

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: I 551/2016

In the matter between:

SANTAM NAMIBIA LIMITED

APPLICANT/DEFENDANT

And

RIB LOGISTICS CC

RESPONDENT/PLAINTIFF

Neutral citation: *Santam Namibia Limited v Ribs Logistics CC* (I 551/2016) [2017]
NAHCMD 143 (11 May 2017)

Coram: Prinsloo AJ

Heard: 10 May 2017

Delivered: 11 May 2017

Summary: This is an application for condonation and postponement brought by the defendant in this matter, for the Court to condone the defendant's failure to file witness statements and to condone the late filing of the application for postponement. Additionally for the Court to postpone the matter that was set down for trial on the action floating roll for the 10th to 12th May 2017.

ORDER

1. Application for condonation is refused;
2. Application for postponement is refused;
3. Legal practitioner for the Defendant to pay cost of the application on attorney client scale.

RULING- INTERLOCUTORY

PRINSLOO AJ:

[1] The application before this court is twofold and reads as follows:

'Take note that the Defendant will at the commencement of the trial on 10 May 2017 apply for an order in the following terms:

1. Defendant's failure to file its expert witness statements is condoned.
2. The trial is postponed to a date determined by the Court.
3. Defendant's legal practitioner is liable for the Plaintiff's wasted costs as between attorney and client occasioned by the postponement provided that such costs exclude travel expenses if any of Plaintiff's witnesses based in Gauteng'

[2] It is necessary for purposes of this ruling to refer to Judicial Case Management and the orders made during course of same, where relevant.

[3] Pursuant to a Case Management Conference held on 06 June 2016 the court made the following order:

'IT IS ORDERED THAT:

1. *Parties are to file their discovery affidavits and bundles of discovered documents on or before 30 June 2016.*
2. *Parties are to file their witness statements on or before 15 July 2016.*
3. *The expert reports shall be filed on or before 29 July 2016.*
4. *Parties are to file a pre-trial report on or before 3 August 2016.*
5. *The matter is postponed to Monday, 8 August 2016 at 14:30 for a pre-trial conference.'*

[4] On 8 August 2016 a joint proposed pre-trial order was submitted to court, which was accepted and made an order of court.

[5] In the joint proposed pre-trial order, the witnesses for the defendant were listed as:

1. Ms Nadia Van Zyl, and;
2. Mr W. Lehman¹.

[6] During these proceedings the matter was set down for trial for 10-12 May 2017. When this matter was set down for trial, the parties effectively confirmed that the matter is trial ready.

[7] The court order also specified a postponement for a status hearing on 17 April 2017. However, as the name of a witness for the plaintiff was omitted from the proposed pre-trial order that was adopted and made an order of Court, the plaintiff filed a status report and the status hearing was attended to on 10 April 2017.

[8] Pursuant to the status hearing on 10 April 2017 the court issued an amended pre-trial order.

[9] I need to interpose at this juncture to note that this order was called into question during argument *in casu* as to whether the amended order was indeed a correct reflection of the court's order or not.

¹ Par 4 of page 104 of JCM bundle.

[10] The court will refer to the relevant paragraphs of the 'fresh' pre-trial order that was called into question by counsel for the respondent/plaintiff, and which reads as follows:

'3. Plaintiff shall call the following witnesses:

a. Mr David Mapendere

b. Mr Trust Mbabvu

c. Mr Kudzanai Takorera (whose witness statement must be filed by 28 April 2017,

if no witness statement no testimony from the listed witnesses)

(a) and (b) witnesses statement have been filed already.

4. Defendant will call the following witnesses:

a. Ms Nadia van Zyl

b. Mr W Lehmann

whose witness statements have been filed already' (my underlining)

[11] As the court order dated 10 April 2017 is of paramount importance in this matter, the Court in an attempt to expedite matters instructed counsel for plaintiff and defendant to listen to the digital recording of the proceedings on said date and report to court on the joint position as to the order made by court at the status hearing.

