

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA
NORTHERN LOCAL DIVISION, OSHAKATI
PRACTICE DIRECTION 61

Case Title: Deputy Sheriff of Oshakati Applicant and Africent Investments (Pty) Ltd 1 st Claimant Tswana Fuel (Pty) 2 nd Claimant Tuno Trading CC 3 rd Claimant	Case No: INT-HC-INTERP-2023/00134 HC-NLD-CIV-ACT-CON-2022/00075
	Division of Court: High Court, Northern Local Division
	Heard on: 19 October 2023
	Delivered: 09 November 2023
	Reasons: 10 November 2023

Heard before: Honourable Mr. Justice Munsu

Neutral citation: *Deputy Sheriff of Oshakati v Africent Investments (Pty) Ltd and Others* (HC-NLD-CIV-ACT-CON-2022/00075 [2023] NAHCNLD 122 (09 October 2023))

ORDER

1. The application for condonation by the Third Claimant is refused.
2. The Third Claimant is ordered to pay the costs of the First and Second claimant.
3. The matter is postponed to 07 December 2023 at 08h30 for status hearing.
4. The Parties are to file a joint status report on or before 04 December 2023.

MUNSU J:

Introduction

[1] This is an opposed application for condonation by the third claimant for the late filing of the particulars of claim in the interpleader, as well as for the failure to lodge this condonation application as directed by the court.

[2] The main action involved the first and second claimants as plaintiffs and Sash Trading & Earthworks CC as Defendant. The parties signed a settlement agreement whereby Sash Trading & Earthworks CC agreed to pay N\$ 80 421.68 to the plaintiff(s) (first & second claimant). The settlement agreement was made an order of court. To date, the said order has not been satisfied, hence, the first and second claimants moved for execution. To this end, a number of properties (two Scania Horse trucks bearing registration number SASH 5 and SASH 3 and four interlink trailers bearing registration numbers N 27312 SH, N 39244 SH, N 18410 SH and N 26484 SH) were attached for execution, however, the third claimant has laid claim to them. As a result, the applicant (Deputy Sheriff) applied to court for interpleader relief.

[3] All the claimants gave notice of their intention to deliver particulars of claim as envisaged by rule 113. However, the third claimant filed its particulars of claim out of time, hence this application for condonation. The court order of 19 July 2023 directed the third claimant to file its condonation application by 01 August 2023. However, the third claimant failed to comply with the said order as it only filed its application on 11 August 2023.

The application

[4] Ms Taimi Shivute deposed to the founding affidavit on behalf of the third claimant. She avers that she is authorised to depose to the affidavit. Ms Shivute explains that she approached third claimant's counsel of record in order to assist in this matter. She further states that she later sought to procure the services of a law firm based in the northern regions of the country in order to reduce the legal costs. According to Ms Shivute, the legal representative was to come on record upon the third claimant filing its notice of intention to deliver particulars and subsequent particulars of claim.

[5] Ms Shivute further states that she failed to obtain such services as law firms in the northern parts of the country were conflicted in that, some of their clients had a vested interest in this matter. She therefore gave instructions to counsel of record to represent third claimant. Ms Shivute,

explains that by the time of giving instructions to counsel, third claimant had run out of time in terms of filing of particulars of claim. She avers that her inability to secure legal representation in time, as well as her being a lay litigant resulted in the non-compliance.

[6] As for the late filing of the condonation application, Ms Shivute states that counsel of record had erroneously diarised the matter for 11 August 2023 as opposed to 01 August 2023. Consequently, that resulted in this application being filed late.

[7] Regarding prospects of success, Ms Shivute states that the third claimant purchased the properties in question from the execution debtor. For that reason, she states that the attached properties belong to the third claimant and not the execution debtor.

The opposition

[8] Ms Amanda Ellis deposed to the answering affidavit on behalf of the first and second claimants. She avers that the first and second claimants resolved to oppose this condonation application and further authorised her to depose to the answering affidavit. A resolution in this regard was attached.

[9] The grounds on which the condonation application is opposed can be summarised as follows:

- a) No confirmatory affidavit by Tangeni Ausiku in respect of information allegedly provided by him and relied upon by the deponent Ms Taimi Shivute;
- b) The applicant failed to satisfy the two requirements of good cause, including providing a reasonable explanation and satisfying the court that there are reasonable prospects of success;
- c) Failure to comply with rule 32(9) and (10) prior to filing this interlocutory;
- d) Lack of authority on the part of the deponent Ms Taimi Shivute to launch the application; and
- e) Res judicata.

