

REPUBLIC OF NAMIBIA



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

Case Title: BME Investment CC Applicant and Jonas Shipanga Ambunda Respondent	Case No: HC-NLD-CIV-ACT-CON-2018/00191
	Division of Court: High Court, Northern Local Division
	Heard on: 19 June 2023
	Delivered: 24 July 2023

Heard before: Mr. Justice Munsu

Neutral citation: *BME Investment CC v Ambunda* (HC-NLD-CIV-ACT-CON-2018/00191) [2023]
NAHNLD 67 (24 July 2023)

ORDER

1. The application for condonation for the late filing of the application for leave to appeal is refused.
2. The applicant is ordered to pay the costs occasioned by this application, subject to rule 32(11).
3. The parties are directed to file a joint status report on the further conduct of the matter on or before 14 August 2023.
4. The matter is postponed to 17 August 2023 at 08:30 for a status hearing.

MUNSU J:Introduction

[1] This is an application for condonation for the late filing of the application for leave to appeal. On 11 October 2021, this court granted an order for security for costs in favour of the respondent against the applicant. The applicant sought to appeal the said order to the Supreme Court but did not file its application on time, hence this application.

Brief background

[2] During May 2021, the parties, by way of a status report informed the court that the respondent intended to file an application for security for costs. On 21 June 2021 the court directed the parties to file papers in respect of the application for security for costs. The respondent filed the application as directed by the court. The applicant, on the other hand failed to comply with the time lines set by the court prompting a condonation application which was not opposed by the respondent.

[3] On 16 August 2021, the court condoned the applicant's non-compliance and directed the parties to file heads of argument and postponed the matter to 11 October 2021 for the hearing of the application for security for costs.

[4] The respondent complied with the court order and filed his heads of argument. Once more, the applicant did not comply with the court order as it did not to file its heads of argument.

[5] On the date of the hearing (11 October 2021), only counsel for the respondent was in attendance while there was no appearance on behalf of the applicant. Counsel for the applicant filed a status report in which she asked for a postponement to allow the applicant to bring a condonation application for the late filing of the heads of argument.

[6] In the order dated 11 October 2021, the court recorded that:

6.1 there was no appearance on behalf of the applicant;

6.2 there was no formal application for a postponement or condonation application;

6.3 at the time of hearing the matter, there was also no status report filed.

[7] In the end, the court granted the application for security for costs. Subsequent thereto, the applicant indicated its intention to appeal the order of 11 October 2021.

The application

[8] Ms Emelie Akanwe, the sole member of the applicant deposed to the founding affidavit. She explains that the applicant intended to bring an application for leave to appeal. Ms Akanwe further asserts that they requested for the transcription of the proceedings of 11 October 2021. In addition, she states that the record of proceedings was only received on 6 December 2021 on a memory stick. Furthermore, Akanwe avers that the order of 3 December 2021, postponing the matter to 31 January 2022 to enable the applicant to appeal to the Supreme Court created a confusion. She recounts that, as a result of the said order, the applicant on 26 January 2022 filed its notice of appeal to the Supreme Court. The matter was then removed from the roll to await a ruling by the Supreme Court.

[9] In addition, Ms Akanwe states that the applicant's legal practitioner was of the view that she had filed correct papers and was only awaiting a ruling. She recounts that this view was however misplaced as on 8 August 2022, she received an order of the Supreme Court dated 19 April 2022 to the effect that the applicant ought to have been granted leave to appeal before approaching the Supreme Court.

The opposition

[10] The respondent captured the history of the matter, more specifically from June 2021 when the parties were directed to file their respective affidavits in respect of the application for security for costs. The respondent then went on to list the numerous occasions on which the applicant failed to comply with the court orders and the varying explanations put forward.

[11] The respondent states that the applicant had been aware as from 11 October 2011 that the application for security had been granted and that the *dies* period of 15 days envisaged in rule 115 commenced to run on the said date. According to the respondent, the applicant fails to explain the issue of the transcription as it relates to when same was requested; whether in writing or verbally; the steps taken to expedite the transcription and the cause of the delay.

[12] In addition, the respondent contends that whereas the applicant claims that the record of proceedings was made available by the transcribers on 6 December 2021, it fails to explain why it

indicated in a status report filed on 26 November 2021 that it had received the transcribed record on 18 November 2021; that it had perused and considered the content of the record; that they were merely unable to locate the sole member of the applicant to obtain instructions regarding the leave to appeal.

[13] Furthermore, the respondent points out that, contrary to the applicant's claim that the record of proceedings was only availed on 6 December 2021, the applicant, in a status report filed on 3 December 2021, creates the impression that it was ready to file papers in respect of the application for leave to appeal and even suggested dates for the exchange of affidavits. The respondent contends that if the applicant had not been in possession of the record and hadn't considered same, it would not have given a clear intention to file the application for leave to appeal. The respondent further argues that the status report filed by the applicant shows that the applicant was consulted and gave a clear instruction to proceed with the matter.

[14] Moreover, the respondent stresses that despite the applicant filing its appeal on 26 January 2022, it fails to explain the steps it took to ascertain the release of the Supreme Court ruling. The respondent makes a point that the applicant as *dominis litis* in the Supreme Court would have been expected to make follow ups to ascertain if the ruling was delivered.

