



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

RULING

Case no: HC-NLD-CIV-MOT-EXP-2022/00022

In the matter between:

AUTO TECH NAMIBIA CC T/A AUTO TECH PANELBEATER **1st APPLICANT**
RAINER ARANGIES **2nd APPLICANT**

and

THE COUNCIL FOR THE MUNICIPALITY OF TSUMEB **RESPONDENT**

Neutral citation: *Auto Tech Namibia CC t/a Auto Tech Panelbeater v The Council for the Municipality of Tsumeb* (HC-NLD-CIV-MOT-EXP-2022/00022) [2023] NAHCNLD 77 (18 July 2023)

Coram: SALIONGA J
Heard: **19 June 2023**
Delivered: **18 July 2023**
Reasons: **9 August 2023**

Fly note: Interlocutory application – condonation – requirements common cause
- Respondent late with five minutes or a day – court exercised its discretion – rules of practice – non-compliance with rule not significant – effect thereof —late filing condoned.

Summary: The respondent in the main action applied for condonation for the late filing of an answering affidavit pursuant to the court order made by this court on 13 December 2022. The application was opposed by applicants who raised several points in limine. Considering the duration of the delay; the court held that respondent immediately took steps to regularise its non-compliance upon realising it. The court further found and held the view that the application for condonation was made out of a genuine and honest desire to pursue or finalise the matter. Furthermore the court held that refusing condonation is rather a grave and too serious sanction that if granted, it has the potential, to shut the doors of justice in the face of the respondent. Respondents/applicants points in limine are dismissed.

ORDER

1. The applicants' points *in limine* are hereby dismissed.
2. The respondent's non-compliance with this court's order dated 13 December 2022 is hereby condoned.
3. The answering affidavit filed by the respondent stands as filed.
4. The respondent is ordered to pay the costs of this application subject to Rule 32 (11).
5. The Parties are directed to file a joint status report on or before **4 August 2023** detailing the further conduct of the matter.
6. The matter is postponed to **9 August 2023** at **10h00** for status hearing.
7. The Rule *Nisi* is further extended to the date stated in order 6 above (**9 August 2023**).

Ruling

SALIONGA J:

Background

[1] The parties will be referred to in this ruling as applicants and respondent as in the main action.

[2] This is an opposed interlocutory application that resulted from an urgent application enrolled in August 2022. A *rule nisi* was issued for the restoration of the Applicants' water supply on 31 August 2022 with a return date of 20 September 2022.

[3] The matter became opposed a day before the return date. The Parties indicated to this Court by way of a status report filed by Ms. Horn, counsel for the applicants that settlement negotiations are underway.

[4] The matter has since been postponed to allow for settlement negotiations. To date no settlement agreement was filed.

[5] On 13 December 2022 the Court ordered the Parties to file papers as follows:
'1 The Respondent must file an Answering Affidavit on or before 08 February 2023.
2 The Applicants must file their Replying Affidavit(s) on or before 08 March 2023.
3 Parties must file Heads of Argument on or before 05 April 2023.
4 The matter is postponed to 25 April 2023 at 10h00 for a Status Hearing (Reason: Fixing of Hearing Date).
5 The Rule Nisi is extended to 25 April 2023.'

[6] Applicants complied with the court order of 13 December 2022. The respondent failed to comply with the aforesaid order, hence this court is now seized with the condonation application.

[7] Ms. Mufune counsel for the respondent explained the delay as follows:
The respondent filed its answering affidavit on or before 8th February 2023 at 16:05 which reflected on e-justice as being filed on 9th February 2023 at 09h00.

[8] Counsel for respondent explained that the reason for late filing at 16:05 was because their offices were experiencing technical difficulty specifically that the document was uploading onto the E-justice system at a very slow speed.

[9] She received the commissioned affidavit from the respondent after 15h00 on the 8th of February wherein she proceeded to upload it on e-justice when realized the internet was not operating at optimum speed. She nevertheless left the document to upload for fear of losing connection all together, she however took pictures of her computer as it uploaded the Respondents answering affidavit as it was the Respondents intention at all times to observe this court order. She attached pictures of the affidavit uploading and marked the same as annexure 1 and 2" respectively.

