



**REPORTABLE**

CASE NO: SA 4/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**MINISTER OF HEALTH AND SOCIAL SERVICES**

**Appellant**

and

**MATHEUS AMAKALI**

**Respondent**

**Coram:** DAMASEB DCJ, SMUTS JA and CHOMBA AJA

**Heard:** 6 July 2018

**Delivered:** 6 December 2018

**Summary:** The appellant appeals against the High Court's decision dismissing his defence against the respondent's claim. That dismissal followed the dismissal of an opposed application for condonation after the appellant failed to file its special plea and heads of argument on time as ordered by the managing judge. Without affording the defaulting party *audi* and without hearing any evidence, the court *a quo* granted default judgment in favour of the respondent as prayed for in the combined summons.

Dissatisfied with the order, the appellant appealed to this court, on the ground *inter alia* that the court *a quo* misdirected itself by dismissing the defence in terms of rule 53 of the rules of the High Court - without affording the appellant *audi*. The notice to Appeal was filed 10 days late and an application for condonation accompanied it.

On appeal, principles on condonation restated.

This court satisfied that the appellant had fully set out the various steps taken in pursuit of the appeal after the adverse order was granted by the court *a quo*; that the appellant offered an explanation for almost the entire period and that the circumstances causing delay were beyond appellants' control; and further that the appellant did not sit idle and let time pass without pursuing the appeal process. Such delay *held* not to be 'glaring' or 'flagrant'.

On whether appellant enjoyed prospects of success, court taking the view that such a determination necessarily required revisiting the circumstances that led to the order of the High Court being made. Therefore, the question on appeal is whether the High Court's order refusing condonation for the late prosecution of the special plea, the striking of the defence and entering of judgment by default, has any prospect of being reversed on appeal.

*Held*, firstly, that the appellant in seeking condonation from the managing judge for its non-compliance was seeking an indulgence and had to make full and frank disclosure and be *bona fide*. However, the application for condonation brought on behalf of the appellant did not meet that test and was quite properly rejected by the managing judge. The appeal in respect of the court's refusal of the condonation application therefore has no prospect of success.

In regard to the striking of the defence and the entry of default judgement by the court *a quo*, *held* that an application for the striking of a defence is a serious matter as it potentially disposes of the matter by shutting the door on the appellant to have its case

heard on the merits. As such, the requirements of justice and fairness dictate that it should be done by way of a substantive application and the party in default be given an opportunity to be heard before such a drastic step is taken against it, failing which the appellant's rights to be heard before a decision adverse to it is taken would be violated.

Court *held* that, the real issue in the appeal is whether the defences should have been struck and whether default judgment should have been granted without (a) the appellant being afforded the opportunity to make representations and (b) on the basis merely of the pleadings as they stood. The court highlighting that, as is apparent from the wording of the terms of rule 53, in the exercise of the discretion to impose sanctions, a managing judge has a panoply of alternatives for punishing a party that is in default of a court order or through which the court may show its disapproval of the party's conduct, which more often than not, includes a punitive costs order. However, such discretion can only be properly exercised after the court had afforded the parties, especially the one in default, the opportunity to make representations.

Court *held* that since the appellant had no notice that the respondent was going to move an application for default judgment after the refusal of the condonation application and dismissal of the defence, the court *a quo* ought to have given the appellant an opportunity to be heard before an order is made.

*Held further* that even if the defence has been struck by a court, it is trite that the party seeking judgment still bears the onus to prove that a claim has been made out. Appeal succeeds in part.

On the issue of costs, court *held* that the appellant's conduct disregarded the rules of court and court orders in various respects and that such reprehensible conduct merited an adverse costs order against the appellant.

DAMASEB DCJ (SMUTS JA and CHOMBA AJA concurring):

[1] In June 2016 and by combined summons, Mr Amakali (the respondent) instituted a claim against his employer, the Ministry of Health and Social Services (the Ministry), represented as the defendant in the proceedings by the Minister of Health and Social Services (the appellant).

[2] The claim relates to a liquidated amount in damages for allegedly unpaid subsistence and travel allowances (S&T) totalling N\$485 764,59 spanning the period 2004-2009 when the respondent was required by the Ministry to go and work away from his duty station, without being provided any accommodation, transport or meals. The claim includes interest and costs. The respondent started work as a cleaner and later became a driver in the Ministry.

