

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case Number: **HC-MD-CIV-ACT-OTH-2016/02233**

In the matter between:

MARGARET EWERT

FIRST PLAINTIFF

MARGARET EWERT

SECOND PLAINTIFF

And

HENNIE COETZER

DEFENDANT

Neutral citation: *Ewert vs Coetzer* (HC-MD-CIV-ACT-OTH-2016/02233) [2019]
NAHCMD 53 (31 January 2019)

Coram: **UEITELE J**

Heard: **02 October 2018**

Delivered: **31 January 2019**

Reasons: **11 March 2019**

Flynote: *Practice* – Rules of court – Interpretation and discussion on Rule 93 (5) on witness statements filed out of time as per court order – Meaning of ‘good cause’ – The ‘good cause’ must be such as it would persuade the court, in exercise of its judicial discretion, to treat the delay or the default as an excusable one – Circumstances of delay and ‘good cause’ shown to vary case by case.

Summary: The plaintiffs in this matter issued summons out of this court seeking the eviction of the defendant from an immovable property situated in the District of Grootfontein. The defendant opposed the application and also filed a counterclaim.

The matter was docket allocated to a managing judge who directed the parties on when to file their pleadings. At the case management conference, the managing judge directed the parties to file their witnesses' statements by not later than 29 September 2017. The plaintiffs failed to file their witnesses' statements by the date set by the managing judge.

On application for the condonation of the late filing of her witnesses' statements, the plaintiff's application for condonation was dismissed and the plaintiff's witnesses' statement disallowed. At the trial of the matter the plaintiff applied to, in terms of Rule 93(5), lead oral evidence.

Held that the overriding objective of the rules of court is to facilitate the resolution of the real issues in dispute between parties justly and speedily. When a court deals with a party who, has failed to comply with the rules, practice direction, court order or direction, it exercises a discretion. That, in accordance with a Constitutional promise that every person in Namibia is entitled to a fair and just trial by a competent and independent Court or Tribunal, the court must impose a sanction that is just, appropriate and fair in all the circumstances.

Held that rule 93(5) empowers the court to, on 'good cause' shown, permit a witness who is otherwise 'barred' to participate and testify at the hearing.

Held further that this court has accepted that two essential elements are discernible from the phrase, namely that the party seeking relief must present a reasonable and acceptable explanation for default; and that on the merits that party has a *bona fide* defence or claim which *prima facie* carries some prospects or probability of success.

Held further that the expression 'good cause' implies the presence of legal and adequate reasons. The 'good cause' must be such as it would persuade the court, in

exercise of its judicial discretion, to treat the delay or the default as an excusable one and that the exercise of the court's discretionary power are generally influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The court found that the plaintiffs have shown good cause as contemplated in rule 93 (5).

ORDER

- a) The plaintiff is, in terms of rule 93 (5), granted leave to give oral evidence at the trial of this matter.
- b) The plaintiffs' must pay the defendant's costs of this application and the wasted costs for 02 July 2018.
- c) The matter is postponed to 23 April 2019 for purposes of determining trial dates of the matter.

JUDGMENT

UEITELE J

Introduction

[1] The main dispute in this matter revolves around the possession and ownership of a portion of agricultural land. The issue that I am, however, now called upon to decide is an intermediate skirmish between the plaintiffs and the defendant.

[2] Ms Margaret Ewert, a pensioner, has instituted action in her personal capacity, as first plaintiff and also in her capacity as executrix in the estate of her late husband,

Bruno Rudolf Ewert, who was the co-owner of the agricultural land in dispute and which land is situated in the Grootfontein District of the Republic of Namibia.

[3] The defendant is a certain Hennie Coetzer, also a pensioner but who at the time of hearing this matter, was employed on a part-time basis. He alleges that he resides on the land which is the subject of the dispute between the parties.

[4] I find it appropriate to, in best understanding this matter, briefly sketch the background which has given rise to this dispute. I have discerned the background from the pleadings and the other documents filed of record in this matter. I now turn to give the background as I have understood it.

