

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON RULE 53

Case no: HC-MD-CIV-ACT-OTH-2017/01488

In the matter between:

NAMIBIA AIRPORTS COMPANY RESPONDENT/PLAINTIFF

and

**IBB MILITARY EQUIPMENT AND ACCESSORY
SUPPLIES CC**

APPLICANT/DEFENDANT

Neutral Citation: *Namibia Airports Company v IBB Military Equipment and Accessory Supplies Close Corporation* (HC-MD-CIV-ACT-OTH-2017-01488) [2018] NAHCMD 271 (31 August 2018)

CORAM: PRINSLOO J

Heard: 27 July 2018

Delivered: 31 August 2018

Reasons: 06 September 2018

Flynotes: Practice - Applications and motions - Application for condonation for non-compliance with court order - Courts will not grant condonation where flagrant breach of court order - Condonation may be refused notwithstanding good prospects of success – Reasons provided however justifiable and reasonable to grant condonation.

Practice - Applications and motions – Application to compel discovery – Determined to be interlocutory in nature and as a result, Rule 32 (9) and (10) must be complied with – Object of Rule 32 (9) and (10) for parties to genuinely engage one another in trying to resolve the matter – It is therefore not for the parties to choose whether it will comply with these rules or not as the compliance is peremptory and the application stands to be dismissed if it is clear that a party had ulterior motives in complying with the rule.

Summary: During proceedings, this court made an order wherein the plaintiff was ordered to discover by 15 January 2018, which it failed to comply with. The defendant then brought an application to have the plaintiff's claim dismissed as a result of the non-compliance.

Held – the court must decide on the reasonableness of the explanation for the non-compliance of the defaulting party as the provisions of Rule 53 will only apply if and when the court finds that the defaulting party, without a reasonable explanation failed to comply with a case plan, as in this instance. Once the court finds that the defaulting party has no reasonable explanation the court must enter an order that is just and fair.

Held – Non-compliances with court order is serious business but each case will have to be treated in the light of its own peculiar facts and circumstances. Given the circumstance of this matter, it would be an unduly harsh sanction to impose should the court not accept the explanation for non-compliance on behalf of the plaintiff.

Held – the defendant was unduly litigious and instead of allowing the matter to move forward it was halted with an interlocutory application that was in my opinion avoidable. It is therefore necessary that this court should show its displeasure with the conduct of the defendant by imposing an appropriate cost order.

ORDER

- a) On the application in terms of Rule 53:
- i. Application is dismissed with cost. Cost to be cost of one instructing and one instructed counsel. Such costs not to be limited to Rule 32(11).
- b) On the application for condonation:
- i. Plaintiff's non-compliance with the court order dated 01/12/2017 is hereby condoned.
 - ii. Plaintiff to pay the cost of the application.
- c) Matter is postponed 13/09/2018 for a status hearing at 15:00.
- d) Status report regarding the further conduct of the matter must be filed on or before 10/09/2018.

JUDGMENT

Prinsloo J:

The parties:

[1] The applicant¹ in this matter is IBB Military Equipment and Accessory Supplies CC (IBB), a close corporation incorporated in terms of the Close Corporation Act.² Its place of business is situated at Omaruru Street, Erospark, Windhoek.

[2] The respondent³ is the Namibia Airports Company (NAC), a company duly registered and incorporated in terms of the Companies Act,⁴ and the Airports Company Act.⁵ The respondent is a state owned enterprise, in terms of the State Owned Enterprises Act.⁶

Background

[3] The action in the matter *in casu* is a review action instituted by NAC, for the review of its own decision to award a tender to IBB. The relief sought by NAC as set out in the particulars of claim is as follows:

- (1) An order setting aside the purported exemption decision. (Annexure B) and/or
- (2) An order setting aside the purported award letter. (Annexure C); and/or

¹ Defendant in the main action.

² Close Corporation Act No. 26 of 1998.

³ Plaintiff in the main action.

⁴ Companies Act No. 28 of 2004.

⁵ Airports Company Act No. 25 of 1998.

⁶ State Owned Enterprises Act No. 2 of 2006.