[3] The respondent alleged in his particulars of claim that during his tour of duty away from his duty station, he was entitled to S&T 'in the amount of N\$384,180. . . for the period of 22 March 2004 to 30 October 2008 at the rate of N\$228 . . . per day; and . . . N\$143,850 . . . at the rate of N\$525. . . per day, for the period of 01 November 2008 to 01 August 2009'.

[4] The respondent further alleged that after he submitted the claim and a resulting delay by the Ministry to pay him, it later acknowledged its indebtedness to him and paid him part of his claim but refuses to pay him the balance.

### The proceedings in the High Court

[5] The combined summons was served on the appellant on 13 July 2016. On 10 August 2016, the Government Attorney, appellant's legal practitioner of record, entered an appearance to defend. At all relevant times the respondent was represented by Mugaviri Attorneys.

[6] In their joint case plan<sup>1</sup> dated 7 September 2016, the parties asked the managing judge to refer the matter to court-connected mediation.<sup>2</sup> On 12 September 2016, the managing judge referred the matter for mediation which was to take place on 18 October 2016 and postponed the case to 24 October 2016 for a status hearing.<sup>3</sup> Ms Mugaviri was present for the respondent and Ms Kishi of Dr Weder, Kauta & Hoveka Inc 'standing in for the Government Attorney on behalf of the Defendant'.

[7] The mediator filed his report on 18 October 2016 recording that the appellant intended to raise a special plea to the respondent's claim which would be dispositive of the matter. In the event the special plea failed, the parties wanted the matter referred 'for mediation on the merits'. The mediation was attended by Ms Mugaviri for the respondent and Ms Monique Meyer of the Government Attorney - who clearly was aware from the court order of 12 September 2016 that there would be a mediation on 18 October and a status hearing on 24 October 2016.

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<sup>1</sup> In terms of rule 23.

<sup>2</sup> In terms of rule 38 and 39.

<sup>3</sup> In terms of rule 27.

[8] On 24 October 2016, the managing judge gave effect to the agreement reached by the parties at the mediation; and by court order directed the appellant to file its special plea on or before 9 November 2016 and postponed the matter to 14 November 2016 for a status hearing. It is clear from the court order that at the 24 October 2016 hearing, the appellant was not represented.

[9] In the event, the special plea was not filed on the date directed by the managing judge. A document purporting to be the special plea was however filed on 10 November 2016 by BB Boois Attorneys ostensibly acting on behalf of the appellant.

[10] On 14 November 2016, Ms Monique Meyer of the Government Attorney brought an application for condonation 'for the late filing of the special plea'. Ms Meyer deposed to the affidavit in support of the condonation application<sup>4</sup>. That condonation application was opposed. The matter was subsequently set down for hearing on 9 December 2016.

[11] It is common ground that on 9 December 2016 the managing judge struck the application for condonation, struck the special plea and the appellant's defence to the claim, and granted default judgment in favour of the respondent. The appellant then lodged an appeal to this court against that order.

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<sup>4</sup> As to the allegations made in support of the condonation application and their unreliability, see paras 25-32 below.

[12] Being out of time, the appellant lodged an application for condonation for the late filing of the notice to appeal. That application for the late prosecution of the appeal is also opposed.

[13] We are called upon at the outset to determine whether the appellant advanced a reasonable explanation for the late filing of the notice of appeal. To do that, we have to consider two related issues:

- (a) That involving the High Court's dismissal of the application for condonation for the late prosecution of the special plea; and
- (b) The High Court's striking of the defence to the claim and the entering of judgement by default in the amount claimed by the respondent.

#### In limine

[14] *In limine*, Mr Phatela argued that by refusing the condonation application and imposing sanctions in the form of dismissal of the defence in terms of rule 53 of the High Court Rules (rule 53), the court *a quo* did not make any determination on the merits rendering the order interlocutory in nature. Since no leave to appeal against the interlocutory order was sought and granted, the appeal is not properly before court and stands to be struck from the roll<sup>5</sup>.

