



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

RULING

Case no: HC-NLD-CIV-ACT-CON-2021/00224

In the matter between:

RINA'S INVESTMENT CC t/a RINA's TRANSPORT PLAINTIFF/APPLICANT

and

AUTO TECH TRUCK AND COACH CC DEFENDANT/RESPONDENT

Neutral citation: *Rina's Investment CC v Auto Tech Truck and Coach cc* (HC-NLD-CIV-ACT-CON-2021/00224) [2022] NAHCNLD 58 (2 June 2022)

Coram: SALIONGA J

Heard: 17 May 2022

Delivered: 2 June 2022

Flynote: Interlocutory application – Application for condonation – Requirement of good cause, acceptable explanation for the delay and reasonable prospects of success – Rules 55 and 56 – Rules of practice– Non-compliance with rule – Effect thereof.

Flynote: Interlocutory application- Rule 61 irregular proceedings-Requirement of.

Summary: This interlocutory application is for condonation for the late filing of a plea pursuant to the case plan order made by this court – Court is of the view that although, the prejudice suffered is relatively minor in light of the fact that the applicant sought to comply with rule of Court after a day and half the previous non-compliance has set a blow on the application for condonation. Further holds that the failure by an applicant to give a full, reasonable and accurate explanation as well as to establish prospects of success in a condonation application is fatal resulting in the dismissal of the application.

ORDER

1. The court upholds all points in limine raised by the defendant.
 2. The plaintiff's application for condonation, the replication and plea to the defendant's counterclaim are struck out.
 3. The applicant is to pay the respondents' costs in terms of rule 32(11).
 4. The matter is postponed to 14 July 2022 for status hearing.
 5. The Parties are directed to file a joint status report on or before 11 July 2022 detailing the further conduct of the matter.
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Ruling

SALIONGA J:

Introduction

[1] Before this court are two interlocutory applications stemming from non-compliance with paragraph 1 of the court order dated 28 March 2022. The applications are opposed and will be heard simultaneously. Ms. Jacobie appears for the plaintiff and Ms. Horn appears for the defendant. For easy referencing the parties will be referred as cited in the main action.

[2] The facts giving rise to the present matter are that; on 28 March 2022 the Court made the order that the Plaintiff files its Replication and Plea in Reconvention on or before 11 April 2022. The plaintiff failed to comply with a case plan order and was accordingly barred from filing the same.

[3] Despite being barred from filing the Replication and Plea in Reconvention, the Plaintiff proceeded to file the pleadings on 12 April 2022 which were served on the defendant on 13 April 2022. At the time of filing the pleadings, the Plaintiff had not filed an application for condonation.

[4] In compliance with Rule 32 (9) and (10) the defendant informed the plaintiff in writing that the filling of the Replication and Plea in Reconvention constitutes an irregular proceeding and should a notice of withdrawal not be filed the defendant will proceed with a Rule 61 application.

[5] The Plaintiff replied that the filing of the aforesaid pleadings were only done to demonstrate to the court that she did not wish to frustrate the court's time. It was not an attempt to ignore the bringing of a condonation application. Further that should the condonation application not be successful then the pleadings will be ignored.

[6] On 13 and 14 April 2022 the plaintiff sought condonation in terms of Rule 54 of the High Court Rules for non-compliance with timeously filing its plea and replication. In the same documents, plaintiff requested extension or abridged of time period in terms of Rule 55.

Parties' submissions

[7] The defendant in the answering affidavit to the condonation application raised the following points *in limine*:

- (i) Founding affidavit amounts to inadmissible hearsay
- (ii) No locus standi;
- (iii) Incompetent relief sought; and

(iv) Non-compliance with rule 55(1).

[8] Defendant contends in the first, second and third point *in limine* that the plaintiff's founding affidavit is deposed by the legal practitioner. She argued that what an attorney deposed to amounts to inadmissible hearsay as she has no interest in this matter entitling her in bringing the application on behalf of the plaintiff. Further that the relief prayed for in the plaintiff's notice of motion and accompanying affidavit to the condonation application did not deal with an application for the upliftment of bar and as such plaintiff is seeking incompetent relief. .

