

REPUBLIC OF NAMIBIA



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

Case Title: Jacob Benyamen Applicant and Southern Africa Aviation CC Respondent	Case No: HC-NLD-CIV-ACT-CON-2023/00303
	Division of Court: High Court, Northern Local Division
	Heard on: On the papers
	Delivered: 15 May 2024

Heard before: Honourable Mr. Justice Munsu

Neutral citation: *Benyamen v Southern Africa Aviation CC* (HC-NLD-CIV-ACT-CON-2023/00303) [2024] NAHCNLD 49 (15 May 2024)

ORDER

1. The Court upholds the point *in limine* raised by the Respondent.
2. The application for condonation is refused.
3. The Applicant must pay the Respondent's costs, subject to rule 32(11).
4. The matter is postponed to 27 June 2024 at 08:30 for a Status Hearing.

MUNSU J:

Introduction

[1] This is an interlocutory application for condonation brought by the defendant in the main matter, (the applicant herein) for his failure to comply with the case plan order. The plaintiff (respondent herein) instituted action against the applicant for alleged breach of a written sale agreement entered into by the parties. The applicant filed his notice of intention to defend the matter. On 18 January 2024, the court issued a case plan order in terms of which the applicant was ordered to file his plea on or before 02 February 2024. The applicant failed to comply with the said order, hence this application for condonation.

The application

[2] The applicant explains in his founding affidavit that the failure to comply with the court order was caused by the fact that the Law Society of Namibia only issued a Fidelity Fund Certificate to his legal representative on 05 February 2024. He states that the non-compliance with the court order was neither willful nor an attempt to undermine the rules of court. The applicant further states that the non-compliance did not cause any prejudice to the respondent.

The opposition

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[3] The respondent opposes the application on the following grounds:

- a. The applicant only asks the court to condone his failure to file his plea. He does not ask for the upliftment of the bar, nor to extend the time periods allowed for in the case plan order. This objection was raised as a point *in limine*.
- b. Even if the applicant's non-compliance is condoned, it will not automatically entitle him to file his plea until such time as the bar has been uplifted. In the absence of any prayer to that effect, it renders the application unsustainable.
- c. The applicant did not address the question of prospects of success at all in his founding papers, which is fatal.
- d. The respondent is prejudiced by the non-compliance because it not only delays the adjudication of the matter, but also carries a sting of additional costs.

The replying affidavit

[4] In reply, the applicant raised a point *in limine of locus standi*. He states that the respondent is a legal entity, which can only oppose the application through a natural person who must be duly authorised by a resolution of the management or Board of the respondent. The applicant avers that there is no resolution filed prior to the institution of the action, and that the deponent, who is merely an employee of the respondent lacks the necessary *locus standi*.

[5] The applicant further states that if the court grants condonation, he will apply from the bar, for the upliftment of the bar without making further formal application. He goes on to say that even if a formal application for the upliftment of the bar is required, it would be unreasonable for the respondent to oppose same if the court had already granted condonation.

[6] Additionally, the applicant states that the respondent's cause of action arose in January 2019, and it only caused the summons to be issued on 28 September 2023, which is a period close to four years. He goes further to state that, if the court grants this application for condonation, the applicant will succeed on a special plea of prescription.

Discussion

[7] It is appropriate at the outset to deal with the point *in limine of locus standi* raised by the applicant to the respondent's answering papers. While the aforesaid preliminary point is pleaded in a way as though it challenges both the authority to institute the main action as well as the authority to oppose this interlocutory, the relief sought in the end confines it the authority to oppose this interlocutory. It reads:

'WHEREFORE, the applicant requests this Honourable Court to dismiss the respondent's opposition to the application, with costs, and enter a judgment in favour of the applicant.'

[8] In *Oranjerivierwynkelders Kooperatief Bpk and Another v Professional Support Service CC and Others*¹ this court had the following to say:

'[24] It is now settled that the applicant need do no more in the founding papers than allege that authorisation has been duly granted. Where that is alleged, it is open to the respondent to challenge the averments regarding authorisation. When the challenge to the authority is a weak one, a minimum of

¹ *Oranjerivierwynkelders Kooperatief Bpk and Another v Professional Support Service CC and Others* 2011 (1) NR 184 (HC).

evidence will suffice to establish such authority (*Tattersall and Another v Nedcor Bank Ltd* 1995 (3) SA 222 (A) at 228J-229A). This principle has been affirmed in several decisions of this court, and I am in agreement with it as far as it goes.²

[9] Thus, the representative of the respondent did not need to do more than allege that he is authorised to oppose the application. This he did. He stated that:

'I am duly able and authorised by Respondent to oppose the Applicant's application and to depose this affidavit on its behalf for that purpose...'

[10] In *Ondonga Traditional Authority v Elifas*,³ this court said the following:

'...In the *Otjonzondjupa Regional Council* matter Muller J accepted that in several matters Courts have regarded a statement under oath by a deponent that he or she had been duly authorised to bring the application, as sufficient.'⁴

[11] Accordingly, I find that the point *in limine* lacks merit.

[12] The respondent also raised a point *in limine* that the relief sought by the applicant is incomplete and thus incompetent because it does not serve to uplift the bar imposed against him by virtue of rule 54(3).

[13] The applicant disagrees and contends that, if condonation is granted, he may apply from the bar for the upliftment of the bar without bringing a formal application.

[14] In *Zaire v Van Biljon*⁵ this court upheld a similar point *in limine*. At para [34] of the judgment, the court said the following:

'The founding affidavit to the condonation application did not deal with or encapsulate an application for an upliftment of the bar. The defendant remained *ipso facto* barred in terms of rule 54(3). The Applicant filed an amended Notice of Motion which included a prayer for the upliftment of the bar. As mentioned earlier no notice to amend was filed prior to the filing thereof and the said document is therefore not properly before court.'

² See *Otjonzodu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd* 2011 (1) NR 298 at para 53-55.

³ *Ondonga Traditional Authority v Elifas* (HC-MD-CIV-MOT-EXP-2017/00134) [2017] NAHCMD 142 (15 May 2017).

⁴ *Ibid* at para 22.

⁵ *Zaire v Van Biljon* (HC-MD-CIV-ACT-OTH-2019/00180) [2019] NAHCMD 253 (25 July 2019).

[15] In its conclusion, the court held that the applicant failed to apply for the upliftment of the bar, and in the end upheld the point *in limine*.⁶

[16] Similarly, in *Rina's Investment CC v Auto Tech Truck and Coach CC*,⁷ the court held that the correct procedure is for the applicant to request for the upliftment of the bar together with the application for condonation, and that failure to comply with rule 55 will ultimately result in the application for condonation not succeeding.⁸

[17] It is my considered view that the respondent's point *in limine* is well taken.

[18] I therefore make the following order:

1. The Court upholds the point *in limine* raised by the Respondent.
2. The application for condonation is refused.
3. The Applicant must pay the Respondent's costs, subject to rule 32(11).
4. The matter is postponed to 27 June 2024 at 08:30 for a Status Hearing.

	Note to the parties:
D MUNSU Judge	None
Counsel:	
Applicant:	Respondent:
Decided on the papers	Decided on the papers.

⁶ At para 38 and 39.

⁷ *Rina's Investment CC v Auto Tech Truck and Coach CC* (HC-NLD-CIV-ACT-CON-2021/00224) [2022] NAHCNLD 58 (2 June 2022).

⁸ At para 25.

