

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No.: HC-MD-CIV-ACT-DEL-2021/02631

In the matter between:

SOFIA NDAHAFAL MALUMBU**PLAINTIFF**

and

ALFEUS ANGULA**DEFENDANT**

Neutral Citation: *Malumbu v Angula* (HC-MD-CIV-ACT-DEL-2021/02631) [2022]
NAHCMD 597 (01 November 2022)

Coram: CHRISTIAAN, AJ**Heard:** 11 October 2022**Delivered:** 01 November 2022

Flynote: Interlocutory applications – Application for condonation – Non-compliance with court orders – Unacceptable explanation for non-compliance – Deponent to the founding affidavit failed to allege that he was authorised by the defendant to act on his behalf and to bring the application – That failure is fatal to the application – Application for condonation dismissed with costs.

Summary: The Defendant applied for condonation for non-compliance with a court order dated 22 March 2022. It was argued on his behalf that the defendant was unavailable as the legal practitioner's calls to the defendant remained unheeded, which was the only means of communication between the legal practitioner and the defendant. The defendant's legal practitioner failed to fully appreciate the financial, logistical and communication challenges in having court documents forwarded to the defendant and having same signed and send back to the defendant's legal practitioner for scanning and uploading on the e-justice system. The Defendant's legal practitioner begs the courts indulgence for having underestimated the said challenges which require the defendant having to commute to Ondangwa to an internet café or business with a fax or email facility for the said purpose. As a result the legal practitioner for the defendant lodged the application and deposed to the founding affidavit in support of the application for condonation. The deponent failed to allege that he was authorised by the defendant to act on his behalf and to bring the application. The defendant did not file a confirmatory affidavit. Explanation for the delay in filing the application does not fully cover the period of delay. Prospects of success not covered. Application for condonation dismissed with costs.

Held: that the deponent to the founding affidavit had failed to prove, that he had the authority– to bring the application and that he was authorised by the defendant to bring the application on his behalf.

The founding affidavit was not deposed to by the 'legal practitioner of the defendant'. In addition, the defendant did not file a confirmatory affidavit. The deponent did not allege that he was authorised by the defendant to bring the application on his behalf.

Held further – In the absence of the facts and evidence relevant to the prospects of success and any defences, the condonation application is fatally defective and stands to be dismissed.

ORDER

I make the following Order:

- a) The application for condoning the defendant's failure to comply with court order dated 22 March 2022 and upliftment of the bar is refused with costs.
- b) Cost of this application is awarded to the plaintiff, of which costs are limited in terms of the provisions of Rule 32(11).
- c) The case is postponed to **09 November 2022 at 14:15** for Status hearing: Application for cost hearing (Reason: Assign Hearing Dates).

JUDGMENT

CHRISTIAAN, AJ

Introduction

[1] This is an opposed interlocutory application in which the plaintiff seeks condonation for his non-compliance with a court order dated 22 March 2022 with regard to the time limits for the filing of his application for reinstatement of his amended counterclaim as ordered by the Court. The plaintiff further prays for an order uplifting the automatic bar and granting him new dates for the filing of his application for reinstatement of the amended counterclaim and exchange of further pleadings by the parties.

[2] The parties will be referred to in this judgment as they are in the main action.

[3] The current matter serving before me is a result of the combined summons issued on 09 July 2021 in which action the Plaintiff claims damages in the amount of N\$ 284,026, as a result of a collision that occurred between the Plaintiff's motor vehicle, and the Defendant's heifer which was roaming on a portion of the road, on which the Plaintiff was driving.

[4] By court order dated 22 March 2022, the parties were directed as follows:

'IT IS HEREBY ORDERED THAT:

1. The parties must comply with rule 32 (9) and (10) before or on 31 March 2022.

2. Should the dispute not become resolved; the plaintiff shall file her application for wasted costs before or on 14 April 2022; the defendant shall file his application for reinstatement of his counterclaim before or on 14 April 2022.
3. The parties shall file their respective sets of answering affidavits to the applications in para 3 above before or on 28 April 2022.
4. The parties shall file their respective replying affidavits to the aforementioned applications before or on 17 May 2022.
5. The heads of argument for both applications shall be filed 5 and 3 days respectively, before the date of hearing of the applications.
6. The case is postponed to 18 MAY 2022 at 08:30 for Status hearing (Reason: For allocation of hearing dates for the application(s).'