Factual background

[5] On 8 January 1990 the late Bruno Rudolf Ewert, who was married in community of property to Margaret Ewert, purchased a portion of agricultural land known as:

CERTAIN	Portion 10 of Farm Felsenquell No. 2
SITUATE	In Registration Division "B" Otjozondjupa Region
MEASURING	39, 4332 (Three nine comma four three three two) hectares
HELD BY	Deed of Transfer No. T 2440/1987.

(I will in this judgment refer to this piece of land as the property).

[6] The late Bruno Rudolf Ewert by Deed of Transfer Number T 2809/1990 dated 30 August 1990 took transfer of the property on 15 August 1990. Approximately fourteen years later, that is, on the 1st day of March 2004, the late Bruno Rudolf Ewert and his wife, Margaret Ewert, (as sellers) and the late Johann Albrecht Buchholz and his wife Ina Buchholz (as purchasers) concluded an *'Offer to Purchase which*

constitutes a Deed of Sale when accepted', in terms of which the Buchholz or their nominee or a close corporation still to be registered purported to purchase the property.

[7] In terms of clause 17.1 of the '*Offer to Purchase*', the property was subject to the Government of the Republic of Namibia's preferent right to be first offered that property. On 17 September 2009, the Government of the Republic of Namibia represented by the then Minister responsible for Lands and Resettlement (now the Ministry of Land Reform) waived, in terms of s 16 of the Agricultural (Commercial Land) Reform Act, 1995,¹ its right to purchase the property. The waiver of the right was valid for a period of one year unless extended by the responsible Minister.

[8] On 02 August 2010 the late Johann Albrecht Buchholz and his wife Ina Buchholz, nominated Hennie Coetzer as the purchaser in terms of the '*Offer to Purchase*' dated 01 March 2004. On the same date, that is on 02 August 2010, Hennie Coetzer accepted the nomination as Purchaser of the property.

[9] From the pleadings and documents filed of record, it is not clear as to when and how Hennie Coetzer obtained possession and occupation of the property, what is, however, clear is that during November 2010 the late Bruno Rudolf Ewert and his wife, Margaret Ewert, instituted proceedings in the Magistrates' Court for the District of Grootfontein seeking the eviction of Hennie Coetzer from the property.

[10] The Magistrates' Court for the District of Grootfontein, on 13 May 2011 found that Mr Hennie Coetzer occupied that property pursuant to a permission given to him by Ms Ina Buchholz (who was acting in her personal capacity and in her capacity as executrix in the estate of late Johann Albrecht Buchholz) and as such the occupation, by Hennie Coetzer was not unlawful. The Magistrates' Court accordingly dismissed the late Bruno Rudolf Ewert and his wife, Margaret Ewert's claim and ordered them to pay the costs of that action.

[11] Before the 'dust' could settle after the Ewerts' claim was dismissed, Ms Ina Buchholz acting in her personal capacity and in her capacity as executrix in the

¹ Agricultural (Commercial Land) Reform Act, 1995 (Act No.6 of 1995).

estate of late Johann Albrecht Buchholz during the year 2011 commenced proceeding by notice of motion (I was not able to determine the exact date when the proceedings were commenced) in this court in terms of which she in essence sought an order compelling the late Bruno Rudolf Ewert and his wife Margaret Ewert to sign all the necessary documentation so as to effect transfer of the property to Hennie Coetzer and also seeking an order directing the late Bruno Rudolf Ewert and his wife Margaret Ewert to submit an application for a Certificate of Waiver to the Minister responsible for Land Reform in terms of the Agricultural (Commercial) Land Reform Act, 1995.

[12] That matter (Ms Ina Buchholz's claim) was heard by my brother Justice Parker, during January 2016, who on 26 February 2016 delivered judgement.² In his judgment, Justice Parker found that the '*Offer to Purchase which constitutes a Deed of Sale if accepted*' was invalid and he dismissed the claim. The dismissal of Ms Ina Buchholz's claim did not resolve the dispute between the parties and on 11 July 2016, Ms Margaret Ewert in her personal capacity and in her capacity as executrix in the Estate of her late husband Bruno Rudolf Ewert commenced proceedings in this Court seeking the ejectment of Hennie Coetzer from the property.