[12] After listening to the digital recording, it was jointly confirmed by counsel that it was the order of the court that the witness statements of the Defendant be filed by 28 April 2017 or the witnesses cannot be called during the trial. The reference in paragraph 3 was thus not in respect of plaintiff's witnesses but indeed that of defendant. Paragraph 4 also thus erroneously indicated that defendant's witness statements have been filed already.

[13] The order dated 10 April 2017 was correctly made but incorrectly typed and thus Rule 103 would not apply. However, this court has inherent competence to correct the pre-trial order *suo motu* so that it corresponds with the order which was indeed made² by court.

[14] Accordingly this court will correct paragraphs 3 and 4 as follows:

² *Isaacs v Williams and Another* 1983 (2) SA 723 (NC)

'3. Plaintiff shall call the following witnesses:

- a. Mr David Mapendere
- b. Mr Trust Mbabvu
- c. Mr KudzanaiTakorera

(Witness' statements have been filed already).

4. Defendant will call the following witnesses:

- a. Ms Nadia van Zyl
- b. Mr W Lehmann

(Whose witness statements must be filed by 28 April 2017, if no witness statement. no testimony from the listed witnesses)

The Condonation application:

[15] Mr Slabber, legal representative for the defendant, deposed to the affidavit supporting the notice of motion before this court.

[16] Having regard to the affidavit, it is clear that the non-compliance with the judicial case management orders is common cause.

[17] Defendant's legal practitioner admits in his affidavit to his culpable neglect that led to the failure in filing the relevant witness statements³ and in amplification thereof explains that due to his medical condition and the prolonged chemotherapy treatment thereof caused a lapse in concentration and memory and as a result he failed to finalise Mr Lehman's statement⁴.

[18] He further states that he realised this omission after the Easter weekend and when he enquired about the witnesses' availability to finalise the statement, the witness was unavailable due to his annual leave⁵.

Legal principles applicable:

³ Paragraph 5 of supporting affidavit.

⁴ Paragraph 11 of supporting affidavit.

⁵ Paragraph 12 of supporting affidavit.

[19] In *Telecom Namibia Limited v Michael Nangolo and 43 Others*⁶, Damaseb J.P identified the following as principles guiding applications for condonation:

- '1 *It is not a mere formality and will not be had for the asking.*⁷ *The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.*⁸
- 2 *There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.*⁹
- 3 *It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.*¹⁰
- 4 *The degree of delay is a relevant consideration;*¹¹
- 5 *The entire period during which the delay had occurred and continued must be fully explained;*¹²
- 6 *There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented.*¹³ *(Legal practitioners are expected to familiarize themselves with the rules of court).*¹⁴
- 7 *The applicant for condonation must demonstrate good prospects of success on the merits. But where the non-compliance with the rules of Court is flagrant and gross, prospects of success are not decisive.*¹⁵
- 8 *The applicant's prospect of success is in general an important though not a decisive consideration. In the case of Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*¹⁶, *Hoexter JA pointed out at 789I-J that the factor of prospects of success on appeal in an application for condonation*

⁶ Case No. LC 33/2009.

⁷ *Beukes and Another v Swabou and Others* [2010] NASC 14 (5 November 2010), para 12.

⁸ *Father Gert Dominic Petrus v Roman Catholic Archdiocese*, SA 32/2009, delivered on 09 June 2011, para 9.

⁹ *Beukes and Another v Swabou and Others* [2010] NASC 14(5 November 2010), para 13.

¹⁰ *Ondjava Construction CC v HAW Retailers* 2010 (1) NR 286(SC) at 288B, para 5.

¹¹ *Pitersen-Diergaardt v Fischer* 2008(1) NR 307C-D(HC).

¹² *Unitrans Fuel and Chemical (Pty) Ltd v Gove –Co carriers CC* 2010 (5) SA 340, para 28.