[5] The defendant failed to comply with the timelines in respect of the application for reinstatement of his counterclaim.

[6] This court is tasked to determine, firstly, whether the Defendant has satisfied the court with the warranting of condonation as sought in the accompanying notice of motion, by determining whether the deponent to the Defendant's founding affidavit has the necessary authority to institute and prosecute this application, secondly, whether the defendant has proffered a reasonable, accurate and full explanation for his non-compliance and that he enjoys prospects of success.

The parties and representation

[7] The applicant, which is the defendant in the main action is Alfeus Angula, a major male who resides at Omushimani, Akuna Village, Ondangwa, Republic of Namibia. I will, in this judgment, refer to the applicant as "the defendant."

[8] The respondent, which is the plaintiff in the main action is Sofia Ndahafa Malumbu, a major female who resides at Okapya No 2, Ondangwa, Republic of Namibia. I will, in this judgement, refer to the respondent as "the plaintiff."

[9] The plaintiff is represented by Mr. Titus while the defendant is represented by Mr. Awaseb.

The relief claimed

[10] The defendant seeks an order in terms whereof the failure by the defendant to file the application for the reinstatement of his amended counter claim as per the court order dated 22 March 2022 be condoned. He also seeks an order in terms whereof the defendant is allowed to file his application for the reinstatement of his amended counter-claim.

[11] The defendant served and filed an application for condonation for non-compliance with a court order pertaining to the filing of an application for reinstatement of an amended counterclaim on 18 April 2022. The following relief is sought in this application:

‘1. That the failure by the defendant to file the application for reinstatement of his amended counterclaim on or before 14 April 2022 be condoned;

2. That the defendant be allowed to file his application for the reinstatement of his amended counterclaim within five (5) days of the date of the order issued by the court;

3. Further and/or alternative relief.’

[12] The application for condonation was filed on Tuesday, 19 April 2022. The plaintiff filed her answering affidavit to the application for condonation.

A brief history of the case management thus far

[13] The following is relevant to the issue:

13.1 The Plaintiff issued his combined summons on 09 July 2021 in which action she claims damages in the amount of N\$ 284,026, as a result of a collision that occurred between the Plaintiff’s motor vehicle, and the Defendant’s heifer which was roaming on a portion of the road, the Plaintiff was driving on.

13.2 The defended filed his notice of intention to defend on 02 August 2021.

13.3 A case planning conference was called for 15 September 2021 and the parties filed their joint case plan on 09 September 2021. A case plan order was issued on 13 September 2022 from chambers, with the following terms:

'IT IS ORDERED THAT:

1. The defendant must file her plea and counterclaim, if any, before or on 14 September 2021.
- 2 The plaintiff must file his plea to defendant's counterclaim and replication, if any, to defendant's plea before or on 20 September.
- 3 The parties must file their discovery affidavits and bundles of discovered documents before or on 27 September.
- 4 The matter is referred for court connected mediation.
- 5 The parties must file a daft mediation referral order in word format, before or on 22 October 2021.
- 6 The case is postponed to 27 OCTOBER 2021 at 14:15 for Mediation: Referral hearing.'

13.4 The defendant filed his plea on 15 September 2021 with an application for condonation for the late filing of the plea and counterclaim.

13.5 On 28 October 2021 the court issued an order in which the Plaintiff was directed to file her opposing affidavit to the application for condonation on or before 13 November 2021 and the defendant his replying affidavit on 03 December 2022 and the allocation of a hearing date to be done on 08 December 2022.

13.6 On 03 December 2021, the defendant filed a status report in which it was made clear that the plaintiff did not file the opposing affidavit on 13 November 2021 and the defendant also did not file a replying affidavit and that the matter remains unopposed.

13.7 The court granted the condonation and upliftment of the bar and the parties were afforded to file a fresh case plan to indicate dates for the exchange of pleadings. The parties were further directed to file a status report and the matter was postponed to 26 January 2022 for a status hearing.