[15] This point was not pursued by Mr Phatela after the court pointed out to him that the striking order did not stand alone and was a precursor to the granting of a final

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<sup>5</sup> Reliance being placed on *Di Savino v Nedbank* 2017 (3) NR 880 (SC).

judgment against the appellant which rendered the court a quo *functus officio* in respect of the suit before it.

[16] Strydom AJA observed in *Knouwds v NO v Josea & another* 2010 (2) NR 754 (SC) at para 10 that ‘a decision that is final, definitive of the rights of parties or has the effect of disposing of at least a substantial portion of the relief claimed in the main is not interlocutory and is appealable as of right’.<sup>6</sup> Mr Phatela’s concession was therefore properly made.

#### The application for condonation: late prosecution of the appeal

[17] An applicant seeking condonation must satisfy the following requirements.<sup>7</sup> He or she must provide a reasonable, acceptable and bona fide explanation for non-compliance with the rules. The application must be lodged without delay, and must provide a full, detailed and accurate explanation for the entire period of the delay, including the timing of the application for condonation.<sup>8</sup> Lastly, the applicant must satisfy the court that there are reasonable prospects of success on appeal.

[18] There are a range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted.<sup>9</sup> These include ‘the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of

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<sup>6</sup> See further *Shetu Trading CC v Chair of the Tender Board of Namibia & others* 2012 (1) NR 162 (SC).

<sup>7</sup> *Balzer v Vries* 2015 (2) NR 547 (SC) at 551J-552F and *Jossop v The State* (SA 44/2016) NASC (30 August 2017).

<sup>8</sup> See *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5; *Primedia Outdoor Namibia (Pty) Ltd v Kauluma* (LCA 95-2011) [2014] NALCMD 41 (17 October 2014).

<sup>9</sup> *Gomes v Meyer* (SA 33/2014) NASC (12 April 2017).



success on the merits, the importance of the case, the respondent's (and where applicable, the public's interest in the finality of the judgment), the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice'.

[19] These factors are not individually determinative, but must be weighed, one against the other. Not all factors need to be considered in each case and each case will be determined on its own merits. The court may therefore weigh the question of prospects of success in determining the application over the non-compliance,<sup>10</sup> or the appeal may be dismissed because the non-compliance with the rules has been 'glaring', 'flagrant' and 'inexplicable'.<sup>11</sup>

*Did the appellant provide a reasonable explanation for the delay?*

[20] The appellant alleges in the affidavit in support of the application for condonation that the deputy sheriff experienced difficulties in effecting service of the notice of appeal on the respondent. The notice had to be served during the festive season when the legal practitioners' offices were closed. That resulted in the notice being served outside the time allowed by the rule. That much is beyond dispute based on the supporting evidence which it is unnecessary to regurgitate here because it was not placed in dispute in any serious manner that raises a genuine dispute of fact.

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<sup>10</sup> *Road Fund Administration v Scorpion Mining Company (Pty) Ltd* (SA 30/2016) NASC (13 July 2018), para 3.

<sup>11</sup> Compare, *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) at 189-190 para 5; *Beukes & another v South West Africa Building Society (SWABOU) & others* (SA 10/2006) [2010] NASC 14 (5 November 2010) para 13; *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2013 (3) NR 664 (SC) para 68; *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) para 9.

[21] I am satisfied that the appellant has fully set out the various steps taken in pursuit of the appeal after the order was granted by the court *a quo*. It is further evident that the appellant did not sit idle and let time pass without pursuing the appeal process. An explanation for almost the entire period has been offered and it is evident that difficulties experienced during the festive season were beyond the appellants' control.

[22] No prejudice on the part of the respondent has been alleged or demonstrated while the appellant not without justification maintains that it stands to suffer great prejudice if condonation is not granted. Condonation should therefore be granted for the late prosecution of the appeal.

#### Prospects of success

[23] The next issue that we must consider is whether the High Court's order refusing condonation for the late prosecution of the special plea, the striking of the defence and entering of judgment by default has any prospect of being reversed on appeal. That necessarily requires us to revisit the circumstances that led to that order of the High Court.