(3) An order declaring that no binding and enforceable agreement has been entered into between Plaintiff and Defendant for the upgrading of the Eros Airport and Hosea Kutako International Airport terminal buildings.’

For purposes of this ruling I will further refer to the parties as they are in the main action or to their acronyms, in order to avoid confusion as there are two different applications pending before me.

Application in terms of Rule 53 of the Rules of Court:

[4] The current application is the second interlocutory application between the parties since the action was instituted on 2 May 2017. On 26 September 2017 my Brother Masuku J heard an application in terms of Rule 61, which ruling was delivered on 8 November 2017.⁷ Following the ruling on 8 November 2017 the parties attended to a case planning conference in terms of Rule 23(5) on 01 December 2017 wherein the joint proposed case plan⁸ of the parties dated 29 November 2017 was made an order of court.

[5] The portion of the case plan that is of relevance for the current matter is par 4 of the case plan that read as follows:

‘ (i) As foreshadowed by paragraphs 48 and 49 of the judgment delivered in this matter by His Lordship Mr Justice Masuku on 8 November 2017, defendant requires, in terms of the provisions of rule 18(2)(n) and 19(j) that the plaintiff fully discover, as contemplated by rule 28, by no later than 15 January 2018, and in any event prior to the juncture at which the defendant will be required to file its plea and/or counterclaim.

(ii) The defendant shall be required to discover once the pleadings are closed, and upon the assumption that this be the case by 21 February 2018, the defendant shall discover no later than 15 March 2018.’

⁷ IBB Military Equipment and Accessory Supplies CC v NAC (HC-MD-CIV-ACT-OTH-2017-01488)[2017] NAHCMD 318 (8 November 2017).

⁸ Page 54 to 57 of the indexed bundle.

[6] The relevance of the specific paragraph in the case plan is that it gave rise to the application before me. Which is an application for dismissing the claim of NAC in terms of Rule 53 of the Rules of court.

The relief sought by the IBB

[7] IBB filed a notice of application on 26 January 2018 seeking the following relief:

1. Dismissing the respondent's claims in the action instituted by the respondent under the above case number, in terms of the provisions of rules (53)(2)(a) and/or (b) and/or (c)⁹;

2. In the alternative to the above, directing the respondent, in terms of the provisions of rule 19(j)¹⁰, and/or rule 18(2)(n)¹¹, to make full and comprehensive discovery of the documents identified below within 10 court days from the date of this order:

2.1 -2.15

3. Directing that, if respondent fails to comply with the order reflected by prayer 2 above, applicant shall be entitled to apply, on the papers of the application duly supplemented to the

⁹ **53.** (1) 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, a joint case management report or parties' proposed pre-trial order;
 (c) comply with a case plan order, case management order, a status hearing order or the managing judge's pre-trial order;
 (d);
 (e); or
 (f),

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).

¹⁰ **19.** Every party to proceedings before the court and, if represented, his or her legal practitioner is obliged –

(j) to disclose critical documents to each other at the earliest reasonable time after the person becomes aware of the existence of the document; and....

¹¹ **18(2)** In giving effect to the overriding objective the court may, except where the rules expressly provide otherwise –

(n) give directions for the production or discovery of documents at a more convenient, practical and earlier time;

extent necessary, for an order dismissing the respondent's claim against the applicant, with costs on the scale as between attorney and own client;

4. Granting to applicant such further and/or alternative relief as this Honourable Court may deem fit;

5. Directing that the applicant/defendant will not be required to file its Plea and/or counterclaim on or before 29 January 2018, as previously ordered on 1 December 2017.

6. Directing respondent to pay the costs of this application on the scale as between attorney and client, such costs to include those of one instructing and one instructed legal practitioner.'

[8] The relief sought in paragraph 1 of the notice was opposed and it would appear according to NAC's supporting affidavit, deposed to by Ms. Harases,¹² the legal practitioner acting on behalf of NAC, that full discovery of the full review record was discovered on 14 March 2018.