13.8 The parties filed a joint case plan on 21 January 2022 and an order was issued directing the parties to comply with Rule 32 (9) and (10) before or on 28 January 2022. Should the matter not be resolved amicably, the plaintiff must file its notice of exception in terms of Rule 57 (2) before or on 4 February 2022 and the defendant must within the period stipulated in the notice in terms of Rule 57 (2) remove the cause of complaint and if same is not forthcoming the plaintiff must file its exception within the time period stipulated in Rule 57 (3). The matter was postponed to 09 March 2022 for a Status hearing.

13.9 On 28 January 2022, the defendant filed a notice seeking the courts direction for non-compliance of the Plaintiff with the aforementioned order, after a Rule 32(9) engagement in which the defendant gave an undertaking to withdraw the counterclaim as it is explicable, but is not willing to tender wasted cost to the Plaintiff for attending to the counterclaim, since it was filed.

13.10 On 03 February 2022, the defendant file a notice of intention to reinstate and prosecute its amended counterclaim. No objection was filed by the plaintiff to the defendant's intention to file an amended counterclaim, what therefore remained was for the defendant to file a leave to amend the counterclaim. An unopposed application for condonation was filed by the defendant for non-compliance with the rules of court pertaining to the filing of the amended counterclaim.

13.11 On 15 March 2022, the parties filed a joint status report in terms of which they have agreed to comply with Rule 32 (9) and (10) before or on 31 March 2022. Should the matter be resolved amicably, the plaintiff must file its application for wasted cost on 14 April 2022 and the defendant must file its application for reinstatement of the amended counterclaim on 14 April 2022. The matter was postponed to 09 March 2022 for a Status hearing. The parties further agreed to file their respective answering affidavits to the applications by 28 April 2022 and replying affidavits by 17 May 2022. This was made an order of court on 22 March 2022, with the following terms:

13.12 The Plaintiff filed a Rule 32(10) report as per the aforementioned court order, indicating that no amicable resolution could be reached on the issue of wasted cost

and filed the application for cost on 14 April 2022 as per the court order dated 22 March 2022.

13.13 On 18 April 2022 the defendant filed an application for condonation for the non-compliance with the court order issued on 22 March 2022, in which the defendant was directed to file the application for reinstatement of the amended counter claim on 14 April 2022, which he has failed to do. The defendant filed the application for the reinstatement of the amended counterclaim on 19 April 2022, which was out of time.

13.14 The matter is opposed by the Plaintiff and was set down for hearing of the interlocutory on 11 October 2022.

13.15 Both counsel filed heads of argument in terms of the practice directives of this court.

[14] Serving before this court presently is an application dated 18 April 2022 in which the defendant applies for condonation for its non-compliance with the order issued by the court on 22 March 2022 and upliftment of the bar for the failure to file the application for the reinstatement of its amended counterclaim.

[15] The plaintiff raised two points *in limine* in its answering papers. Mr Titus counsel for the plaintiff, objected to the application and took issue with the fact that the deponent to the defendants founding affidavit in support of the application for condonation failed to aver that he has the necessary authority to institute the proceedings. Mr Titus further contends that the defendant failed to ultimately satisfy the court that he had proffered a full, reasonable and detailed explanation for his non-compliance and that he failed to allege that he enjoys prospects of success.

[16] Mr Awaseb in his response to the answering affidavit and heads of argument filed by the counsel for the plaintiff regarding the grounds on which the opposition is based, submitted contrariwise.

[17] It has been held in *Ondonga Traditional Authority v Elifas*¹ that if the authority of an applicant to institute the proceedings is challenged or raised at the onset of proceedings it would be incompetent for the court to determine anything else without first deciding the issue of the applicant's authority, as a result the court will firstly deal with the issue of lack of authority and then address the defendants' failure to meet the requirements for a successful condonation application.

Preliminary issues

Lack of authority

[18] The deponent to the affidavit in support of the defendants' application for condonation for the reinstatement of the amended counterclaim contains the following allegations:

'1. The facts hereinafter set out are within my personal knowledge and are true and correct to the best of my knowledge and belief.

2. I am a legal practitioner for Alfeus Angula, who is the Defendant in this matter.

3. I am a major male legal practitioner practising as such at AWASAB LAW CHAMBERS in Kasino Street, Windhoek.

*4. I have full capacity to depose to this affidavit.*²(My emphasis).

[19] No further allegation regarding authority is contained in the affidavit.