*Application for condonation of the late prosecution of the special plea*

[24] An applicant seeking condonation is seeking an indulgence from the court. It must therefore make full and frank disclosure and be *bona fide*. The application for condonation brought by Ms Meyer on behalf of the appellant does not meet that test and was quite properly rejected by the managing judge. I will give very brief reasons why.

[25] The thrust of Ms Meyer's explanation for failing to file the special plea on 9 November is two-fold. The first is that when the order of the court was made on 24 October 2016 stipulating the date of 9 November 2016, Ms Boois of BB Boois Attorneys was present but that after court the order was sent to a wrong firm of legal practitioners (being Shikongo Law Chambers). It was therefore only on 9 November at 15h25 that they were provided a copy of the order by Shikongo Law Chambers and it became apparent that the special plea had to be filed on that date.

[26] It is implied in what Ms Meyer states that it was too late by then and that it was the first time the Government Attorney became aware of the deadline of 9 November 2016. The second aspect of the explanation is that Ms Boois had an instruction to appear at the hearing of 24 October 2016 and to arrange new dates for the filing of the special plea.

[27] Ms Meyer's affidavit in support of the condonation application makes the following startling allegation:

'Instructions were given to Ms Boois to appear in court on the 24<sup>th</sup> of October 2016 for a status hearing in which new dates would be given for filing our special plea. Ms Boois proceeded to appear on our behalf as instructed.'

[28] There is no confirmatory affidavit by Ms Boois to confirm the instruction allegedly given to her. In any event, the allegation is not supported by the content of the instruction letter of 20 October 2016 sent to Ms Boois by the Government Attorney. It is also clear from the record that Ms Boois did not attend the hearing on 24 October 2016. It defies belief that Ms Meyer, an officer of the court, would in the circumstances state under oath that Ms Boois did.

[29] As an annexure to her affidavit, Ms Meyer also attached a copy of a purported special plea filed by BB Boois attorneys on 10 November 2018. Not only is there no confirmation by Ms Boois that she had the authority to file such a document but it is not accompanied by a notice of representation placing her on record as legal practitioner of record for the appellant or being a correspondent for the Government Attorney.

[30] In fact, the only notice of representation there is in the name of BB Boois Attorneys is that filed of record on 14 November 2016 – 4 days after the special plea was filed. On whom Ms Meyer expected the order of 24 October 2016 to be served is also not explained considering what I say below.

[31] The record shows that Dr Weder, Kauta & Hoveka Inc. filed a notice of withdrawal as attorneys of record for the appellant on 12 October 2016. The notice of withdrawal was duly served on the Government Attorney. In other words, on 12 October

2016, or soon thereafter, the Government Attorney knew that Dr Weder, Kauta & Hoveka Inc. were no longer the appellant's attorneys of record. The Government Attorney did not proceed to file a fresh notice of representation.

[32] It is apparent though from the record that on 20 October 2016, the Government Attorney directed a letter to BB Boois Attorneys of Ongwediva 'to act in the above-mentioned matter and attend to the status hearing scheduled for 24 October 2016. . . as well as all subsequent appearances as they may arise'. There is no mention in this instruction about the special plea or what specifically BB Boois were to do at the hearing of 24 October 2016.

[33] The above chronology demonstrates the chaotic manner in which the Government Attorney conducted the appellant's defence in this matter. What stands out clearly though is the fact that Ms Boois had no authority to file a special plea. What is on file is a special plea without mandate and it stood to be ignored by the managing judge. There was therefore nothing to condone and the appeal in respect of the court's refusal of the condonation application has no prospect of success.

[34] I will next consider if the appellant has any reasonable prospect of success on appeal in regard to the striking of the defence and the entry of default judgement.<sup>12</sup>

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<sup>12</sup> *Metropolitan Bank of Zimbabwe Ltd & another v Bank of Namibia* (SA 77-2017) [2018] NASC (23 October 2018), para 13.

## Submissions on appeal

### *The appellant*

[35] Mr Ndlovu appeared on behalf of the appellant. He argued that the court *a quo* misdirected itself in granting default judgement. Counsel argued that the court *a quo* did not properly exercise its discretion in terms of rule 53 in that the order granted was not 'just' and 'fair'. According to Mr Ndlovu although the dismissal of the opposed application for condonation for the late filing of the special pleas and the heads of argument may have been justified, it was unfair and unjust to dismiss the appellant's defence to the claim.