Chronological flow of events leading up to application

[9] As indicated above a case plan order was issued on 1 December 2017 by Masuku J ordering that the joint proposed case plan of the parties be made an order of court. The proposed case plan sets out the further conduct of the matter and the dates for compliances by the respective parties. During the said proceedings the matter was postponed to 28 March 2018 for a Case Management Conference hearing.

[10] During early January 2018 correspondence were exchanged between the legal practitioners of the parties regarding security for costs but the issue of the discovery was apparently not raised. By 15 January 2018 the NAC did not file the relevant discovery as yet and on 25 January 2018 the legal practitioner acting on behalf of IBB forwarded e-mail correspondence to the legal practitioner acting on behalf of NAC.

¹² Page 79 of Indexed Bundle at paragraphs 26 to 27.

[11] The gist of the e-mail correspondence was that in the event that the complete and full discovery were not received by Friday 26 January 2018 that an application will be lodged to compel NAC to file the necessary discovery with ancillary relief and costs.¹³

[12] On Friday 26 January 2018 at approximately 16:15¹⁴ the current application in terms of Rule 53 was filed and in the alternative application to direct the NAC to make full and comprehensive discovery in terms of rule 28 read with rule 18 (2) (n).and/or 19 (j).

[13] On the same date at 16:45 an explanatory affidavit¹⁵ by Ms. Harases under the caption Sanctions affidavit was filed on E-Justice system together with a discovery affidavit.

[14] In the explanatory affidavit Ms. Harases stated that she understood from the proposed case plan that IBB required discovery of certain documents in order to decide on the amount of security payable and that the said discovery was not made as security was paid on 22 January 2018. She further states that once she received IBB's correspondence on 24 January 2018¹⁶ (sic) regarding the filing of the discovery in terms of paragraph 4(i)¹⁷ (sic) she took the issue up with counsel and was advised to prepare and file the discovery affidavit as soon as possible, which she then filed on 26 January 2018.

[15] On 05 July 2018 NAC brought an application for condonation for non-compliance with the case plan order dated 01 December 2017 with a supporting affidavit by Ms. Harases again explaining the reasons for the non-compliance by NAC with the relevant court order. This application was opposed by IBB and the application for condonation by NAC constitute the second application before me.

¹³ Annexure MO 3 as per page 23 of the Indexed Bundle.

¹⁴ As per E-Justice.

¹⁵ Page 26-28 of Indexed Bundle.

¹⁶ 25 January 2018.

¹⁷ Paragraph 3 (i).

Submissions made on behalf of the Defendant (Applicant)

[15] Mr. Barnard, counsel on behalf of IBB, took issue with the explanatory affidavit of Ms. Harases, on the basis that there is not provision of an explanatory affidavit in opposing an application as the one before court. IBB refers to the affidavit of Ms. Harases as a “purported explanatory affidavit” which should be regarded as an irregular step should thus be disregarded by Court.

[16] The explanatory affidavit of Ms. Harases was severely criticized by Mr. Barnard, and for reasons that will become apparent hereunder I will not discuss the criticism levelled at the said affidavit at this point.

[17] It was argued that the explanatory affidavit explained nothing and did not provide an excuse for what counsel for IBB termed as ‘the cavalier, careless and reckless disregard on the part of NAC’¹⁸ of the court order dated 1 December 2017.

[18] The next issue raised by Mr. Barnard was that the discovery affidavit and the documents discovered in such an affidavit was done to contrive a belated compliance with the court order and that NAC or its legal representatives simply took documents annexed to the particulars of claim and ‘discovered’ such documents. This was done, so it was submitted, without any attempt to have regard to the documents identified in IBB’s notice of application. There was therefore no attempt on the part of NAC to apply their minds to the true ambit of the documents that it had to discover and to such an extent that its actions amounted to a wilful attempt to undermine the principles of discovery and that it was filed for purposes of arguing that discovery had been made and thereby avoid the application to compel.

[19] It was submitted by Mr. Barnard that the discovery affidavit was not such an affidavit at all and that it was fatally defective because of certain statements made by

¹⁸ Paragraph 51 of Applicant/Defendant’s Heads of Argument.

the deponent, Mr Lot Hafidi. In addition thereto the document referred to as 'second schedule' was not attached to the affidavit.