¹³ *Salojee and Another NNO v Minister of Community Development* 1965 (2) SA 135(A) at 141B; *Moraliswani v Mamili* 1989(4) SA 1 (AD) at p.10; *Maia v Total Namibia (Pty) Ltd* 1998 NR 303 (HC) at 304; *Ark Trading v Meredien Financial Services Namibia (Pty) Ltd* 1999 NR 230 at 238D-I.

¹⁴ *Swanepoel, supra* at 3C; *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432(SC) at 445, para 47.

¹⁵ *Swanepoel, supra* at 5A-C; *Vaatz: In re Schweiger v Gamikub (Pty) Ltd* 2006 (Pty) Ltd 2006 (1) NR 161 (HC), para; *Father Gert Dominic Petrus v Roman Catholic Diocese*, case No. SA 32/2009, delivered on 9 June 2011, page 5 at paragraph 10.

¹⁶ 1985 (4) SA 773 (A).

for the late notice of appeal can never, standing alone, be conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with the rules, should be considered.

9 *If there are no prospects of success, there is no point in granting condonation.*¹⁷

Applying the legal principles to the facts:

[20] The court acknowledges the defendant's legal practitioner's serious health condition and has a great measure of empathy for him in this difficult time, however, as correctly pointed out in the answering affidavit, this is not a new condition. When the matter was set down for trial in August last year, and even earlier during the time of the pre-trial order, said practitioner was already undergoing treatment.

[21] This court will readily accept that the prolonged chemotherapy treatment has unfortunate side effects that affect concentration and memory, but being aware of it, Mr Slabber should have put measures in place to ensure that matters like the current one does not slip through the cracks.

[22] The supporting affidavit is silent on the steps taken to prevent mishaps. In the matter of *Cloete v Bank of Namibia*¹⁸ when the court was faced with a similar dilemma, Geier J proceeded to note the following:

'[42] What compounds this problem is that it is common knowledge that a number of aids are available to modern legal practitioners and their clients to assist them in meeting the time lines imposed on them by the rules of court. Not only are conventional diaries, in hard copy, still available to assist in this task, but also the old – fashioned, time-tested diarisation practices followed in legal firms, which were designed to ensure compliance with the rules of court, the parameters within which a legal practitioner operates. Nowadays computers and cellphones all have calender and other functions which can, in addition, be effectively employed to timeously alert their users as to when particular actions by them are required. These alerts usually 'pop- up', so-to-speak, on the screens of computers and cellphones, where they usually will remain until deliberately closed, through the click of the

¹⁷ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

¹⁸ (LCA 86/2013) [2015] NALCMD 8 (22 April 2015).

mouse or the touch of a button or touch-screen. So even if one would have forgotten about a task these 'alerts' – if activated – would have remind a particular user that a particular action would be required at a particular time.'

And further

[43] . . . The practice of the proper diarisation of files is as old as the attorneys' profession, and it does not take much to understand why diarisation of files has always been one of the fundamental cornerstones to conducting an efficient legal practice.'

[23] As an experienced legal practitioner, Mr Slabber surely had the assistance of a proper filing and diarisation system in place in addition to a secretary. It was also pointed out in argument on behalf of the respondent that Mr Slabber is practicing in a law firm with multiple associates who could assist in this matter when the need arises. The supporting affidavit is however silent as to what measures were in place to prevent issues of non-compliance, as was the case in the matter at hand.

[24] What is disturbing is that nobody picked up on the due dates in this matter during the eight months that lapsed from the date of the pre-trial order up to the date of trial. There was a prolonged delay in filing the witness statement and the entire period during which the delay occurred and continued had to be fully in the supporting affidavit¹⁹. The supporting affidavit is however very brief in this regard.

[25] During the status hearing of 10 April 2017 it was conceded that the witness statements for defendant were not filed. However, Mr Slabber stated that he only came to realise that the said statements were not filed after the Easter weekend.

[26] The law is settled that the application for condonation must be brought as soon as the delay (or non-compliance in this instance) has become apparent.

¹⁹ *Telecom Namibia Limited v Michael Nangolo and 43 Others supra at par 5.*

[27] When defendant's legal practitioner realised that the witness statements were not filed and that Mr Lehman was not available to finalise the statement, he should have acted pro-actively by applying for an extension of time in terms of Rule 55(1)²⁰.