[13] Hennie Coetzer opposed the claim and apart from opposing the claim, he instituted a counterclaim in terms of which he sought an order directing Ms Margaret Ewert *NO* to sign all the documents and to do all things necessary to transfer the property into his name. Mr Coetzer, in the alternative claimed; payment in the sum of N\$ 780 000. The matter was, on 09 August 2016 docket allocated for case management to my brother Justice Oosthuizen who, at a case planning conference held on 29 September 2016, directed the parties on when to file their various pleadings. The parties were directed by the managing judge to exchange their pleadings between 05 October 2016 and 27 October 2016.

[14] Because of the vagaries of litigation, the parties throughout the course of the case had some setbacks and could not fully comply with court orders during the process of case management, necessitating applications for condonation and requests to extend dates on which to file certain pleadings. The matter was ultimately

² That judgment is reported as *Buchholz NO and Another v Ewert and Others* 2016 (2) NR 511 (HC).

postponed to 10 July 2017 for the purpose of holding a Pre-Trial Conference hearing. At the Pre-Trial Conference hearing of 10 July 2017, the managing judge, amongst other orders, ordered the parties to file witness statements by not later than 29 September 2017 and set down the matter for trial on the Action Floating Roll for the week of 07 May to 11 May 2018. The managing judge furthermore postponed the matter to 12 March 2018 for a 'Pre-Trial status hearing'.

[15] The plaintiff did not, as ordered by the court, file her witness statements by 29 September 2017. On 12 March 2018, the plaintiff's legal practitioner lodged an application for the condonation of her failure to file the plaintiffs' witnesses statements as directed by the managing judge in the Pre-Trial order dated 10 July 2017. On 12 March 2018 at the 'Pre-Trial status hearing', the court postponed the matter to 16 April 2018 to hear the condonation application and on that date, the court postponed the matter to 23 April 2018 for a ruling and to provide reasons for the ruling. On 23 April 2018 the ruling and reasons were not ready and the court again postponed the matter to 30 April 2018. The court ultimately made its ruling on the 30th April 2018. In the order of 30 April 2018, the court made the following order:

- '1 Matter is removed from the roll: Case Finalized.
- 2 Witness statement of plaintiff's Margaret Ewert is disallowed.
- 3 Plaintiff's condonation application dismissed with costs.
- 4 Capping in terms of Rule 32(11) shall apply.'

[16] On 02 May 2018, the Registrar of this court issued a notice informing the parties that the matter has been removed from the Action Floating Roll for the week commencing on 7 May 2018.³ Hot on the heels of the notice removing the matter from the Action Floating Roll, the Registrar issued another notice dated 03 May 2018 in terms of which she notified the parties that the matter is scheduled for a hearing on

³ That notice reads as follows:

- '1. The managing judge, Honourable Justice OOSTHUIZEN, hereby notifies the parties or their legal practitioners that the matter as set down on the Action Floating Roll for 07th day of May 2018 at 10:00 AM has been cancelled, due to the following reason:
- 2 Case finalized as per Court Order 30 April 2018'.

the Action Floating Roll for the week commencing 07 May 2018.⁴ When the matter was called for trial before Justice Unengu on 07 May 2018, he made an order referring the matter back to Justice Oosthuizen for the latter to properly place the matter on the Action Floating Roll for Trial.⁵ On 14 May 2018, the parties attended a hearing before Justice Oosthuizen who postponed the matter to 02 July 2018 for trial on the Action Floating Roll on commencing the week of 02 July 2018.

[17] The matter was allocated to me and placed on my Action Floating Roll for the week of 02 to 06 July 2018 for trial. When the matter was called on 02 July 2018, Mr Naude who appeared on behalf of the defendant, submitted that the plaintiff was, in terms of Rule 93 (5),⁶ not allowed to testify because the court, per Justice Oosthuizen, on 30 April 2018 disallowed the witness statement of Ms Ewert and her application for the condonation of the late filing of her witness statement was dismissed.