[10] As soon as the answering affidavit uploaded onto E-justice, she took the next step to engage with the Applicants' Legal Practitioner as required by this court's rules.

[11] She submitted that the non-compliance with a court order was not as a result of a wilful default but as a result of a technical problem. In her view applicants will not be prejudiced in the granting of a condonation as they will only have to file their replying affidavit on the 8th of March 2023 and further the granting of condonation herein will not affect the fair and reasonable adjudication and hearing of this matter.

[12] Applicants in their opposing replying affidavit, placed all allegations made in the deponent's founding affidavit in dispute. They also raised several points *in limine* i.e. the deponent made untruthful admissions in her affidavit; the contents of the deponent's founding affidavit amounting to inadmissible hearsay; the deponent has no *locus standi* and was not authorized to depose the affidavit, the deponent acted *ultra vires* and the relief sought is incompetent; the deponent failed to comply with rules 32(9) and 32(10) and 55(1) of the Rules of court. It should be pointed out at the onset that these points *in limine* are unnecessary voluminous, interchangeable and interrelated, and as such, only the ones that stand out for me will be considered for discussion in this judgment.

[13] On the untruthful admissions in the deponent's affidavit, Applicants took an issue that the deponent to the respondent's founding affidavit is Lwando Luwa Mufune who stated that; "I am an adult female legal Practitioner practice as such at No 28 Corner of Beethoven and Wagner Street, Windhoek West, Windhoek under the name and style Uitele and Hans Inc. who reside at No 14 Langerhoven Crest Apartments, Liliencron Street Eros Windhoek, Republic of Namibia. The legal practitioner of the Respondent and duly able to depose to this affidavit and the contents hereof are both true and correct unless the content indicates otherwise." The applicants contended that the deponent is not a sole practitioner practicing under the name and style of Uitele and Hans Inc. A corporation or Inc. is an entirely separate entity from its owners and /or shareholders. They argued that deponent is a legal practitioner employed as an associate legal practitioner by the incorporation being a juristic entity as per the screenshot printout of the law society of Namibia website attached and marked "AUT4". I find this point

in limine technical and will not waste time discussing the point as the contents are common cause and were admitted by the deponent.

[14] With regard to the point of law that the founding affidavit amounting to inadmissible hearsay, applicants contend that the legal practitioner by deposing to the founding affidavit is acting as both the witness and/or a party to the matter; that the founding affidavit by the legal practitioner contains some material allegations and contentions that are not within her personal knowledge. In the applicants' view, a founding affidavit should be deposed to by the respondent itself or its duly authorized representative. I had privilege of perusing the affidavit and could not find anything indicating that was not in the deponent personal knowledge as alleged by applicants. Deponent was merely explaining the difficulties she experienced while uploading the document and nothing more.

[15] Another point of law is that deponent lacks *locus standi* entitling her in bringing the condonation application. They contended that the deponent was to show that she has an interest in the matter entitling her to bring the application and no such interest was shown. Applicants further contended that deponent not only lack authorisation but also acted *ultra vires* as no proof was provided or confirmation affidavit attached as to why she was able to depose to the affidavit to a matter in which she is not a party to, or has any interest on behalf of respondent.

[16] On these contended issues of inadmissible hearsay in the deponent's founding affidavit, of lack of *locus standi* and authority raised by applicants, I agree with Masuku J in making reference to *Benedictus Ngairoure v Counsel for the Municipality of Windhoek and six others*¹ where he stated that; 'when one deals with the issue of authority, it should be borne in mind that a deponent need not be authorized in order to depose to an affidavit. The authorization of such a deponent should not be confused with the authorization of the institution, defending and prosecution of proceedings on behalf of another party' (See also *Christian v Namibia Financial Institutions Supervisory Authority* (A 35-2013) [2015] NAHCMD 146 (11 February 2015)).