[20] The plaintiff is challenging Mr Awaseb's authority to launch the application. Counsel for the defendant argued with no clarity that no specific authority is required for any person to depose to an affidavit as they are entitled to depose to an affidavit, whether it is a founding affidavit or any ancillary affidavit³.

[21] The plaintiff argues that the deponent to the defendant's founding affidavit has not made the allegation, nor has he provided any evidence under oath, as required in motion proceedings, to convince the court that he had the requisite authority to

¹ *Ondonga Traditional Authority v Elifas and Another* (HC-MD-CIV-MOT-EXP 13 of 2017) [2017] NAHCMD 145 (15 May 2017).

² Paragraph 2 of the Founding affidavit

³ Paragraph 33.2 of the Defendant's replying affidavit.

launch the application for condonation for the reinstatement of the amended counterclaim on behalf of the defendant.

[22] Counsel for the Plaintiff highlighted the decision by Judge Angula in the matter of *Minister of Safety and Security v Inyemba*⁴ and argued that an applicant must make out his case in the founding affidavit and explicitly state the source of his authority to bring an application on behalf of another person, be it an artificial or a natural person. The deponent must state that he or she had been authorised to bring the application in that representative capacity and if possible produce his source or proof of such authority. Alternatively the principal must file a confirmatory affidavit confirming such authorisation.⁵

[23] The counsel for the plaintiff continued to cite a number of high court matters in support of his position and finally closed arguments by relying on the *Boabab Capital (Pty) Ltd v Shaziza Auto One (Pty) Ltd*⁶ matter, in which it was held that the authorisation of proceedings is a serious matter and should not be taken lightly by the court. He contended that to ascertain authorisation, same must be stated under oath and evidence thereof must be provided. As such, where authorisation is not alleged in the founding affidavit, the proceedings are not properly before court and as a result, the proceedings is fatal and stand to be dismissed.

[24] Counsel for the plaintiff concluded that the defendant did not make out a case in his founding affidavit that the deponent had been duly authorised to institute and prosecute the proceedings on behalf of the defendant, and this is destructive to the Defendants matter.

⁴*Minister of Safety and Security v Inyemba* (HC-MD-CIV-MOT-GEN-2019/00247) [2020] NAHCMD 170 (13 May 2020).

⁵ See also *Naholo v National Union of Namibia Workers* 2006 (2) NR (659) (HC); *South West Africa National Union v Tjozongoro and Other* 1985 (1) SA 376 (SWA); *Wlotzkasbaken Home Owners Association v Erongo Regional Council* 2007 (2) NR 799; *JB Cooling and Refrigeration CC v Dean Jacques Willems t/a Armature Winding and Other* (A 76/2015 [2016] HAHCMD 8 (20 January 2016); and *Standard Bank Namibia Ltd v Nekwaya* (HC-MD-CIV-MOT-GEN-2020/00089 [2020] NAHCMD 122 (26 March 2020).

⁶ *Boabab Capital (Pty) Ltd v Shaziza Auto One (Pty) Ltd* [2020] NAHCMD 290 (10 July 2020).

Defendant's failure to meet the dual requirements for a successful condonation application

[25] It is trite law that where a litigant seeks condonation from the court for non-compliance, such litigant must show good cause. This entails that the litigant must place before the court a full, reasonable and detailed explanation for the delay, and show that he enjoys reasonable prospects of success.⁷

[26] Counsel for the defendant in his application for condonation and upliftment of the bar requested the court to indulge the defendant for the non-compliance with the court order as he experienced financial, logistical and communication challenges in having court documents forwarded to the defendant and having the same signed and send back.

[27] Mr Awaseb further conceded that the non-compliance was due to the fact that he underestimated the aforementioned challenges and the defendant should not be blamed for it.

[28] On the issue of the prospects of success, Mr Awaseb conceded in his address to the court that he failed to address the court on the prospects of success and that the court should consider the particulars of claim regarding the same.