[18] After I read the court order of 30 April 2018, which I have quoted above,⁷ I formed the view that that court Order was incomplete and vague. I say the order of 30 April 2018 was incomplete because it did not state what happens with the plaintiff's claim, nor did it state what would happen to the plaintiff's pleadings (that is, her particulars of claim, her plea to Coetzer's counterclaim and her replication to Coetzer's plea) that were still on the record. The order furthermore did not indicate what role the plaintiff had to play or not play at the trial. I furthermore say the order of 30 April 2018 was vague because that order removed the matter from the roll and regarded it finalized without specifying which matter it was that was finalized and removed from the roll. Surely the dispute between Ms Ewert and Mr Coetzer could not have been finalized because the merits of their respective claims were never

⁴ That Notice reads as follows:

'The Honourable Justice UNENGU, hereby directs the parties or their legal practitioners to attend the hearing on the Action Floating Roll (according to the Pre-Trial Order dated 10 July 2017) to be held at **Windhoek** on **07th day of May 2018 at 10:00 AM** at the Windhoek Correctional Facility, Otjozondjupa Court Room. All court documents must be clearly indexed.'

⁵ The Order made by Justice Unengu on 07 May 2018 reads as follows:

'Due to the confusion created by the court order dated 30 April 2018 read with the Notice of Cancellation dated 02 May 2018, the matter is referred back to the case management roll of the Honourable Judge Oosthuizen for 14 May 2018 at 14h00 to properly enroll the matter for trial.'

⁶ Rule 93(5) reads as follows:

'If a witness statement for use at the trial is not served within the time specified by the court the witness may not be called to give oral evidence, unless the court on good cause shown permits such witness to give oral evidence'.

⁷ The Court Order of 30 April 2018 is quoted in paragraph 14 of this judgment.

addressed by the managing judge. I formed the further view that for the purpose of completeness, the court on 30 April 2018 ought to have in clear terms told the parties what the state of the plaintiffs' claim and defence to counterclaim were.

[19] In order to eliminate or address the uncertainty emanating from the order of 30 April 2018, I made an order directing the plaintiffs to show cause why I must not absolve the defendant from the instance and why I must permit Ms Ewert to give oral evidence at the trial of this matter. Ms Ewert, on behalf of the plaintiffs, filed an application supported by an affidavit explaining why I must not grant an order for absolution from the instance and why I must grant leave to Ms Ewert to testify at the trial. Mr Coetzer on the other hand opposed the application and his legal practitioner (Mr Naude) deposed to an affidavit opposing the application. I pause here to observe that the wisdom of a legal practitioner deposing to an affidavit in a matter in which he is involved as a legal representative was questioned by Justice Masuku in the matter of *Soltec CC v Swakopmund Super Spar*.⁸ I endorse the sentiments expressed by my brother in that judgement. Mr Naude and Ms Ferris are advised to read that judgment. I now turn to the plaintiff's application to be permitted to lead oral evidence at the trial of this matter.

Ms Ewert's affidavit.

[20] Ms Ewert, in her affidavit in support of her application to be allowed to give evidence at the trial of this matter, states that she has been advised that on 30 April 2018, the court disallowed her witness statement. She states that she has further been advised that although her witness statement has been disallowed, that was not the end of the matter because in terms of Rule 93 (5), the court may on good cause shown allow her to give oral testimony at the trial of this matter.

[21] Ms Ewert explains that the reason why her witness statement was disallowed is not because of her fault but that of her legal practitioner and her legal practitioner's conduct was totally out of her control. She further argues that if the court were to allow her to place her version before court, the defendant, Coetzer, will not be prejudice at all, because whatever she is going to testify to in court, Coetzer is

⁸ *Soltec CC v Swakopmund Super Spar* (I 160/2015) [2017] NAHCMD 115 (Delivered on 18 April 2017) at paras [54] to [70].

already well aware of. She submits that her claim is contained in her particulars of claim, her plea to Coetzer's counterclaim and in her replication to Coetzer's plea. These pleadings have not been struck and are part and parcel of the record which is before court. She further submits that her version was also placed before court in the application which the Buchholz's launched in 2011 and which resulted in the judgment of Justice Parker of 26 February 2016, which found that the agreement on which Coetzer relies for his occupation of the property was declared void.