[17] Deponent in her affidavit in support of condonation application, states that: She is the legal practitioner of the respondent, duly able to depose to this affidavit

¹ *Ngairoure v Council of the Municipality of Windhoek* (HC-MD-CIV-MOT-REV-2019/00338) [2021] NAHCMD 273 (3 June 2021).

and the contents hereof are both true and correct unless the content indicates otherwise. She amplified her explanation in the replying affidavit that the allegations of slow internet in the affidavit do not fall within the respondent's personal knowledge as she was the one who experienced slow internet problem, a reason why she deposed to the affidavit.

[18] It is common cause that the deponent in the instant matter is a legal practitioner of the respondent who failed to upload the answering affidavit on time and as such, will *prima facie* have personal knowledge as to why same was not uploaded on time (See: *Firststrand Bank Limited v Carl Beck Estates (Pty) Ltd and another* 2009 (3) SA 384 (E) at 391 F to 392; *Firststrand Bank Limited v Fillis and Another* 2010 (6) SA 565 (ECB) at 569 para [13]). There is nothing untoward the legal practitioner deposing to the founding affidavit in this application and the applicants' call for viva-voce evidence to be led could not be entertained as such authority was not necessary.

[19] The applicants further objected to a granting of condonation because respondent failed to comply with rule 55 (1) of the Rules and referred the court to *Nambinga v Mudjanima*² in substantiating her objection. Their contention is that the claim sought is incompetent as the respondent was barred from filing its answering affidavit. That respondent should have sought the uplifting of the bar and not merely seek condonation for late filing. Applicants submitted that a case for the relief sought in the present application needs to be made out in the founding papers and not in the reply. Applicants specifically referred to paragraphs 21 and 49 of the respondent's replying affidavit that they constitute new evidence to which they will have no opportunity to reply to and will thus be prejudiced by such allegations. Paragraphs 21 states that;

'Again, the respondents/applicants were clearly advised to raise whatever petty and unreasonable issue to deviate this court's attention from the real issue at hand, which is the non-payment of the respondents' municipal accounts which led to the disconnection of the water supply to the respondents which I submit is allowed in accordance with section 21 of the Municipality of Tsumeb: Water Supply Regulations GN 11 of 1998 made under section 94 (1) of the Local Authorities Act ,1992 (Act No 23 of 1992) that reads as follows:

'21, (1) If an account rendered by the Council in respect of the supply of water is not paid by a consumer before the expiry of the last day for such payment specified in the account, the

² *Nambinga v Mudjanima* (HC-MD-CIV-MOT-GEN-2021/00500) [2022] NAHCMD 410 (12 August 2022).

council may forthwith suspend the supply of water to such consumer until the amount due is paid by the consumer, together with the charges referred to in sub regulation (3).

(2) If the Engineer considers it necessary as a matter of urgency to prevent any wastage of water, unauthorized use of water, damage to property, danger to life or pollution of water, the Engineer may without prior notice and without prejudice to the Council's power under regulation 19 (2) (b)-

1. (a) suspend the supply of water to any premises
2. (b) enter upon such premises and carry out at the owner's expense such emergency work as the Engineer may deem necessary; and
3. (c) by written notice require the owner to carry out such further work as the Engineer may deem necessary within a specified period.

(3) If the supply of water to any premise is suspended under sub regulation (1) or (2), the consumer concerned shall before such supply is restored by the council pay both the charges for the suspension of the supply of water and for the restoration of such supply as determined in the water tariff.

(4) After the charges under sub regulation (3) have been paid in full, the Council shall restore the supply of water to such premises within 48 hours, but to no such restoration shall be done outside of normal working hours.'

[20] While paragraph 49 of the respondent's reply states that; I do submit that my affidavit does not deal with the prospects of success but it clearly sets out that I have not acted in a willful frivolous and vexatious manner in dealing with this case and I immediately engaged the respondent's legal practitioner. This is a case for spoliation for which the court has to make a decision and the legal practitioner of the respondent/applicants have failed to bring to the attention of the court the legislation that specifically deals with the matter at hand which does render the action by the applicants/respondents in this application unlawful. Section 21 of the Municipality of Tsumeb: Water Supply Regulations GN 111 of 1998 made under section 94 (1) of the Local Authorities Act, 1992 (Act No 23 of 1992). To the aforesaid paragraphs, applicants contended they should be struck.