[9] The fourth point *in limine* is that the plaintiff is barred in terms of rule 54(3) and should have sought to uplift the bar and not merely seek condonation. In that regard plaintiff did not comply with rule 55 (1) of the High Court Rules.

[10] In substantiating her contention, Ms. Horn submitted that plaintiff failed to explain why the documents in question were only sent to the client for consideration after 30 March 2022. The plaintiff was aware it has to file the pleadings on 11 November 2021 which it failed to do. Further to this, it was not the plaintiff's first non-compliance with the court order yet the plaintiff failed to give a full, detailed and accurate explanation for the delay. She thus contended that the lack of diligence and the insufficiency of the explanation tendered by the deponent on behalf of the plaintiff is inexcusable and there is no factual basis presented to justify the disregard of the court order which was made by agreement between the parties.

[11] Counsel further contended that the application for condonation does not show good cause, in that same does not show that plaintiff has good prospects of success or a *bona fide* defense to the claim. Counsel in this regard argued that the plaintiff had its summons issued on 23 August 2021 and the first case plan order was issued on 18 October 2021. The defendant filed a special plea, a plea on merits and counter-claim on 25 October 2021 and was represented throughout the proceedings. Plaintiff did not comply with the court order dated 18 October 2021 in filling its plea in reconvention and replication on 1 November 2021 causing a delay. The plaintiff's non-compliance with a court order dated 18 October 2021 was already condoned and bar uplifted for the same transgression as per court order of 7 February 2022.

He was granted a second chance to file but plaintiff again failed to file the documents on time. Plaintiff was well aware that a delay in filing of the pleadings will result in further delays caused by interlocutory applications and no defence is canvassed.

[12] On the issue of costs counsel argued that the plaintiff should be ordered to pay costs of this application.

Plaintiff

[13] Ms. Jacobie submitted that rule 61 disentitles a litigant from resorting to the remedy provided therein where a further step has already been taken by the party alleging the irregularity. To this, counsel argued that applicant on 21 April 2022 filed its discovery affidavit and exchanged the discovery bundle which is common cause that in doing so has taken a further step which is prohibited by the rule. Further that by opposing the condonation application the defendant has advanced a step further or nearer to the completion of the matter in that the prosecution of his opposition to the condonation application may result in the pleadings being struck or set aside.

[14] Counsel further submitted that defendant did not show that he suffered any prejudice as a result of the irregular step complained of. Neither did the defendant disclose how filing of the pleadings one day late has prejudiced him in his defence. In her view there is nothing precluding him if the condonation is successful to file a replication if he so wishes or such filing be stayed pending mediation. The plaintiff filed his pleadings on e-justice which is available 24 hours a day and not physically through the registrar's office.

[15] It was her submission that the plaintiff is prejudiced instead by a delay caused because the court has to hear two interlocutory applications wherein the same relief is sought.

[16] The application for condonation was sought in terms of rule 54 and plaintiff has in the meantime also requested for abridged and or extension of time for filing. Ms. Jacobie in her explanation for delay submitted that, after she received payment from the client, she forwarded the documents for consideration. It was quite difficult

for her to communicate effectively due to network problems from 4 April 2022 notwithstanding sooner dates as the client was in Windhoek and travels to Angola due to work commitments.

[17] According to Ms. Jacobie it was only on Saturday 9 and Sunday 10 April 2022 that they managed to consult and finalized all pleadings. But yet on the 11th April she was at the Oshakati Magistrates' court for bail consideration in another matter and thereafter to the High Court for 10h00 session. She could only attend to changes made by the client on the documents between 13h00 and 14h00. At 14h15 the High Court reconvened till 15h00 which took longer than she anticipated. She thus informed the opposing legal practitioner that she would not be able to file pleadings by 15h00 as she was still at court by 16h30. The above had caused the plaintiff to be unable to file his Replication and Plea by the 11 April 2022.