[20] In conclusion Mr. Barnard argued that NAC present the worst kind of contempt and/or disregard of and for the rules of court and court orders conceivable. That by virtue of a court order NAC was ordered to fully discover and to date have failed to file a proper discovery affidavit, complying with the court rules. It was submitted that the attitude taken by the legal practitioners of NAC was to simply not be concerned by their non-compliances with the relevant court order.

[21] On the issue of costs he argued on behalf of IBB that the attitude of NAC appears to be that a wealthy litigant need not comply with court orders as long as it is in a position to pay an "admission of guilt fine". This is with reference to the protective cost provision of Rule 32(11). It would appear that NAC in an effort to resolve the issue of the interlocutory application directed a letter on 9 April 2018 to IBB offering wasted costs to IBB in terms of Rule 32(11).

[22] It was submitted that the a proper case was made out for the main relief sought in the notice of application and that the action of NAC should be dismissed with costs on a scale as between attorney and own client and said costs should not be limited to Rule 32(11).

Submissions made on behalf of the Plaintiff/Respondent

[23] Mr. Heathcote made the position of NAC in respect of the application before this court quite clear. He argued in no uncertain terms that the application is vexations and an abuse of process. He further argued that it is highly opportunistic of IBB to seek the dismissal of NAC's claim.

[24] Mr. Heathcote submitted that the criticism levelled against Ms. Harases is unfair and without merit. He argued that the delay in in filing the discovery was explained, not

once but twice and yet in spite of the explanation IBB proceeded to launch the application to dismiss NAC's action. Mr. Heathcote submitted that IBB's legal practitioners did not even consider what was discovered before launching its application.

[25] It was further argued by Mr. Heathcote that IBB brought the current application seeking the dismissal of NAC's claim, without a determination first being made by the managing judge as to whether the explanation for the lateness in filing discovery of documents was reasonable. He submitted that the court ought to first determine the reasonableness for the non-compliance with the court order dated 1 December 2017, and secondly the court having pronounced itself on the issue of reasonableness, may proceed to enter any order that is just and fair including any of the orders set out in Rule 53(2).¹⁹

[26] Mr. Heathcote argued that a proper explanation was advanced on behalf of NAC as to why the discovery was not made on 15 January 2018 and that the appropriate sanction would not be to dismiss the plaintiff's action.

[27] He pointed out that IBB does not say why it would be 'just' or 'fair' to dismiss NAC's action.

[28] On the issue of how the affidavit by Ms. Harases was termed and framed it was argued that it is beside the point and what is relevant is that an affidavit was filed on behalf of NAC explaining why there was non-compliance with the court order of 1 December 2017. It was further pointed out by Mr. Heathcote that although it was argued on behalf of IBB that the explanatory affidavit is an irregular step and should be

¹⁹ (2) 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 or her legal practitioner to pay the opposing party's costs caused by the non-compliance.

disregarded, however IBB had neither a basis for its contention nor did IBB invoke Rule 61(1) at the time and is now barred from doing so in its heads of argument.

[29] The next issue raised by Mr. Heathcote is IBB's non-compliance with the mandatory Rule 32 process. He argued that the application by IBB stand to be dismissed for lack of compliance with Rule 32(9) and (10). There was no attempt on the part of IBB to amicably resolve the matter and no report was filed in compliance with Rule 32(10). Submissions were made in IBB's heads of arguments that defendant's legal practitioner repeated enquired telephonically from plaintiff's legal practitioners when compliance with the relevant court order can be expected but, Mr. Heathcote argued, this was not raised on affidavit and would constitute inadmissible evidence that belatedly appears in heads of argument, and stands to be rejected.

[30] In concluding on the issue of compliance with the Rule 32 procedure Mr. Heathcote submits that if IBB properly engaged in the Rule 32 procedure as per the Rules of Court there would have been no reason to launch the current application before court. NAC has since discovered what it regards as full record and the legal practitioners of IBB was engaged on the sufficiency of the discovery but the latter made a tactical election not to respond to the repeated enquiries.