[22] Ms Ewert further submits that if she is not allowed to testify at the hearing of the matter, the court will have to grant absolution from the instance because the court will not have her evidence before it, meaning that she will have to start all over again and this may take another two to three years before the matter could be finalized. She submits that this will severely prejudice her because she is currently 74 years of age and her health condition deteriorates on a daily basis and her memory is fading. She further argues that her prospects of success are good because Justice Parker found that the agreement on which Coetzer relies is void and that finding of Justice Parker has not been appealed or altered, so there is as such no reason why Coetzer is still in occupation of the property. The lack of finality to this dispute furthermore hampers the finalization of her late husband's Estate. She thus conclude by stating that she has shown good cause why the court must, as contemplated in Rule 93 (5), allow her to lead oral evidence at the trial of this matter.

Ms Naude's affidavit.

[23] Mr Naude commenced his affidavit by raising a point *in limine* where he contends that the plaintiffs (that is, the first and second plaintiffs in this matter) did not obtain leave from this court to lodge an application to this court in the fashion that she (they) did for condonation. He continued and said that the parties were only requested by the court to provide reasons as set out in the court order of 02 July 2018 and to state their case as to why the Court must not grant absolution from the instance against the plaintiffs. *'In any event, there is a fresh court order by this court (by J. Oosthuizen) made on 30 April 2018 and whereby the Plaintiffs' witness statement was disallowed and the condonation application was dismissed with costs on its merits. No case was then made out'* said Mr Naude.

[24] Mr Naude proceeded to contend that the use of the witness statement by the plaintiffs and the condonation application are *res judicata*. He states that as no appeal was lodged against dismissal of the condonation application, the said court order stands and it is not open or lawful for the plaintiffs/applicants to bring a similar and new application for condonation and/or leave to testify, barely 2 months after the granting of the court order on 30 April 2018. This is contempt of the court order and the use of the same facts and evidence and annexures of the previous abortive condonation application should not be allowed, pressed Mr Naude.

[25] Based on the court order of 30 April 2018, the plaintiffs are barred from leading evidence and the plaintiffs no longer have any lawful or admissible evidence on which she can rely to prove her case, contends Mr Naude. He continued and said the test for absolution from the instance at the close of the plaintiff's case is whether there is admissible evidence on which the Court, applying its mind reasonably to the evidence, could or might find for the plaintiffs. The answer is that there is no admissible or lawful evidence on which the Court can find for the plaintiffs. The irregular and unlawful attempt by the plaintiffs to again apply for condonation on the same facts must be dismissed by the Court, also for the reason that the court did not grant the plaintiffs' leave to so apply in contempt of the Court Order of 30 April 2018.

[26] He continued and said the irregular and unlawful attempt by the plaintiffs to again apply for condonation on the same facts must be dismissed by the court, also for the reason that the court did not grant the plaintiffs leave to so apply in contempt of the court order of 30 April 2018. Mr Naude accordingly implored the Court to absolve the defendant from the instance against plaintiffs' claims and defences and that the defendant be allowed to proceed with his counterclaims filed of record and to lead his evidence.

General remarks.

[27] Before I deal with the question that is confronting me (namely, whether or not this Court may allow Ms Ewert to testify at the trial of this matter) I want to make

some preliminary comments as regards the current rules of court. It is now common cause that since April 2011 when the case management rules of this court were first introduced, those rules marked a radical departure from the civil process of old. The Rules are divided into 15 separate parts. Each part deals or governs a specific area during the progress of a matter. Part 1 of the rules deals with the definitions of words used in the Rules and with the objectives of the rules. Rule 1(2), (3) and (4) of the High Court Rules⁹ amongst others reads as follows:

(2) These are rules for the conduct of proceedings in the court and for giving effect to the provisions of Article 12(1) of the Namibian Constitution and the overriding objective set out in subrule (3) governs the application of these rules.