Applicable law

[18] It is common cause that the defendant had taken a further step in the cause with the knowledge of the irregularity. However a different conclusion can be reached on proper reading of a well-reasoned judgment¹ where Heher J in rejecting the dictum in *Peterson v Burnside*² reformulated it along the following lines:

'[A] further step in the proceedings is one which advances the proceedings one stage nearer completion and which objectively viewed manifests an intention to pursue the cause despite the irregularity.' Seen in that light, I am not convinced that the filing of discovery and discovery bundles which were done in compliance with the case plan order of 28 March 2022 and the filing of the notice to oppose the condonation application can lead to an inference that the applicant intends to pursue the cause despite the irregularity. In my view the actions taken do not constitute the taking of a further step within the meaning of rule 61.

[19] Applications for condonation are common place in our jurisdiction. The court may on good cause shown condone any non-compliance with the rules. It is trite that a party seeking condonation must provide reasonable, acceptable and *bona fide*

¹ *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 904

² *Peterson v Burnside* 1940 NPD 403 at 406

explanation for the non-compliance with the rules of court. The party is also expected to satisfy the court in its founding affidavit that there are reasonable prospects of success should the condonation application be granted³. It goes without saying that a failure to meet those cardinal requirements may result in the dismissal of the condonation application⁴. [Emphasis added].

[20] In the matter of *Katjaimo v Katjaimo*⁵, the Supreme Court, though in the context of an appeal at para 25 of that judgment held that the requirements applicable to applications for condonation remain the same, and quoted with approval the approach to condonation applications as outlined in *Beukes and Another v South West Africa Building Society (SWABOU) and Others*⁶ as follows:

‘An application for condonation is not a mere formality; the trigger for it is non-compliance with the Rules of Court. The jurisprudence of both the Republic of Namibia and South Africa indicate that a litigant is required to apply for condonation and to comply with the rules as soon as he or she realises there has been a failure to comply.’

[21] The applicable law to condonations were more recently considered by this court in *South African Airways Soc Limited v Camm*⁷, where Prinsloo J, referred to the Supreme Court matter of *Balzer v Vries*⁸ in which the court pronounced itself as follows:

‘It is well settled that an application for condonation is required to meet the two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal.’

³ *Minister of Health and Social Services v Amakali Matheus* (SA4-2017)[2018] NASC (6 December 2018)

⁴ *Namiseb v Etosha Transport (Pty) Ltd* (LCA 102/2010) [2014] NALCHMD 25 (4 June 2014) at [11] referred to, with approval, to the case of *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764.

⁵ (SA 36/2013) [2014] NASC (12 December 2014).

⁶ *Beukes and Another v South West Africa Building Society (SWABOU) and Others* (SA 10/2006) [2010] NASC 14 para 12.

⁷ *South African Airways Soc Limited v Camm* (HC-MD-CIV-ACT-DEL-2016/02479) [2019] NAHCMD 14 (31 January 2019).

⁸ *Balzer v Vries* 2015 (2) NR 547 (SC) at 661J-552F.

[22] It appears that the events that led to the non-compliances with the court order were entirely within the control of the legal practitioner of the plaintiff who was inundated with work such that he or she could not obtain instructions on time and when he obtained instructions he could not timeously file the pleadings. I agree with Ms. Horn in her submission that the entire period during which the delay occurred was not explained in that plaintiff failed to explain why instructions were not obtained earlier, when exactly the plaintiff travelled to and from Angola and why instruction could not be sought on 25-30 March 2022 or 1, 2, 3, 4, 5, 6, 7, and 8 April 2022 and why pleadings were not finalised on 09 and 10 April 2022.

[23] Objectively, the delay is relatively minimal when one has regard to the fact that the applicant was in default of the case plan for only a day and half before taking action. The relatively short delay may very well have been cured by an appropriate costs order. Regrettably, however, the previous non-compliances and disregard to simple rules and procedure drew a fatal blow to the plaintiff's case.

[24] Not only is it expected of legal practitioners to comply with procedural and substantive legal requirements but to diligently comply with the rules of court. In this regard, the Supreme Court in *Arangies t/a Auto Tech v Quick Build*⁹, expressed its displeasure with sluggish compliance with court rules:

'The absence of any sense of diligence or attention to compliance with the court's rules renders the explanation for the delay in filing the court record weak and unpersuasive.'