[31] Mr. Heathcote argued that no objection was raised by IBB pursuant to the discovery dated 26 January 2018. He argues that IBB acquiesced and elected to limit their participation in the discovery process and is therefore bound by that election insofar as discovery is concerned. He submitted that IBB's submissions made regarding the discovery have no merits.

[32] In concluding Mr. Heathcote contended that IBB's attempt to have NAC's action dismissed without it being fully ventilated is not consistent with the spirit of Article 12 of the Namibian Constitution and requested that the application be dismissed with costs.

Discussion

[33] It is common cause between the parties that NAC did not discover on 15 January 2018 in terms of the case plan order dated 1 December 2017. It is further common cause that a discovery affidavit and explanatory affidavit was filed on 26 January 2018. In view of the NAC's non-compliance with the court order, IBB has applied to this court to impose sanctions on the NAC in terms of the provisions of rule 53. In particular, IBB prayed that the court should strike the defendant's defence in the circumstances. Rule 53 (1) reads as follows:

'If a party or his 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 order set out in subrule (2)'.

[34] Subrule (2), on the other hand, provides the following:

'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.'

[35] Having considered Rule 53 it is evident that there is a number of alternatives available to the court when applying sanctions to an errant party. It is further clear that the imposition of sanctions falls within the discretion of court. In considering applying sanctions the court should exercise its discretion judicially and must enter an order that would be just, appropriate and fair in all circumstances. The court must thus have regard to case at hand, its nuances, the nature of the non-compliance, the attitude or behaviour of the party or its legal representative and thereafter make a value judgment that will at the end meet the justice of the case.²⁰

[36] If one has regard to the sequence of events in the current case from the date of institution of the action one would see that not much happened in the past 16 months apart from interlocutories. The first interlocutory application was filed on 06 June 2017 relating to the issue of irregular proceedings on which the court pronounced itself on 08 November 2017. The case planning conference was held on 01 December 2017 and the second interlocutory was filed on 26 January 2018. There is no long history of non-compliances in this matter. The first non-compliance is also the one that caused the application *in casu* to be brought. The discovery affidavit on behalf of NAC was filed by Ms. Harases nine (9) days after it was due to be filed.

²⁰

Donatus v Muhamederahimvo & Others; Donatus v Ministry of Health and Social Services (I2304/2013; I 1573/2013) [2016] NAHCMD 49 (2 March 2016) at paragraph 32.

[37] As discussed earlier Mr. Barnard was extremely critical in his submissions regarding the affidavit filed by Ms. Harases and the discovery affidavit by Mr Hafidi. Mr Barnard also stated, that Ms. Harases was not truthful to state that she misunderstood the court order regarding discovery and interpreted it to be in respect of the determination of the security to be paid. The terminology used in naming the affidavit was also severely criticized and counsel pointed out to this court that an answering affidavit should be filed in opposition to IBB's application and not an explanatory affidavit. If I look at the court record in context it is clear that the explanatory affidavit was not filed with an aim to oppose the current application but was filed in an effort to explain the non-compliance of the plaintiff with the preceding court order. The notice to oppose the current application was filed on 31 January 2018.

[38] Ms. Harases is an officer of this court there is no reason not to accept what she stated under oath, unless it is obviously patently untrue, which does not appear to be the case. In support of what Ms. Harases stated in her affidavit the court also received the e-mail correspondence to which she refers in the affidavit, seeking direction from the senior counsel in this matter, who in turn advised her that her interpretation was incorrect and that she should file the discovery affidavit without delay, which she did. I am not prepared to castigate a legal practitioner for making a *bona fide* mistake just because it can be argued that she should have known better and should have interpreted the court order differently.

[39] The discovery affidavit and even the explanatory affidavit might be flawed but I must ask myself if that is sufficient ground to dismiss the claim of the plaintiff?