[36] The other ground relied on by Mr Ndlovu is the alleged failure of *audi alteram partem*. According to counsel, an application for the striking of a defence is a serious matter as it potentially shuts the door on a party to have its case heard on the merits. As such, the requirements of justice and fairness dictate that it should be done by way of a substantive application and the party in default be given an opportunity to be heard before such a drastic step is taken.

[37] Since both the application to dismiss the special plea and to have the defence struck were orally made from the bar, no notice of the application for default judgment was given. The appellant was also not given an opportunity to be heard before default judgment was granted in favour of the respondent. This, Mr Ndlovu submitted, violated the appellant's right to be heard before a decision adverse to it was taken.

[38] Counsel for the appellant further argued that the court *a quo* misdirected itself by dismissing the defence in the face of a court order endorsing the agreement that the determination of the merits should stand over for mediation in the event of the court dismissing the special pleas.

*The respondent*

[39] Mr Phatela for the respondent argued that it is undesirable for this court to interfere with the managing judge's exercise of a discretion in the application of the sanctions regime provided for in rule 53. Counsel argued that it is an important part of a managing judge's discretion to regulate procedure in promoting the overriding objective<sup>13</sup> of the rules of court.

[40] In refusing the application for condonation, the court *a quo* exercised a judicial discretion by considering the facts before it in order to satisfy itself whether a reasonable explanation for the non-compliance with the court order was furnished. This court should therefore be slow to interfere with such value judgment unless a clear case for interference is made which the appellant has not done.

[41] Mr Phatela further contended that the appellant disregarded the rules of court and court orders in various respects as previously described and thereby failing to minimise delay in the finalisation of the matter. According to counsel, the respondent's conduct was 'tardy and lackadaisical' towards the court and its the proceedings. Mr Phatela contended that the appellant's remissness justified the dismissal of the defence.

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<sup>13</sup> The overriding objective in rule 1(3) is cited in relevant part at *fn* 14 below.

### Analysis

[42] A study of the record makes clear that appellant's legal practitioners' conduct of the matter was wholly unacceptable and justified the managing judge in refusing the condonation application. The real issue in this appeal is whether the defence should have been struck and whether default judgment should have been granted without (a) the appellant being afforded the opportunity to make representations and (b) on the basis merely of the pleadings as they stood.

[43] After the order refusing the condonation application, the exchange between the managing judge and counsel for the respondent is captured as follows:

'Ms. Haufiku: My Lord in the premises if the court is so inclined we would like to move for default judgment in this matter as the defendant (intervention)

Court: but have you proved your claim?

Ms. Haufiku: My Lord?

Court: Have you proved your claim?

Ms. Haufiku: My Lord, the claim as set out in this some in the particulars of claim my lord is forms the basis of the Plaintiff's claim my Lord against the respondent and my Lord we move for default judgment with regards to the fact that My Lord the Applicant was applying for condonation for the late filling of their special plea which was, which formed the basis of their defence to the plaintiff's claim My Lord.

Court: Yes the third order then that defendant's defence is dismissed and judgment is entered for the plaintiff as prayed with costs.'



[44] Mr Phatela for the respondent quite forcefully argued that it became unnecessary after the appellant's defence was struck, for the court to afford the appellant a further opportunity to show cause why judgment should not be entered. Mr Ndlovu for the appellant, of course, takes the contrary view and relies on *Donatus v Muhamederahirimo & others* 2016 (2) NR 532 (HC) in support of his position. I will refer to that case presently.

[45] The managing judge placed reliance for his striking the defence and entering judgment by default on rule 53 of the Rules of the High Court. It provides as follows:

'If a party or his or her legal practitioner, if represented, without reasonable explanation fails to –

- (a) attend a case planning conference, case management conference, a status hearing, an additional case management conference or a pre-trial conference;
- (b) participate in the creation of a case plan, joint case management report or parties' proposed pre-trial order;
- (c) managing judge's pre-trial order;
- (d) participate in good faith in a case planning conference, case management or pre-trial process;
- (e) comply with a case plan order or any direction issued by the managing judge; or
- (f) comply with deadlines set by any order of court,

the managing judge may enter any order that is just and fair in the matter, including any of the orders set out in subrule (2)'.