[29] The Counsel for the Plaintiff argued that the defendant failed to meet the requirements for a successful application for condonation for the following reasons:

'We submit this for the following reasons:

In a successful condonation application, the deponent must make out, in the founding affidavit, a full, reasonable and acceptable explanation for the delay and prospects of success must be alleged. The deponent on behalf of the Defendant provided a whimsical, hearsay and unacceptable explanation for the delay in applying for the reinstatement for the Defendant's counterclaim. More so, and which is ultimately destructive to the Defendant's case is the deponents failure to allege prospects of success, in the founding affidavit.¹⁸

⁷ *Amutenja v Amutenja* (HC-MD-CIV- ACT-OTH-2019/02282) [2020] NAHCMD 322 (30 July 2020).

⁸ Paragraph 38 of the Plaintiff's heads of arguments.

[30] Mr Titus closed his arguments on this point and argued that the defendant failed to meet the requirements of a successful condonation application and his application stands to be dismissed.

The application of legal principles to the present facts

Lack of authority

[31] The first issue for determination by this court is whether the Defendant has satisfied the court with the warranting of condonation as sought in the accompanying notice of motion, by determining whether the deponent to the Defendant's founding affidavit has the necessary authority to institute and prosecute this application.

[32] It is trite that an applicant must make out his case in the founding affidavit and explicitly state the source of his authority to bring an application on behalf of another person, be it an artificial or a natural person. The deponent must state that he or she had been authorized to bring the application in that representative capacity and if possible produce his source or proof of such authority.⁹

[33] I wish to highlight, what Masuku J stated in the *Standard Bank Namibia Ltd v Nekwaya*¹⁰ matter, as it finds application in the current circumstances:

'[18] Authorisation of proceedings is a serious matter, and is not just an idle incantation required for fastidious reasons. The court must know, before it lends its processes, that the proceedings before it are properly authorised. This is done by a statement on oath, where applicable, with evidence thereof that the person who institutes or defends the proceedings is properly authorised and is not on a reckless, self-serving frolic of his or her own.¹¹

[19] Once this is not stated in the founding affidavit, the only conclusion that may be reached is that the proceedings are not properly authorised and that inevitably, is the

⁹ *Wlotzkasbaken Home Owners and Another v Erongo Regional Council and Others* (PA 202 of 2007) [2007] NAHC 95 (12 December 2007).

¹⁰ *Standard Bank Namibia Ltd v Nekwaya* (HC-MD-CIV-MOT-GEN-2020/00089 [2020] NAHCMD 122 (26 March 2020).

¹¹ Paragraph 18.

applicant's fate in these proceedings. It is accordingly unnecessary to consider the other issues raised by the Plaintiff in his notice.'

[34] And further.

'[11] It is a matter of note that the applicant did not address this issue at all in its founding affidavit and thus could not, in reply, place proof of the authority as no authority whatsoever, was alleged. It is a trite principle of law that a party stands or falls on its founding affidavit. In the instant case, the applicant did not make out a case for the authority in the founding papers, nor did or could it do so in reply as that opportunity never came.' (My underlining)

[35] The above shows that a litigant is bound to make out his case in his founding affidavit. In the current matter, the deponent to the founding affidavit failed to state that he was duly authorized to institute the proceedings on behalf of the defendant. The issue of authority was not addressed at all in the founding affidavit and he could not, in reply, place proof of the authority as no authority whatsoever, was alleged. The only conclusion that may be reached is that the proceedings are not properly authorised.

[36] Angula DJP in the matter of *Minister of Safety and Security v Inyemba*¹² held as follows:

'[16] It has also been held in a number of judgments of this court that an applicant must explicitly state the source of his authority to bring an application on behalf of another person, be it an artificial or a natural person. He or she must state that he or she has been authorised to bring the application in that representative capacity and if possible produce his or her source or proof of such authority. Alternatively, the principal must file confirmatory affidavit confirming such authorization.¹³

¹² *Minister of Safety and Security v Inyemba* (HC-MD-CIV-MOT-GEN-2019/00247) [2020] NAHCMD 170 (13 May 2020).

¹³ *Naholo v National Union of Namibia Workers* 2006 (2) NR (659) (HC); *South West Africa National Union v Tjonzongoro and Other* 1985 (1) SA 376 (SWA); *Wlotzkasbaken Home Owners Association v Erongo Regional Council* 2007 (2) NR 799; *JB Cooling and Refrigeration CC v Dean Jacques Willems t/a Armature Winding and Other* (A 76/2015 [2016] HAHCMD 8 (20 January 2016); and *Standard Bank Namibia Ltd v Nekwaya* (HC-MD-CIV-MOT-GEN-2020/00089 [2020] NAHCMD 122 (26 March 2020).