(3) 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) ensuring that the parties are on an equal footing;

(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;

(e) recognising that judicial time and resources are limited and therefore allotting to each cause an appropriate share of the court's time and resources, while at the same time taking into account the need to allot resources to other causes; and

(f) considering the public interest in limiting issues in dispute and in the early settlement of disputes by agreement between the parties in dispute.

(4) The factors that a court may consider in dealing with the issues arising from the application of the overriding objective include –

⁹ High Court Rules published under Government Notice No. 4 of 2014 and promulgated in *Government Gazette* No. No. 5392 of 17 January 2014.

- (a) the extent to which the parties have complied with any pre-trial requirements or any other mandatory or voluntary pre-trial process;
- (b) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute;
- (c) the degree of promptness with which the parties have conducted the proceeding, including the degree to which each party has been prompt in undertaking interlocutory steps in relation to the proceeding;
- (d) the degree to which any lack of promptness by a party in undertaking the step or proceeding has arisen from circumstances beyond the control of that party;
- (e) any prejudice that may be suffered by a party as a consequence of any order proposed to be made or any direction proposed to be given by the court;
- (f) the public importance of the issues in dispute and the desirability of a judicial determination of those issues;
- (g) the extent to which the parties have had the benefit of legal advice and representation; and
- (h) any other relevant matter.'

[28] Part 2, of the Rules deal with court process before judicial case management, Part 3 of the Rules deal with the process of judicial case management, Part 4 of the Rules deals with the procedural steps in respect of causes, Part 5 of the Rules deal with pleadings and Part 6 of the Rules deal with non-compliance with Rules of court, Practice Directions or court orders. Rule 53 specifically deals with sanctions for failure to comply with the rules, practice direction or court order or a direction issued by a managing judge and states the following:

'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) participate in good faith in a case planning, case management or pre-trial process;
- (e) comply with a case plan order or any direction issued by the A 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).'

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

'(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 legal practitioner to pay the opposing party's costs caused by the non-compliance.'

[30] Part 10 of the Rules regulates the process at the trial stage of a matter. Rule 92 (1) and 93 (5) amongst other matters read as follows:

'Witness statement

92. (1) After the case management conference or at the pre-trial conference the managing judge must order the parties on Form 20 to serve on the other party a witness statement of the oral evidence which the party serving the statement intends to adduce during the trial in relation to any issues of fact to be decided at the trial.

93. (1) If a party has served a witness statement and he or she wishes to rely at the trial on the evidence of that witness he or she must call the witness to give oral evidence.

(2) ...

(5) If a witness statement for use at the trial is not served within the time specified by the court the witness may not be called to give oral evidence, unless the court on good cause shown permits such witness to give oral evidence.'

[31] What stands out clear from the Rules that I have quoted above is the fact that the overriding objective of the Rules of court, is to facilitate the resolution of the real issues in dispute between parties justly and speedily. It thus follows that when a court deals with a party who, has failed to comply with the rules, practice direction or court order or direction, it exercises a discretion. It is equally clear that, in accordance with Constitutional promise that every person in Namibia is entitled to a fair and just trial by a competent and independent court or tribunal, the court must impose a sanction that is just, appropriate and fair in all the circumstances. This was eloquently articulated by Justice Masuku in the matter of *Donatus v Ministry of Health and Social Welfare* where he said:¹⁰

'It is clear from the foregoing that the court, in applying sanctions to an errant party, exercises a discretion and has at its disposal a panoply of alternatives in terms of punishing a party that is in default of a court order or direction. In this regard, it would seem to me that the court should enter an order that is just, appropriate and fair in all the circumstances. It would seem to me that the court has to consider the case at hand; its nuances; the nature of the non-compliance; its extent; its effect on the further conduct on the proceedings; the attitude or behaviour of the party or its legal representative, to mention some of the considerations, and thereafter make a value judgment that will at the end meet the justice of the case'.