[46] Subrule (2), provides as follows:

'Without derogating from any power of the court under these rules the court may issue an order-

- (a) Refusing to allow the non-compliant party to support or oppose any claims or defences;
- (b) Striking out pleadings or part thereof, including any defence, exception or special plea;
- (c) Dismissing a claim or entering a final judgment; or
- (d) Directing the non-compliant party or his legal practitioner to pay the opposing party's costs caused by the non-compliance.'

[47] The question arises, assuming that a party failed to offer a reasonable explanation for not complying with a deadline set by the court, does it forfeit the right to be heard before the court strikes its defence and enters judgment against it?

[48] In two judgments of the High Court, that question has been answered in the negative. In *Donatus v Muhamederahimuo & others* 2016 (2) NR 532 (HC), an application was brought on behalf of the plaintiff to have a defence struck on the basis of non-compliance with an order for discovery. The court noted that although non-compliance with court orders may be serious, the striking of a defence is a grave matter and the court must consider each case in light of its peculiar facts and circumstances.

[49] Masuku J noted at para 20 that:

‘. . . the order for the striking of a defence is very serious as it has the potential, if granted, to show to the errant party, what in footballing parlance, is akin to a red card. This card effectively excludes that party from further participation in the trial. For that reason, the dictates of justice and fairness would in my view require that this application should not merely be made orally or only in heads of argument. Good practice, propriety and fairness would suggest that it must on account of its gravity be on notice, preferably on application, and to which the defaulting party may have an opportunity to deal with it. Furthermore, it will always assist the court, before issuing such a drastic order, to have had the benefit of argument by both parties where they both still have their hands on the plough so to speak.’

[50] Masuku J took the same approach in *Hilifilwa v Mweshixwa* (I 3418/2013) [2016] NAHCMD 166 (10 June 2016). In that case, the High Court had to determine whether it would be just to impose sanctions for non-compliance of a lay litigant who had no notice to jointly formulate the joint pre-trial order. At the onset, the court pointed out the effect of rule 53 by stating at para 13 and 14 that:

‘[13] What is implicit in the foregoing rule is that the sanctions take place after the party has been afforded an opportunity to explain and show cause why they may not be so censured. There is good reason why this should be the case. It boils down to the principles of natural justice, which require that a man or woman should not be judged unheard. Put differently, no person should have an adverse order issued against him or her without him or her having been afforded an opportunity to address or deal with that proposed order or sanction.’

[14] It must be pointed out that the refrain, in the sanctions enquiry, is for the court, at the end of the day, to issue an order that is in all the circumstances of the case just and fair. This means that there can be no one size-fits-all order. The court should, in fashioning an appropriate order in a case, have regard to all the pertinent factors and circumstances. Having done so, it will then be properly placed to issue a sanctions order, if called for, which meets the justice of the case.’

[51] Mr Phatela argued that such an approach undermines the new ethos of judicial case-management. I beg to disagree. Judges of the High Court deal with the vagaries of managing cases on a daily basis. They know the pressures *that* brings on the court and the litigants before them. High Court judges are best placed to make an assessment where the balance should be struck. In two considered judgments the High Court set out a procedure to be followed before the invocation of the sanctions regime granted under rule 53. It would be inappropriate for this court to interfere with that approach.

[52] As is apparent from the terms of rule 53, in the exercise of the discretion to impose sanctions, a managing judge has a panoply of alternatives for punishing a party that is in default of a court order or through which the court may show its disapproval of the party's conduct. More often than not, a punitive costs order would suffice. That discretion can only be properly exercised after the court has afforded the parties, especially the one in default, the opportunity to make representations.

[53] It is common ground that the appellant had no notice that the respondent was going to move an application for default judgment after the refusal of the condonation application and striking of the defence. That does not comply with the procedure which, in binding decisions, the High Court has laid down should be followed. On that basis alone the appeal must succeed in part.

[54] There is another concern about the manner in which the matter was approached by the learned managing judge. Just because there is no longer a defence

to a claim does not mean the court must, without more, proceed to grant judgment to a plaintiff. No doubt there will be cases that can be done. The present was not such a case.

