-justice system - legal practitioner failed to give a reasonable explanation for non-compliance:

Court orders are a must to adhere to and that an applicant should provide a reasonable explanation for the delay. An applicant must give full details and accurate explanation for the entire period of the delay having failed to do so, applicant did not meet the criteria set down by the authorities.

Held: that, applicant had not given a reasonable explanation for the delay even though the delay was for a short period.

Held further: that applicant should have realised that there was an order by the managing judge before she filed her plea and counter-claim.

Held further: applicant should not regard applications for condonation as a mere formal procedure which can be easily and frequently resorted to.

ORDER

1. The application for condonation is dismissed with costs.
2. The defendant is barred from prosecuting its defence and thus its defence is consequently struck.

JUDGMENT

CHEDA, J:

[1] Before me is an application for condonation for the non-compliance with a case plan order in terms of rules 54 and 55 of the High Court Rules.

[2] The application was mounted by Ms Boois for defendant and opposed by Mr Aingura for plaintiff in the main matter. Mr Aingura on behalf of plaintiff issued summons out of this court against defendant on the 8 November 2018 and was duly defended on the 26 November 2018.

[3] On 29 November 2018 this court issued a case plan conference notice for the parties to *inter alia* attend to a case planning conference on the 21 January 2019 and for parties to submit a joint case plan to the managing judge.

[4] Upon receipt of the said case planning notice, the parties agreed to go for mediation. On 11 January 2019 the managing judge issued a case plan order in terms of which the defendant was ordered to file its plea on or before the 21 January 2019, this order was uploaded on e-justice on the 14 January 2019. The following day, the 15 January 2019 defendant filed and served the signed joint case plan on e-justice system.

[5] Ms Boois deposed to a founding affidavit for this application. She admitted that in terms of the case plan order, applicant was ordered to file her counter-claim on or before 21 January 2019. On the 21 January 2019, the managing judge in chambers issued out a case plan order and it seems Ms Boois did not see it, despite it already being filed on the e-justice system. When asked why she did not see it, she stated that she was under the impression that the matter was going to be heard in open court. This conclusion is wrong because in terms of the rules, legal practitioners ought to know that a managing judge can issue an appropriate order even if they have filed their own draft order and the parties are obliged to check the e-justice system and comply with the judge's order as it is a final order. The fact that she did not do so is an admission of negligence and is inexcusable in the circumstances.

[6] I agree with Mr Aingura on the other hand who has argued that Ms Boois's explanation of failing to see the order on the e-justice system is inexcusable.

[7] With regards to applications for condonation, these courts have laid down essential requirements which should be met by an applicant and there is a plethora of authorities in that regard. I hereunder state the correct legal position:

- a) applicant must provide a reasonable, acceptable and *bona fide* explanation for the non-compliance with rules, orders or same such directions;
- b) the application must be lodged without delay;
- c) the application must provide a full detailed and accurate explanation for the entire period of delay including the timing of the application for condonation;
- d) applicant must satisfy the court that there are reasonable prospects of success on appeal.

[8] These requirements are clearly laid out in the matter of *Minister of Health and Social Welfare v Amakali SA 4/2017* (delivered on 6 December 2018)¹,

[9] Having perused Ms Boois's affidavit and listened to her oral submissions, I find nothing which passes the well laid down principles stated above. The order was uploaded on e-justice well before she filed her documents and as such it boggles one's mind how she failed to see it. The only reasonable conclusion is that, she did not fully apply her mind to the documents on the e-justice system and unfortunately this is not an excuse. Further to that, this application does not even meet the least of the requirements.

[10] Ms Boois reasoned that she was of the opinion that the managing judge was going to issue the same order in terms of the draft order as per the case plan. This unfortunately is not the correct legal position. Legal practitioners should by now know that the managing judge can make any suitable order and he, therefore, cannot be confined to draft orders in case plan filed of record. I should add that, there is an increasing flagrant disregard of the rules in this jurisdiction which has reached unprecedented levels. There are some legal practitioners who seem to be of the view

¹ See also *Disciplinary Committee for Legal Practitioners v Murorua & another* 2016 (2) NR 374.

that applications for condonation for non-compliance will be easily granted by the courts, hence this lackadaisical approach to legal process.

[11] The introduction of the e-justice system to this jurisdiction came at a great expense to the state and should therefore be embraced by all and sundry. It is for that reason that all those who are charged with the administration of justice should ensure that the facility is utilized to its optimum.

[12] It has never been the purpose for this procedure at all. Applications for condonation, should not be a general rule, but, an exception. In my view, they should be less frequent and be far-in-between in the litigation process. These courts will henceforth be strict in granting such applications particularly were the reasons are not convincing.

[13] For the above reasons the following is the order of court:

1. The application for condonation is dismissed with costs.
2. The defendant is barred from prosecuting its defence and thus its defence is consequently struck.

M Cheda
Judge

APPEARANCES:

APPLICANT:

Ms Boois
Of BB Boois Attorneys, Ongwediva

RESPONDENT:

Mr Aingura
Of Aingura Attorneys, Oshakati