Discussion

[10] The third claimant (applicant in this application for condonation) is a close corporation and therefore an artificial person. With that background, counsel for the first and second claimant submitted that the deponent to the founding affidavit did not make sufficient allegations regarding the authority to launch this application. It was argued that she did not explicitly state that the third claimant authorised the institution of the application for condonation or that the application is

instituted at the instance of the third claimant, nor did the deponent provide any evidence in this regard. In support of the contention, counsel referred to numerous authorities on the issue.¹

[11] It is a requirement of the law that authorisation of proceedings must be done under oath and where applicable be supported by evidence.² In the present matter, all that the deponent to the founding affidavit did was to allege that she is duly authorised to depose to the affidavit, however, it has been held that a deponent to an affidavit in motion proceedings need not be authorised to depose to an affidavit, it is the institution of the proceedings and the prosecution thereof which must be authorised.³

[12] Despite this issue being raised in opposition, the third claimant did not cure it in reply as there was no replying affidavit filed. Thus, on this point alone, the third claimant's application stands to be dismissed.

[13] There are however two other grounds on which the third claimant's application stands to be dismissed. It is trite that an application for condonation should satisfy two requirements of good cause before it can succeed. These entail firstly establishing a reasonable and acceptable explanation for the delay, and secondly, satisfying the court that there are reasonable prospects of success.

[14] The reason advanced for the late filing of the particulars of claim is that the third claimant was making efforts to instruct counsel. However, the deponent states that the legal representative was to come on record 'upon the third claimant filing its notice of intention to deliver particulars and subsequent particulars of claim'. As such, the issue of sourcing legal representation cannot be the reason for the delay. The third claimant filed its notice to deliver particulars in time and without legal assistance. It is only the particulars of claim that was filed late.

[15] Further, the reason for filing this application late is that the legal practitioner erroneously diarised this matter for the 11th of August 2023 and not 01 August 2023, being the date on which the application was supposed to be filed. However, there is no confirmatory affidavit from the said legal practitioner. This anomaly was not rectified even after the first and second claimant raised it in opposition. Thus, the explanation provided by the deponent for the late filing of this application

¹ *Malumba v Angula* (HC-MD-CIV-ACT-DEL-2021/02631) [2022] NAHCMD 597 (01 November 2022); *Baobab Capital (Pty) Ltd v Shaziza Auto One (Pty) Ltd* (HC-MD-CIV-ACT-CON/2019/02613) [2020] NAHCMD 290 (10 July 2020); *Ondonga Traditional Authority v Elifas* (HC-MD-CIV-MOT-EXP-2017/001340) [2017] NAHCMD 142 (15 May 2017).

² *Standard Bank Namibia Ltd v Nekwaya* (HC-MD-CIV-MOT-GEN-2020/00089) [2020] NAHCMD 122 (26 March 2020).

³ *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA).

amounts to inadmissible hearsay evidence.

[16] Lastly, there are no reasonable prospects of success as the issue of ownership of the properties in question is *res judicata*. In the matter *The Deputy Sheriff of Oshakati v Kambwa Trading CC & Tuno Trading CC*⁴, the same properties as in the present matter were attached by the deputy sheriff. The third claimant laid claim to the properties. On 23 July 2023, the Main Division found that the properties in question belong to the execution debtor in this matter and ordered the deputy sheriff to proceed with execution. Thus, the issue has already been decided by this court and there has not been any appeal against the said order.

[17] In light of the foregoing, the third claimant did not make out a case for condonation to be granted. Counsel for the first and second claimant urged the court not to limit the costs in terms of rule 32(11) given the manner in which the third claimant handled the matter. I agree, especially in light of the fact that the issue became *res judicata* on 23 July 2023, however, the third claimant still persisted with the application.

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

1. The application for condonation by the Third Claimant is refused.
2. The Third Claimant is ordered to pay the costs of the First and Second Claimant.
3. The matter is postponed to 07 December 2023 at 08h30 for status hearing.
4. The Parties are to file a joint status report on or before 04 December 2023.

	Note to the parties:
D MUNSU Judge	None
Counsel:	
1st & 2nd Claimants:	3rd Claimant:
J Greyling Of Greyling & Associates Oshakati.	T Ausiku Of Ausiku Attorneys Windhoek

⁴ *The Deputy Sheriff of Oshakati v Kambwa Trading CC & Tuno Trading CC* (HC-MD-CIV-ACT-OTH-2019/01146 (INT-HC-INTERP-2023/00150)).