[55] Even if the defence has been struck by a court, the party seeking judgment still bears the onus to prove that a claim has been made out. I see no reason why the appellant through its counsel should have been denied the opportunity, even if the appellant was barred from supporting its defences, to address the court on why the claim or parts of it could not be granted as the pleadings stood. For example, what if there was a duplication in the amounts claimed?

[56] The appellant's counsel could still submit to the court that the calculations were wrong on the face of it and that the actual amount was less than what is stated in the particulars of claim. The possibilities are infinite of the sort of assistance that the appellant's counsel could still give to the court without pursuing defences which had been struck by the court. On that basis too, the appeal ought to succeed.

### Disposal

[57] There certainly was no reasonable explanation for the contumelious conduct which led to the refusal of the condonation application for the prosecution of the special plea by the managing judge. Therefore, in so far as the managing judge denied the appellant the opportunity to pursue the special plea, the High Court's order to that effect should not be interfered with.

[58] That notwithstanding, the ensuing order striking the appellant's defence and shutting the door to the appellant to defend the claim on the merits cannot be sustained in view of the fact that the appellant was not afforded the opportunity to make representations why its defence should not be struck. The prospects of success on appeal are good in that respect. As stated above, there is a reasonable explanation for the late filing of the notice of appeal and therefore condonation should be granted for the late prosecution of the appeal.

#### The appropriate order

[59] There has already been undue delay in the finalisation of this matter. It would not promote the overriding objective<sup>14</sup> to make an order that will lead to the parties further engaging in skirmishes on whether or not the appellant's defences should be struck. In the light of the agreement between the parties which was endorsed by the court *a quo* on 24 October 2017, it is more appropriate to remit the matter to the managing judge for the determination of the merits without further delay in the interest of the overriding objective; but leaving the door open for them to have the matter mediated.

#### Costs

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<sup>14</sup> Rule 1(3) of the High Court Rules states: 'The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by –

(a) . . .

(b) saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter;

(c) . . .

(d) ensuring that cases are dealt with expeditiously and fairly.'

[60] The appellant's legal practitioner's conduct of this matter *a quo* is not exemplary as evidenced by the litany of failures that I chronicled. They failed to comply with every order given by the managing judge and occasioned a great deal of delay in the finalisation of the case. That reprehensible conduct calls for censure.<sup>15</sup> The appellant should bear the costs of the respondent both in the High Court and in the appeal. The respondent is a man of modest means and has tried to assert his rights but was frustrated at every turn by the dilatory and reprehensible conduct of the appellant's legal practitioners.

#### The order

[61] I therefore propose the following order:

1. The condonation for the late prosecution of the appeal is granted.
2. The appeal succeeds and the order of the High Court is set aside and substituted for the following order:
  - '1. The application for condonation of the late filing of the heads of argument is refused and the special pleas struck from the roll with costs against the defendant.
  2. The application to strike the defendant's defences and to enter default judgment is refused.

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<sup>15</sup> *Du Toit v Dreyer & others* 2017 (1) NR 190 (SC) at 199D-E; *United Africa Group (Pty) Ltd v Uramin Incorporated & others* Case No. SA 9/2017 para 57, delivered on 23 November 2018.

3. The parties are afforded the opportunity to refer the matter to mediation within ten (10) court days of this order, failing which they must set the matter down for pre-trial in terms of rule 26 of the High Court rules for the adjudication of the merits.'
3. The matter is remitted to the High Court (Northern Local Division) for the managing judge to deal with the matter according to law and in terms of the judgment and order of this court.
4. The Registrar for the Northern Local Division is directed to enrol the matter on the Case Management Roll of that Division within 10 days of this order.
5. The respondent is awarded costs of the appeal to include the costs of instructed counsel.

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**DAMASEB DCJ**

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**SMUTS JA**

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**CHOMBA AJA**



APPEARANCES

APPELLANT:

M Ndlovu (with him M Meyer)  
of Government Attorney,  
Windhoek

RESPONDENT:

T C Phatela  
Instructed by Mugaviri Attorneys,  
Oshakati