[21] Rule 55 requires that the application for upliftment of the bar or an application for condonation should be made on good cause shown. The respondent's application for condonation also did not deal with or encapsulate an upliftment of the bar instead requested the court only to condone late filing of their answering affidavit. In this regard Applicants correctly submitted that respondent remained *ipso facto* barred in terms of rule 54(3) for the late filing. Applicants contended that respondent should have approached the court in terms of Rule 55 to condone the late filing and to have the bar uplifted. The correct relief should have been to seek condonation and

the upliftment of the bar but respondent failed to do so and failure to comply with rule 55 will ultimately have a consequence of application for condonation not succeeding. Asking this court to only condone their late filing means that respondent is praying for incompetent relief.

[22] In his book, Damaseb PT³, dealt with rule 54 (3) and stated that Rule 54 is a very important provision which bears mention in that;

'54(1)...

(2)...

[3] Where a party fails to deliver a pleading within the time stated in the case plan order or within any extended time allowed by the managing judge, that party is in default of filing such pleading and is by that very fact barred.'

Damased went on to state that 'in such a situation, the non-compliant party bears the onus of seeking relaxation, extension or condonation in order to escape the adverse consequence'.

[23] From the above quoted rule, it is crystal clear that the Court, when applies sanctions to an errant party, or considers an application for condonation it exercises a discretion, and as it has been said many a times in this Court, the exercise of this discretion must be done judiciously, in other words, not capriciously but in accordance with established legal principles. Rightly said filing the pleadings without applying for upliftment of the bar is an irregular step which is not permitted by the rules. Applicants further contended that the application for condonation does not show good cause, in that same does not show that respondent has good prospects of success or a *bona fide* defense to the claim and on that basis alone the application should fail.

[24] In amplifying its point applicants' made reference to *Rina's Investment CC v Auto Tech Truck and Coach cc*⁴ where condonation was refused for the same reason. In that case the applicant filed the pleadings without applying for upliftment of the bar, has prior record for delay in the prosecution of her case, no notice to amend was filed prior to the filing thereof and the delay was substantial. In other words the applicant did not show good cause neither did he give a full, detailed and accurate explanation for the delay nor dealt with the prospects of success. In my

³ P T Damaseb *Court-Managed Civil Procedure of the High Court of Namibia, Law, Procedure and Practice* at 213 para 8-073.

⁴ *Rina's Investment CC v Auto Tech Truck and Coach* (HC-NLD-CIV-ACT-CON-2021/00224) [2022] NAHCNLD 58 (2 June 2022).

view the two cases are distinguishable in that, the respondent in the present matter, has no record for delay in the prosecution of her case, took action immediately after realizing she was late by engaging the applicants' legal practitioner and filed the application for condonation without delay a sign that she was interested in finalizing the matter.

[25] On whether the facts as alleged by applicants in the respondent's replying affidavit are indeed completely new. This court is of the view that the allegations contained in the replying affidavits are neither unique nor completely new to what applicants alleged/stated in the answering affidavit. It appears from the replying documents that respondent made specific reference to the suspension of water in response to what applicants had deposed to in their answering affidavit.

[26] On proper perusal I did not notice the glaring completely newness of facts as alleged. While I tend to agree with counsel for the applicant regarding the general rule that new matter may not be introduced in the replying affidavit, such rule is not absolute and the court may in an appropriate case allow an applicant to do so. The court has an inherent discretion to debar a party from proceedings with an action when there has been undue delay in prosecuting the action (See *Herbstein & van Winsen, The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa* 4 ed at 365). In this regard notwithstanding that the respondent failed to apply for upliftment of the bar as required by the rules, this court after considering all the facts before it use its discretion to grant condonation.

[27] Regarding the objection that respondent did not comply with rule 32 (9) and (10), Rule 32(9) that requires proper engagement between the parties to an interlocutory matter. The duty to comply with rule 32(9) and (10) lies with both parties.

It was contended that the legal practitioner for the respondent was well aware on 9 January 2023 of the Court order dated 13 December 2022 and had knowledge that respondent had to file its answering affidavit on or before 8 February 2023. Yet, she failed to explain in her affidavit why the document in question was only sent for consideration after 15h00.