[28] This was not done. Only at roll call on Friday morning, 05 May 2017, the court was informed that the defendant is not ready to proceed to trial and will move for a postponement. The notice of motion was filed thereafter at 14:20 on even date wherein applicant moved for condonation and postponement.

[29] The Managing judge was firm in his order that, if the defendant's witness statements were not filed by 28 April 2017, defendant would not be able to call those witnesses to testify. This order gave the defendant a second bite to the cherry as the initial order dated 06 June 2016 set dates for filing of statements, i.e. witness statements to be filed by 15 July 2016 and expert reports to be filed by 29 July 2016.

[30] None of the time lines set by the Managing Judge was complied with.

[31] The unfortunate fact is that the legal representative for defendant was the cause for the inordinate delay in this matter, which causes a glaring non-compliance with the Rules and the judicial case management orders of record.

[32] The court notes that Mr Slabber was not the practitioner that appeared during case management and he had to rely on the feedback from the different practitioners who stood in for him in court. However, throughout he was the leading counsel in this matter and therefore bears the responsibility for the consequences flowing from the prosecution of this matter.

[33] This court does not want to appear unsympathetic to the plight of counsel but holding on to this case in spite of his poor health was not reasonable under the

²⁰ Rule 55(1) -the court or the managing judge may, on application on notice to every party and on good cause shown, make an order extending or shortening a time prescribed by these rules or by an order of court for doing an act or taking a step in connection with proceedings of any nature whatsoever, on such terms as the court or managing judge considers suitable or appropriate.

circumstances. This went to the point where Mr Slabber felt obliged to admit his own culpable negligence and although the court appreciates his candour it cannot remedy the dilemma for the defendant.

[34] To refuse the application for condonation is a drastic step and is not one that I am taking lightly as the court is mindful of the prejudice that will be suffered by the plaintiff and the defendant in this regard.

[35] The court had regard to the matter of *Katjiamo v Katjiamo and Others*²¹ where Damaseb DCJ discussed the effect of negligence or remissness of a legal practitioner on a litigant as follows:

*'The negligence and remissness of a legal practitioner are only to be visited on the litigant where he or she contributed thereto in some way, was aware of the steps that need to be taken in furtherance of the prompt conduct of the case, or through inaction contributed to the matter stalling and thus impeding the speedy finalisation of a contested matter. The following dictum by Steyn CJ in Salojee and Another NNO v Minister of Community Development*²² *has been cited with approval by our courts:*

'There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court.'

The court also added at 141E – H that:

'A litigant, moreover, who knows, as the applicant did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorneys and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney . . . and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the

²¹ 2015 (2) NR 340 (SC).

²² 1965 (2) SA 135 (A) at 141C; cited with approval in, for example, *Leweis v Sampoio* 2000 NR 186 (SC) at 193; *De Villiers v Axiz Namibia (Pty) Ltd* 2012 (1) NR 48 (SC) at 57 para 24.

matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself.'

[36] The proposed witnesses for the defendant in this matter are both employees of the defendant. The failure of the special investigator for the defendant to cooperate with counsel for the plaintiff in finalizing the expert summary was a contributory factor to the delay in this matter. According the supporting affidavit of Mr Slabber, he drafted the expert summary and forwarded it by e-mail to the said witness but same was never returned to his office.

[37] In addition thereto, the second witness listed as witness for the defendant in the pre-trial order, one Ms Nadia van Zyl, whose statement was also not filed, interestingly enough, appears to be the general manager of the defendant, according to annexure 'PL1'²³ attached to the plea of the defendant.

[38] From the supporting affidavit the court must infer that no enquiries were made on behalf of the defendant for an extended period of time, regarding the statements of the witnesses, as Mr Slabber indicated he only came to realise after Easter weekend that the statement of Mr Lehmann, specifically, was not filed. If enquiries were made regarding the progress of this matter, as a diligent litigant would do, it surely would have prompted Mr Slabber to take action sooner in order to comply with the pre-trial order.