¹⁰ *Donatus v Ministry of Health and Social Welfare*: 2016 (2) NR 532 (HC).

[32] In *Hilifilwa v Mweshixwa*¹¹ Masuku J took the same approach. In that case, the 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 stating¹² 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.'

[33] Against the background of these general remarks, I now proceed to consider whether the court may or may not allow Ms Ewert to testify at the trial of this matter and what order is appropriate if Ms Ewert is not allowed to testify at the trial of the matter.

May the Court allow Ms Ewert to testify at the trial of this matter?

[34] I must at the outset indicate that I disagree with Mr Naude when he contends that the plaintiffs (that is, the first and second applicants) in this matter did not obtain leave from this court to lodge an application to this court in the fashion that she (they) did for condonation. I furthermore do not agree that the parties were only

¹¹ *Hilifilwa v Mweshixwa* (I 3418/2013) [2016] NAHCMD 166 (Delivered on 10 June 2016).

¹² at paras 13 and 14.

requested by the court to provide reasons as set out in the court order of 2 July 2018 and to state their case as to why the court must not grant absolution from the instance against plaintiffs.

[35] I disagree for the reason that, first Ms Ewert did not, on 17 July 2018, apply to this court for an order condoning the plaintiffs' late filing of their witness statements. The notice of motion filed on behalf of Ewert is clear, it indicates that she intends to show cause why the court must not absolve the defendant from the instance and why the plaintiffs must be allowed to lead evidence at the trial of the case.

[36] Second, the court order of 02 July 2018 is clear, it calls upon the plaintiff to show cause why the court must not absolve the defendant from the instance and why the plaintiff must be allowed to testify at the trial. The reason why the plaintiff was called upon to show cause why the defendant must not be absolved from the instance is because the court was cognisant of the fact that the plaintiffs witnesses' statements were filed out of time and by order of court could not be used at the trial, and if no witness statements are used at the trial there will be no evidence on behalf of the plaintiff.

[37] I furthermore do not agree with Mr Naude that that the plaintiffs' are impermissibly reopening the application for condoning the late filing of the witness statement. I say so because of the following reason; the second leg of the court order of 02 July 2018 is again clear, it calls upon the plaintiff to show cause why she must at the trial of the matter be allowed to give oral evidence. This order is in line with Rule 93 (5) which contemplates the situation the plaintiffs find themselves in, namely that the plaintiffs' witness statement was filed out of time, the plaintiff could therefore not call the witness who deposed to the statement to testify at the trial. In fact the court on 02 May 2018 said that much. But that is not the end of the matter because the rule, that is Rule 93(5), empowers the court to, on 'good cause' shown, permit a witness who is otherwise 'barred' to participate and testify at the hearing. For this reason also the question of whether or not the plaintiff must be allowed to testify at the trial is not *res judicata*. The court did not deal with that aspect, it was simply concerned with whether or not to condone the late filing of the plaintiffs' witnesses' statements.

[38] This court once remarked that the term ‘good cause’ defies precise definition.¹³ Despite that remark, this court has accepted that two essential elements are discernible from the phrase, namely that the party seeking relief must present a reasonable and acceptable explanation for default; and that on the merits, that party has a *bona fide* defence or claim which *prima facie* carries some prospects or probability of success.¹⁴ It is the understanding of this court that the expression “good cause” implies the presence of legal and adequate reasons. The “good cause” must be such as it would persuade the court, in exercise of its judicial discretion, to treat the delay or the default as an excusable one. The exercise of the court’s discretionary powers is generally influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case.¹⁵

[39] The question that confronts me now is thus whether the plaintiffs have shown good cause for this court to permit her to lead evidence at the trial of this matter. In my view, if this court were to refuse the plaintiffs to lead oral evidence at the trial of this matter, that option will not advance the matter further or to finality, as the option open to the court is then to absolve the defendant from the instance, meaning that the plaintiffs may again reopen their case and place evidence before this court.