Non-compliance with rule 55(1)

[25] The founding affidavit to the condonation application does not show good cause because it lacks compliance with the requirements set out in rule 55 (1). Rule 55 requires that the application or upliftment of the bar or an application for condonation should be made on good cause shown. Plaintiff's application for condonation did not deal with or encapsulate an application for an upliftment of the bar instead requested the court to allow the pleadings to form part of the record of

⁹ *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC).

proceedings and/or extension as provided for in rule 55. The plaintiff remained *ipso facto* barred in terms of rule 54(3) and to file pleadings while barred is an irregular step. The correct procedure was to request for uplifting of the bar together with the application for condonation. Failure to comply with rule 55 will ultimately have a consequence of application for condonation not succeeding.

Prospects of success

[26] As said above, plaintiff was expected in its founding affidavit to set out what its defence is as well as the facts upon which the defence is based for this court to form an opinion but that is lacking in this application. It is alleged that the defences are fully contained in the answering affidavit attached thereto but no defence was set out. Without such facts there is no basis upon which this court can assess facts to determine whether the defence is good in law. Nor was it alleged in the founding affidavit that the plaintiff has a *bona fide* defence to the defendant's counter-claim. The pleadings are not before court until such a time the bar is uplifted and the condonation is granted. To ask the court to have regard to the pleadings filed late thereto would amount to a backdoor attempt to sneak in pleadings that is not properly before it and would in all respects render the very application for condonation superfluous.

[27] Counsel for the defendant rightly argued that the plaintiff had summons issued on 23 August 2021 and the first case plan order was issued on 18 October 2021. The defendant filed a special plea, a plea on merits and counter-claim on 25 October 2021. Plaintiff who was represented throughout the proceedings failed to comply with the court order dated 18 October 2021 in filing its plea in reconvention and replication on 1 November 2021 as required. Such non-compliance with a court order was already condoned and the bar uplifted for the same transgression as per court order of 7 February 2022. Plaintiff was granted a second chance to file the documents but he again failed to comply with a court order. It could only be fair when an attorney is inundated with work to alert the client of such difficulties and advise them to refer their work elsewhere. These previous instances of non-compliance with the Rules of Court and case plan orders have an inescapable effect of abuse or willfully ignoring court rules and orders.

[28] It is crystal clear from the documents filed and explanation given that the deponent on behalf of the plaintiff while knowing that she has to file the plaintiff's plea in reconvention and replication and having ample time to do so, opted to rather work on other matters without ensuring that the pleadings were timeously filed.

[29] With regard to those legal practitioners who take it all to file affidavits, in support of the application for condonation, at the same time prepares heads of argument and eventually argue the application I share the sentiments expressed by counsel for the defendant that such practice is procedurally inappropriate, undesirable and should be discouraged at all costs.

Conclusion

[30] In light of the foregoing, I hold that the applicant was and is still barred from filing the replication and plea to the defendant's counter-claim. To file the pleadings without applying for upliftment of the bar is an irregular step which is not permitted by the rules. As no notice to amend was filed prior to the filing thereof, the said document is therefore not properly before court. I further hold that the plaintiff (respondent) has failed to give a reasonable explanation of the delay, to show good cause and prospect of success in order for this court to consider condoning the late filing of Replication and plea in Reconvention. Finally hold that the failure to give a full, detailed and accurate explanation for the delay is fatal to this application for condonation and the application has to fail. This also renders the application for irregular proceedings mute.

[31] In consequence whereof, the following order is made:

1. The defendant's points *in limine* are upheld.
2. The plaintiff's application for condonation, the replication and plea to the defendant's counterclaim are struck out.
3. The plaintiff is to pay the defendant's costs in terms of rule 32(11).
4. The matter is postponed to 14 July 2022 for a status hearing.

5. The Parties are directed to file a joint status report on or before 11 July 2022 detailing the further conduct of the matter.

J. T. SALIONGA
Judge

Appearances

Applicant/Defendant: Ms. W. Horn
Of W Horn Attorneys, Oshakati

Respondent/Plaintiff: Ms. T. Jacobie
Of Angula Co. Incorporated, Ongwediva