[28] Indeed in this matter the deponent failed to explain why its answering affidavit was filed only after 15h00. However immediately after the respondent realized that

the answering affidavit was filed late onto e-justice, engaged with the applicants' legal practitioner as required by the Rules by addressing a letter to the applicants' legal practitioner and was further contacted telephonically and the attitude of the applicants' legal practitioner was that should an application be brought it would be opposed. She also advised the Executive Officer Mrs. Victoria Kapenda of the respondent who already attended to signing the answering affidavit timeously, on what had transpired and explained the legal consequences of the late filing of the documents. Considering that the matter was postponed several times for settlement negotiations this court has a different view than that advanced by legal practitioner for the applicants.

[29] It is trite that the founding affidavit is a foundation of any application for condonation and the court has discretion to grant or refuse the application. The requirements for condonation are common cause as outlined in *Telecom Namibia Ltd v Nangolo*⁵ and for that reasons shall not be restated in this judgment.

[30] Whereas the explanation for the entire period of delay is not fully explained in the respondents founding affidavit but in the respondent's replying affidavit, I keep in mind what Strydom has said in *Leweis v Sampoio*.⁶ It is trite that the court in any application for condonation has to exercise its discretion in accordance with established legal principles. In so doing, it should not simply regard an application of this nature an enquiry on whether or not to penalize a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts or Court Orders. The question must rather be, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it willful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence and hence that the application for condonation is not *bona fide* (See *Am-Chagas & Gilhos Lda v Feist Investments Number Seventy-Two CC* (HC-MD-CIV-ACT-CON-2019/04676) [2020] NAHCMD 555 (10 November 2020)).

[31] The respondent in this case at all material time presented an intention to take part in the matter. That the delay and degree of lateness was minimal, that respondent does not have a track record as it was their first non-compliance with the rules or court -order. With the aforesaid, it is safe to settle that the respondent's

⁵ *Telecom Namibia Ltd v Nangolo* (LC 33/2009) [2012] NALC 15 (28 May 2012).

⁶ *Leweis v Sampoio* 2000 NR 186 (SC) at 191 G-H.

application for condonation is made out of a genuine and honest desire to pursue the matter. No indication that applicants suffered prejudice or will be suffered by applicants as a result of late filing of the answering affidavit. In terms of the court order the applicants had ample time within which to file their replying papers. Refusing condonation is rather grave and too serious sanction as it has the potential, if granted, to shut the doors of justice in the face of the respondent who has displayed their desire to take part in the proceedings.

[32] Objectively, the applicant was in default for few minutes or a day and no prejudice suffered, the court use its discretion to condone non-compliance. This must not, however, as Justice Masuku has warned,⁷ be regarded as a cues by the Court to litigants that it will always treat non-compliance with court orders by a party in this fashion. Each case, as indicated, will have to be treated in the light of its own peculiar facts and circumstances.

Conclusion

[33] I take note that a party seeking condonation is praying for an indulgence from the court and in this regard the applicant's opposition to application before court was not unreasonable to be awarded costs as prayed by the respondent. The proper order to issue in the circumstances of this case is to penalize the respondent with an order for costs.

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

1. The applicants' points *in limine* are hereby dismissed.
2. The respondent's non-compliance with the court's order dated 13 December 2022 is hereby condoned.
3. The answering affidavit filed by the respondent stands as filed.
4. The respondent is ordered to pay the costs of this application subject to Rule 32 (11).
5. The Parties are directed to file a joint status report on or before **4 August 2023** detailing the further conduct of the matter.
6. The matter is postponed to **9 August 2023 at 10h00** for status hearing.
7. The Rule *Nisi* is further extended to the date stated in order 6 above (9 August 2023)

⁷ *Donatus v Ministry of Health and Social Welfare* 2016 (2) NR 532 (HC).

J. T. SALIONGA

Judge

APPEARANCES

APPLICANT/RESPONDENT: L L Mufune
Of Hans Weitele and Hans Inc., Windhoek

RESPONDENT/APPLICANT: W Horn
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