[40] This approach will in my view frustrate one of the main objects of the Case Management Rules namely to resolve the real issues in dispute between the parties in a just, speedy, efficient and cost effective manner. I am of the further view that barring the plaintiffs from placing their evidence before court is rather grave and too serious a sanction, having due regard to the nature of the claim and the dispute between the parties and particularly when the defendant knows fully well what the plaintiffs’ would testify to in court.

[41] I am therefore satisfied that the plaintiffs’ have shown good cause as contemplated in Rule 93(5). This must not, however, be regarded as a cue by the

¹³ *Lüderitz Tuna Exporters (Pty) Ltd v Cato Fishing Enterprises CC* (I 3961/2011) [2013] NAHCMD 166 (Delivered on 18 June 2013).

¹⁴ Also see Herbstein & Van Winsen, *The Civil Practice of the High Court of South Africa*, 5th ed Vol 1 at 938.

¹⁵ Also see *Donatus v Ministry of Health and Social Welfare* (*supra*) and *Hilifilwa v Mweshixwa* (*supra*).

court to litigants that it will always treat non-compliance by a party in this fashion. Each case, as indicated, will have to be treated in the light of its own peculiar facts and circumstances. The circumstances of this case are that, the defendant will suffer no prejudice if the plaintiffs are allowed to testify, the defendant is fully aware of what the plaintiffs' will testify to in court and will not be taken by surprise at all, it is not fair nor just to deny the plaintiffs the opportunity to place its evidence before court, barring the plaintiff from testifying will not resolve and finalize the dispute between the parties.

Costs

[42] What is left for determination is the question of costs. It is generally accepted that costs pre-eminently lie within the discretion of the court. Second, the ordinary rule is that costs should follow the event. There are however exceptions to these general rules. In certain circumstances costs may, for reasons advanced by the court, not be ordered by the court to follow the event but, in its wisdom, may be awarded even against the successful party. One such instance was the case of *Keymeulen v Van der Vijver*¹⁶ where my brother Masuku awarded costs against a successful party. The Learned Judge stated that;

'[54] It is a general rule that costs are in the discretion of the Court. To be exercised judicially in the light of the circumstances of the case. In summary judgment, the ordinary course followed by the Court is to order costs to be in the cause or to be decided by the trial Court.

[55] In the instant matter, I am of the view that although the 1st defendant has succeeded in staving off the plaintiff's application for summary judgment, the manner in which the defendant went about its defence of the summary judgment is inexcusable and placed the plaintiff in a precarious position, with new defences sprung upon it for the most part in the heads of argument.'

[43] It would appear that in *Keymeulen v Van der Vijver*, the court considered that the successful party in the summary judgment application did a shoddy job in its affidavit resisting summary judgment. Although it was eventually successful in

¹⁶ *Keymeulen v Van der Vijver* (2016/02512) [2017] NAHCMD 159 (Delivered on 09 June 2017).

resisting summary judgment, and should ordinarily have been entitled to costs, if same were ordered to follow the event, the court ordered that party to pay the costs of the summary judgment, using its discretion, on the issue of costs, to do so.

[44] It must also be recalled that ordinarily, a party seeking leave under Rule 93(5) from a court, essentially craves that court's indulgence. For that reason, and all things being equal, I am of the view that the party craving for the court's indulgence must pay the costs occasioned by its application except where the opposition of the application was unreasonable. In the instant case, I cannot say that the opposition by Coetzer was in any way unreasonable or obstructive.

Order:

[45] I accordingly, the Court makes the following order

- a) The plaintiff is, in terms of Rule 93(5), granted leave to give oral evidence at the trial of this matter.
- b) The plaintiffs must pay the defendant's costs of this application and the wasted costs for 02 July 2018.
- c) The matter is postponed to 23 April 2019 for purposes of determining trial dates of the matter.

S F I Ueitele
Judge

APPEARANCE:**PLAINTIFFS:**

M NTINDA

Of Sisa Namandje & Co Inc.

Windhoek, Namibia

DEFENDANT:

A A J NAUDE

Of Dr, Weder, Kauta & Hoveka Inc

Windhoek, Namibia.