[17] It is trite law that in application proceedings, the applicant must stand or fall by his founding affidavit. In other words, the applicant must make out his or her case in the founding affidavit. First and foremost he or she must make out a case that she or she has a *locus standi* to bring the application before the court can hear the merits of his or her claim. The court in *Stipp and Another v Shade Centre and Others* at p 634 G-H¹⁴ stressed the point in this way: 'In a long line of cases the courts have stated as a general rule that an applicant in motion proceedings must set out his cause of action and supporting evidence in his founding affidavit'.

[18] [...] It is further common cause that neither of the applicants filed a founding affidavit nor a confirmatory affidavit. It is to be noted further in this connection that Mr Mhoney simply says he is 'authorised depose to this affidavit' but significantly, does not say by whom he has been so authorised. If it was by the applicants, it would have been the easiest fact to state. As a result, there is no legal connection between the applicants and Mr Mhoney's founding affidavit, who purports to act in this matter.

[19] What is significant and fatal to Mr Mhoney's standing is the fact that he does not profess to act on behalf of the applicants. He simply says that he is 'duly (sic) authorized to depose to this affidavit'. The Supreme Court of Appeal in *Ganes and Another v Telecom Namibia Ltd*¹⁵ at p 615 G-H held that; 'The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised'. Nowhere does Mr Mhoney state that he has been authorised to bring this application.' (Underlining my emphasis)

[37] Angula DJP in *Inyemba* supra held further that:

[22] Furthermore, *Herbstein and Van Winsen* (supra) (at p 77) say the following as regards the power of an agent to institute legal proceedings on behalf of a principal: 'Where an application is made by an agent on behalf of a principal, an allegation of the agent's authority is essential, unless it appears from affidavits filed in the application that the principal is aware of and ratifies the proceedings'. In the present matter there is no evidence that the applicants are aware of the present proceedings, neither is there any evidence that the applicants have given authority to Mr Mhoney to bring this application or have ratified even *ex post facto*, his action. In my judgment this is fatal to the application.'

¹⁴ 2007 (2) NR 627.

¹⁵ 2004 (3) SA 615 (SCA).

[38] It is common cause in the matter before me that that the defendant did not file a confirmatory affidavit. It is to be noted further in this connection that Mr Awaseb simply says 'he has full legal capacity to depose to this affidavit'. The deponent further states in his founding affidavit that his calls to the defendant went unheeded, which is the only form of communication between the deponent and the defendant. Mr Awaseb further confirmed that when making calls to the defendant, the number is said to be unavailable. As a result, it is quite clear that the deponent did not have the necessary authority to institute these proceedings on behalf of the defendant, at the filing of the application.

[39] It is trite law that a litigant who is a natural person with full legal capacity is entitled to prosecute proceedings in his or her own interest, but has no right or title to institute proceedings on behalf of another person or on behalf of the public, save in very limited circumstances.¹⁶ The circumstances of this matter cannot be such.

[40] I therefore stand to disagree with the argument of the counsel for the defendant, when he says that that no specific authority is required for any person to depose to an affidavit as they are entitled to depose to an affidavit, whether it is a founding affidavit or any ancillary affidavit¹⁷. The counsel clearly loses sight of the above principle in law.

[41] It is imperative to note that the deponent to the Defendant's founding affidavit in support of the application for condonation is his legal practitioner of record. The defendant's legal practitioner in his founding affidavit clearly outlined that he had financial, logistical and communication challenges to forward court documents to the defendant as he did not respond to his call and therefore he could not file the application for reinstatement of the amended counter claim during the timelines stated in the court order.

[42] The courts have forewarned legal practitioners from deposing to affidavits on behalf of their clients. Masuku J, with reference to legal practitioners deposing to

¹⁶ *Minister of Safety and Security v Inyemba* supra at par 20 to 21.

¹⁷ Paragraph 33.2 of the Defendant's replying affidavit.

affidavits on behalf of their clients, in the matter of *Minister of Urban and Rural Development v Witbooi*¹⁸, held as follows:

[38] [One] cannot help but wonder whether a legal practitioner has locus standi to move such an application without the evident involvement of the concerned client.