[40] An order for the striking of a defence or dismissing a claim is very serious as it has the potential, if granted, effectively excludes that party from further participation in the trial and this is an order that a court would not make lightly. However, before a matter can go to the extent of making such a decision the court must decide on the reasonableness of the explanation for the non-compliance of the defaulting party as the provisions of Rule 53 will only apply if and when the court finds that the defaulting party,

without a reasonable explanation failed to comply with, for example, a case plan, as in this instance. Once the court finds that the defaulting party has no reasonable explanation, the court must enter an order that is just and fair. Interestingly no reasons were advanced on behalf of IBB why it would be just and fair to dismiss the plaintiff's claim.

[41] Non-compliance with court order is obviously serious business but each case will have to be treated in the light of its own peculiar facts and circumstances. Given the circumstance of this matter it would be an unduly harsh sanction to impose should the court not accept the explanation for non-compliance on behalf of NAC.

Non-compliance with Rule 32(9) and (10)

[42] Rule 32 regulates interlocutory matters and applications for directions. Rule 32(9) and (10), read as follows:

'(9) In relation to any proceeding referred to in this rule, a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication by the court.

(10) The party bringing any proceeding contemplated in this rule must before instituting the proceeding, file with the registrar details of the steps taken to have the matter amicably resolved as contemplated in subrule (9) without disclosing privileged information.'

[43] The alternative to the application to dismiss NAC's action is one in terms of Rule 28 read with rule 18 (2) (n) and/or Rule 19 (j) to procure early discovery. An application to compel discovery in terms of rule 28 is indeed interlocutory in nature and rule 32(9) and (10) would apply.

[44] In many instances Rule 32(9) and (10) proceedings are wielded as a weapon to gain some advantage over an opponent.

[45] In the matter of *Haufiku v Kaukungwa*²¹ Parker AJ said the following in this regard:

'The object of rule 32(9) and (10) should not be seen as a weapon to be used furtively by one party against the other in a manner that encourages ambushes in judicial proceedings. In short, the efficacy of the rule should not be prostituted in a manner that renders the rule an instrument of gaining unfair advantage, rather than an instrument of attaining justice, fairness and expedition in judicial proceedings.'

[46] It is common cause that Rule 32(9) and (10) was not complied with in the matter before me. In the solemn affirmation of Mr. Naude he contended that the e-mail directed to Ms. Harases on 25 January amounted to an attempt on behalf of IBB in terms of Rule 32(9), to avoid the launching of the application.²² It was further his contention that IBB was not required to file a Rule 32(10) certificate in this matter.

[47] The e-mail correspondence referred to reads as follows:

"We refer to the above matter and the Court Order dated 01 December 2017, as well as the Case Plan dated 29 November 2017, filed herein.

According to the Case Plan the Plaintiff had to file its full Discovery on or before 15 January 2018, but we have not received any Discovery to date hereof.

We accordingly await discovery herein as a matter of urgency as our client, the Defendant, has to file its Plea to your and/or Counterclaim on Monday 29 January 2018, which we will be unable to do due to your default and non-compliance with the Court Order.

Should we not receive your complete and full Discovery, as ordered, by Friday 26 January 2018 at 12h00, an Application will be lodged to, inter alia, compel your client with ancillary relief and costs.

²¹ (A 25/2016) [2017] NAHCMD 64 (9 March 2017).

²² Indexed Bundle Page 15.

All our client's rights are and remains reserved.

We urgently await to hear from you.”

[48] It is my considered opinion that there is not the slightest effort on the part of the defendant to resolve the issue of the discovery amicably. In the affidavit of Ms. Harases she indicates that she spoke to the personal assistant of the legal practitioner on record for the IBB on the morning of the 26 January 2018 informing her that the relevant discovery would be filed during the course of that day, yet in spite thereof IBB proceeded to file the application in terms of Rule 53 on the same day.

[49] If IBB engaged NAC in Rule 32 proceedings the parties would have been able to resolve the matter amicably. What is interesting is that no mention was made in the abovementioned correspondence of an application to dismiss the claim of NAC. There is only reference to an application to compel discovery, which is regulated by Rule 28. However instead of an application to compel the Plaintiff to discover defendant went for the jugular, i.e. application to dismiss in terms of Rule 53.

