

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR CONDONATION

Case No: HC-MD-CIV-ACT-CON-2017/00734

In the matter between:

ANDRICO INVESTMENTS NUMBER SIXTY FIVE CC

PLAINTIFF

And

WELWITSCHIA FAMILY CLINIC CC

DEFENDANT

Neutral citation: *Andrico Investments Number Sixty Five CC v Welwitschia Family Clinic CC* (HC-MD-CIV-ACT-CON-2017/00734) [2018] NAHCMD 110 (26 April 2018)

Coram: PRINSLOO J
Heard: 15 November 2017
Delivered: 06 December 2017
Reasons: 26 April 2018

ORDER

- a) The application for condonation for the late filing of the rescission application is granted.
 - b) Condonation for non-compliance with the court order dated 31 August 2017 is hereby granted.
 - c) Cost in respect of the application for condonation to stand over for determination at end of the interlocutory application.
 - d) The case is postponed to 14/03/2018 at 09:00 for Hearing of the Interlocutory Application (Reason: Application for rescission of judgment)
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RULING IN TERMS OF PD 61 OF THE PRACTICE DIRECTIVES

PRINSLOO J:

[1] This is a ruling condonation for late filing of the application for rescission of judgment in terms of Rule 16 (1) of the Rules of the High Court. This rule requires that a rescission application for a default judgment granted under that rule be brought within 20 days after the defendant acquired knowledge of the judgment. In addition thereto, there is also an application for condonation for non-compliance with court order dated 31 August 2017, more specifically the late filing of applicant's heads of arguments.

[2] It is common cause that the default judgment granted in favor of the respondent came to the attention of the applicant on 08 May 2017 when the writ of ejectment was executed by the Deputy Sherriff. It is further common cause that the application for rescission of judgment was due to be filed on or before 05 June 2017 whereas it was only filed on 08 June 2017. The application was thus filed three days out of time.

[3] In such a case, the applicant is required to file an application for condonation for the late filing of the rescission application.¹ The court will only grant such an application on good cause shown for the delay. The applicant is required to provide reasons for the delay by bringing the application with sufficient detail to enable the court to understand the cause for the delay and to assess the applicant's motive for bringing the application.²

[4] The plaintiff opposed the application for condonation and further argued that the application should fail already on the ground of non-compliance with Rule 32(9) and (10).

[5] This court only dealt with the condonation application and the outcome of the said application would dictate the further conduct of the matter.

Was compliance with Rule 32 (9) and (10) required before launching the application for condonation?

[6] As in the matter of *Haufiku v Kaukungwa*,³ the application for condonation is not one where it is indicated in the case plan or other judicial case management report that an interlocutory application will be instituted and that the applicant that instituted the interlocutory institutes the interlocutory without compliance with Rule 32 (9) and (10).⁴

[7] Parker AJ also remarked the following in the matter of *Haufiku v Kaukungwa* at para 25 of that judgment:

'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

¹ Rule 55(1).

² *Silver v Ozen Wholesaler (Pty) Ltd* 1954 (2) SA 345 (A) at 352.

³ (A 25/2016) [2017] NAHCMD 64 (9 March 2017)

⁴ *Mukata v Appolus* 2015 (3) NR 695 (HC)

of gaining unfair advantage, rather than an instrument of attaining justice, fairness and expedition in judicial proceedings.’

[8] The applicant launched her application on 08/06/2017 after she withdrew previous application. On 05/06/2017 the applicant complied with the Rule 32(9) and (10) and filed the relevant report. The opposition based on Rule 32(9) and (10) is without merit.

Law relating to condonation applications

[9] To determine whether the applicant has shown good cause for the delay, I am guided by the following factors: the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the Respondent’s interest in the finality of its judgment, and the avoidance of unnecessary delay in the administration of justice.

[10] It is trite that applicants for condonation are required to meet the two requisites of good cause before they can succeed in such an application. The first entails establishing a reasonable and acceptable explanation for the non-compliance with the rule(s) in question and secondly satisfying the court that there are reasonable prospects of success on appeal. In *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) at para 5 the Supreme Court practically summarised the jurisprudence of the court on the subject of condonation applications for the benefit of practitioners in the following way:

‘The application for condonation must thus be lodged without delay, and must provide a full, detailed and accurate explanation for it....They 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 success on the merits of the case, 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.”

These factors are not individually determinative, but must be weighed, one against the other. Nor will all the factors necessarily be considered in each case. There are times, for example, where this court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been glaring, flagrant and inexplicable.'

Application of the law to the facts

[11] I am satisfied that a reasonable explanation was advanced for the delay in filing the defendants' plea. It is further clear that the defendant was *bona fide* and that the application for condonation was not made with the object of delaying this matter. There appears to be no reckless or intentional disregard for the Rules of Court.

[12] In the result, I make the following order:

- a) The application for condonation for the late filing of the rescission application is granted.
 - b) Condonation for non-compliance with the court order dated 31 August 2017 is hereby granted.
 - c) Cost in respect of the application for condonation to stand over for determination at end of the interlocutory application.
 - d) The case is postponed to 14/03/2018 at 09:00 for Hearing of the Interlocutory Application (Reason: Application for rescission of judgment)
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J S Prinsloo

Judge

APPEARANCES:

Plaintiff:

A Van Vuuren

instructed by Fisher, Quarmby & Pfeiffer, Windhoek

Defendant:

M Petherbridge

of Petherbridge Law Chambers, Windhoek