[15] As regards prospects of success, the respondent avers that the applicant failed to file heads of argument and was not in attendance at the hearing. It is further stated that counsel for the respondent, who was present at the hearing confirmed that the court granted the application for security for costs after having considered the merits.

Disposal

[16] 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 on appeal.¹

[17] I find merit in the respondent's argument. The applicant indicated in a status report of 26 November 2021 that its legal practitioner received the record of proceedings from the transcribers on 18 November 2021. Further that from the time of receiving the record and after perusal of same, applicant's practitioner has been unable to locate the applicant's member for further instructions in

¹ See *Balzer v Vries* 2015 (2) NR 547 (SC).

respect of the filing of the leave to appeal. The applicant requested for a postponement to 06 December 2021. In a status report filed on 3 December 2021, the applicant states that its legal representative obtained instructions to proceed with filing leave to appeal. To that end, the applicant suggested dates for filing papers in respect of condonation for the late filing of the application for leave to appeal.

[18] The aforementioned reports by the applicant suggest that the applicant was ready to file its application for leave to appeal. It is clear from the reports that the applicant was in possession of the record of proceedings. Therefore, to state in this application that the record of proceedings was only made available on 6 December 2021 is contrary to the applicant's own version. The applicant did not take the court into its confidence to explain the state of affairs.

[19] After the applicant filed its appeal to the Supreme Court on 26 January 2022, the respondent moved for the summary dismissal of the appeal in terms of rule 6 of the rules of the Supreme Court. A ruling was delivered on 19 April 2022 wherein the Supreme Court stated that the order sought to be appealed is interlocutory and leave to appeal is required. There is no explanation of the steps taken by the applicant after that order until this court issued a hearing notice in terms of rule 132(6). More than three months passed after the Supreme Court ruling before this court issued a hearing notice for inactivity.

[20] While I accept that the order of 3 December 2021 might be one of the reasons the applicant approached the Supreme Court prematurely, the explanation up to that stage is contradictory especially as it relates to the record of proceedings and the actual reason for the delay in filing the application for leave to appeal.

[21] Additionally, although the applicant states that the ruling of the Supreme Court was not brought to its attention by the Registrar, there is no explanation as to the efforts taken by the applicant as *dominis litis*, to obtain the ruling immediately after its release and not wait until this court had to issue a hearing notice more than three months. Accordingly, it follows that the applicant did not provide detailed reasons to show that it intended to bring this application without delay.

[22] The applicant must demonstrate further that it has reasonable prospects of success in addition to providing a legitimate explanation for the delay. In this regard the applicant's reasons are a mere speculation about the order of 11 October 2021. In the absence of the reasons for the order, which the applicant never requested, it speculates that the order of 11 October 2021 was

granted simply on the basis of the non-appearance of the applicant's legal practitioner at the hearing.

[23] I may state here that the court was differently constituted on 11 October 2021. I will consider the issues pertaining the order of 11 October 2021.

[24] The court had directed the parties to file papers in respect of the application for security for costs. The parties complied, however, the applicant failed to file heads of argument. On the date of the hearing (11 October 2022) only the respondent's counsel was in attendance. There was no appearance for the applicant. The applicant states that it no longer has the record of proceedings and does not make reference to the content of the record which it had perused. Thus, in the absence of the record of proceedings and the reasons for the order, coupled with the fact that the applicant was not present at the hearing, this court does not understand how the applicant claims to enjoy prospects of success, let alone formulate grounds of appeal.

[25] Furthermore, in terms of rule 68(b) the court may grant relief against the respondent if the circumstances justify granting such relief, if on the date of set down for the hearing of an application, the respondent does not appear. Given what is before court, the applicant cannot adequately deal with this issue.

[26] From the papers filed, it is apparent that the application for security emanated from a costs award made in favour of the respondent when the trial could not proceed because the applicant had not placed its counsel in funds. The bill of costs was drafted and taxed but has not been paid.

[27] In light of the foregoing, I am unable to find reasons why the applicant claims that it enjoys prospects of success. As can be seen from the papers filed, the applicant's conduct have led to the respondent filing many papers since the date of the order in order to move the case forward, which in my view, is detrimental to the respondent. All things being considered, I find that the application lacks merit and stands to be dismissed.

Costs

[28] Although the respondent implored the court to grant a costs order not capped in terms of rule 32(11), I do not find such order appropriate under the circumstances of the matter.

The order

[29] In the result, the following order is made.

1. The application for condonation for the late filing of the application for leave to appeal is refused.
2. The applicant is ordered to pay the costs occasioned by the application, subject to rule 32(11).
3. The parties are directed to file a joint status report on the further conduct of the matter on or before 14 August 2023.
4. The matter is postponed to 17 August 2023 at 08:30 for a status hearing.

	Note to the parties:
D MUNSU Judge	None
Counsel:	
Appellant:	Respondents:
M Amupolo Of Jacobs Amupolo Lawyers, Notaries & Conveyancers Ongwediva	J Greyling (Jnr) Of Greyling & Associates Oshakati.