[50] What is even more disturbing is that even though full discovery was made on 14 March 2018 and in spite of NAC offering to pay the cost of the interlocutory on 09 April 2018, this matter still proceeded to argument and IBB still persist in their argument that the claim of the plaintiff should be dismissed.

[51] IBB never had the intention of amicably settling this matter, that much is clear from the papers before me. In their heads of argument on the issue of compliance with Rule 32(9) and (10) it was argued on behalf of IBB that it is 'unlikely that the plaintiff will agree to abandon its action. For such reason it would amount to an empty charade to seek a concession from it that its action can no longer be pursued, as purported attempt to comply with the provisions of rule 32(9).' However, in the same breath IBB allege in its heads of argument that there was continuous attempts to secure an undertaking from

NAC's legal practitioner that their client will comply with provisions of the court order of 1 December 2017. IBB is clearly contradicting its own earlier submissions.

[52] Reference is made to the plaintiff abandoning its action but as indicated earlier the issue between the parties was to compel NAC to discover, as per correspondence dated 25 January 2018, and not Rule 53 proceedings. There was no reason not to engage the plaintiff on the issue of the application to compel. The argument that compliance with Rule 32 proceedings would be an empty charade therefor does not pass muster.

[53] I need to emphasize that the defendant cannot choose whether it will comply with these rules or not as the compliance is peremptory and the application stands to be dismissed.

Condonation application by NAC

[54] I have considered the affidavits of Ms. Harases and I am satisfied that the non-compliance with the court order was duly explained.

[55] Where there has been non-compliance by a party but which when objectively considered does not yield an injustice or serious prejudice to the other party, the court should, in appropriate circumstances and subject to appropriate safeguards, condone the non-compliance.²³

[56] In *Petrus v Roman Catholic Archdiocese*,²⁴ at para [10] O'Regan AJA unequivocally stated:

"In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant's

²³ *Donatus v Muhamederahimvo & Others; Donatus v Ministry of Health and Social Services* Supra footnote 18 at paragraph 26.

²⁴ 2011 NR 637.

prospects of success on the merits, save in cases of “flagrant non-compliance with the rules which demonstrate a “glaring and inexplicable disregard” for the processes of the court.”

[57] NAC’s explanation for its non-compliance was filed 9 court days after discovery was due and a subsequent application for condonation and supporting affidavit was filed. The latter amplified the explanatory affidavit filed in January 2018. The initial affidavit was filed as soon as the non-compliance was brought to the attention of Ms. Harases.

[58] I am of the opinion that the non-compliance was not flagrant or glaring and that it would be order to grant the plaintiff condonation for its non-compliance with the relevant court order.

[59] As the NAC is seeking an indulgence from this court it will then be liable for the cost of this application.

Conclusion

[60] When I consider the manner in which IBB conducted this application it is clear to me that there was an abuse of the court process. IBB was unduly litigious and instead of allowing the matter to move forward it was halted with an interlocutory application that was in my opinion avoidable. It is therefore necessary that this court should show its displeasure with the conduct of the defendant by imposing an appropriate cost order.

[61] My order is thus as follows:

a) On the application by the defendant in terms of Rule 53:

- i. Application is dismissed with cost. Cost to be cost of one instructing and one instructed counsel. Such costs not to be limited to Rule 32(11).

- b) On the application for condonation by plaintiff:
- i. Plaintiff's non-compliance with the court order dated 01/12/2017 is hereby condoned.
 - ii. Plaintiff to pay the cost of the application.
- c) Matter is postponed 13/09/2018 for a status hearing at 15:00.
- d) Status report regarding the further conduct of the matter must be filed on or before 10/09/2018.

J S Prinsloo
Judge

APPEARANCES:

APPLICANT/DEFENDANT: T Barnard (with him A Naude)
instructed by Dr Weder, Kauta & Hoveka Inc.,
Windhoek

RESPONDENT/PLAINTIFF: R Heathcote (with him L Kavendjii)
instructed by Kangueehi & Kavendjii Inc., Windhoek