[39] After considering all the factors relative to the application for condonation, I remain unpersuaded that the delay has been satisfactorily explained.

The postponement application

[40] In his supporting affidavit, Mr Slabber indicates that 12 April 2017 further chemotherapy treatment was prescribed, which commenced on 20 April 2017 and was scheduled for 11 and 12 May 2017, being the second and third for which the matter was set for trial and that he would thus be unable to attend court on these days.

²³ Page 40 of the Pleadings Bundle.

[41] In light of his unavailability, Mr Slabber applied that the matter would be postponed to a date as set by court.

Legal principles applicable on application for postponement:

[42] It is common cause that the matter of *Myburgh Transport v Botha t/a SA Truck Bodies*²⁴ is *locus classicus* when it comes to postponement applications.

[43] The principles in considering a postponement is set out concisely by the Supreme Court. This court is fully in agreement with the principles set out therein.

[44] The court will be slow to refuse a postponement where the true reason for the party's non-preparedness is fully explained and where his unreadiness is not due to delaying tactics.

[45] The court considered the reason advanced for Mr Slabber's unavailability on 11 and 12 of May 2017, and although this court does not regard it as a delaying tactic, the court must remark that even if Mr Slabber did not have to undergo this treatment, he would not have been ready to proceed with trial due to the failure to file defendant's witness statements.

[46] When Mr Slabber was informed on 12 April 2017 of the dates that he had to attend his treatment, there was still ample opportunity to lodge an application for postponement in terms of Rule 96(3)²⁵ or to return to court and file a status report setting out his predicament.

[47] Again, this was not done and the postponement was sought only two court days prior to the commencement of the trial. Court must also add at this point that no documentary proof regarding his treatment schedule was filed in support of the application.

²⁴ 1991 NR 170 (SC).

²⁵ 96(3) When a matter has been set down for hearing a party may, on good cause shown, apply to the judge not less than 10 court days before the date of hearing to have the set down changed or set aside.

[48] It is obviously of critical importance for Mr Slabber to attend his treatment, but it brings the court back to the measures that had to be in place to ensure that the matter can proceed.

[49] The strict non-adjudgment policy of this court is set out in PD 62(5) and this is in line with the overall objectives of the Rules of court to facilitate matters being finalized expeditiously.

[50] Cases are enrolled for hearing by a managing judge on the basis that the matter will be heard on the assigned date, and not become begged down by interlocutory proceedings raised after the matter was enrolled for trial. A managing judge should be slow to allow any late interlocutory proceedings which may delay the final determination of the case²⁶.

[51] Having said that, each application must be dealt with on its own merits. In the matter at hand the appointment of counsel to attend to the trial, as was done in respect of the current interlocutory proceedings, would have avoided any undue delay in commencing with the trial.

[52] The witnesses for the respondent/plaintiff are present and the matter is ready to proceed.

[53] Vacating the date would cause inconvenience not only to the court but would also cause substantial prejudice to the opposing party as there are no trial dates available for this year and as a result this matter would have to be adjourned until 2018.

[54] This court is not satisfied that the prejudice that will be suffered can be mitigated by a cost order alone. Court must be pointed out that the defendant's legal practitioner offered to pay the cost of this application and has done rightly so.

²⁶ *Nedbank Namibia Limited v Tile and Sanitary Ware CC* (I 1545/2009) [2014] NAHCMD 279 (25 September 2014)

[55] This court thus make the following order:

1. Application for condonation is refused;
2. Application for postponement is refused;
3. Legal practitioner for the Defendant to pay cost of the application on attorney client scale.

J S Prinsloo
Acting Judge

APPEARANCES:

PLAINTIFF:

Mr Bangamwabo

OF:

Clement Daniels, Windhoek

DEFENDANT:

Adv. JP Jones

INSTRUCTED BY:

Weder, Kauta & Hoveka, Windhoek