[39] This is a practice that needs to be nipped in the bud in this jurisdiction, as some practitioners are hell bent on willy-nilly deposing to affidavits that their clients ought to have deposed to. In some cases, especially in those relating to condonation, where this practice is rife, the question arises in some instances whether the clients even know about the applications at all. Some of these application initiated and deposed to by legal practitioners may be necessitated by the natural instinct of self-preservation and survival. (Underlining my emphasis)

[40] 'Our courts have spoken times without number regarding the impermissibility of legal practitioners deposing to affidavits in matters where they appear on behalf of their clients. This nefarious practice also extended to rule 108 applications and a stern rebuke in that particular area appears to have immediately struck the right chord and thus stemmed the tide.'

[43] Having regard to the circumstances before me and the fact that the counsel for the defendant pertinently states in his founding affidavit that 'the delay is entirely down to the defendants' legal practitioner and no blameworthiness should at all attach to the defendant'¹⁹, shows that the application for condonation was 'necessitated by the natural instinct of self-preservation and survival'. A practise that should be avoided at all costs.

[44] I therefore conclude that the deponent to the founding affidavit failed to state that he was duly authorized to institute the proceedings on behalf of the defendant. The issue of authority was not addressed at all in the founding affidavit and he could not, in reply, place proof of the authority as no authority whatsoever, was alleged. The only conclusion that may be reached is that the proceedings are not properly authorised.

¹⁸ *Minister of Urban and Rural Development v Witbooi* (HC-MD-CIV-MOT-GEN-2019/00225 [2020] NAHCMD 279 (9 July 2020).

¹⁹ Paragraph 8 of defendants founding affidavit.

[45] The point *in limine* that the deponent to the founding affidavit lacks the authority to institute the application is upheld. I will proceed and address the second point *in limine*.

Application for condonation

[46] The first issue for determination by this court is whether the defendant has proffered a reasonable, accurate and full explanation for his non-compliance and that he enjoys prospects of success.

[47] Applications for condonation are common in our jurisdiction. The requirements are thus trite. Therefore it appears that for an application for condonation to succeed, it is important for the applicant to address the twin elements of a reasonable explanation for the delay or non-compliance together with the issue of prospects of success.²⁰ In *Balzer v Vries*²¹ the Supreme Court pronounced itself on this matter. The court said:

[20] It is well settled that an application for condonation is required to meet the two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal.'

[48] The granting of condonation is not just for the asking. The Rules of Court and court orders are to be observed to facilitate strict compliance with them to ensure efficient administration of justice.²²

[49] Turning to the substance of the defendants' condonation application. The explanation advanced by the defendant is that he was unavailable as the legal practitioner's calls to the defendant remained unheeded, which was the only means of communication between the legal practitioner and the defendant. The defendant legal practitioner failed to fully appreciate the financial, logistical and communication

²⁰ *Quenet Capital (Pty) Ltd v Transnamib Holdings Limited* (I 2679/2015) [2016] NAHCMD 104 (8 April 2016).

²¹ *Balzer v Vries* 2015 (2) NR 547 (SC) at 661 J – 552 F.

²² *S v Kakolo* 2004 NR 7 at 10 E- C.

challenges in having court documents forwarded to the defendant and having same signed and send back to the defendants legal practitioner for scanning and uploading on the e-justice system.

[50] The Defendants legal practitioner begs the courts indulgence for having underestimated the said challenges which require the defendant having to commute to Ondangwa to an internet café or business with a fax or email facility for the said purpose. The application for reinstatement of the counterclaim was filed late on the 19th of April 2022. As a result the legal practitioner for the defendant lodged the application and deposed to the founding affidavit in support of the application for condonation.

[51] The defendant conceded in his heads of arguments²³ that the delay is one day, as the other two days were public holidays which could not count as court days. The defendant's founding affidavit does not state the steps that his legal representative took to approach the court for an extension when they could not get hold of him during that period. There is no confirmatory affidavit filed by the defendant's confirming the averments made by the deponent of the founding affidavit or an explanation why such affidavit was not obtained. Such a confirmatory affidavit is crucial in determining whether or not the explanation given for the non-compliance with the court order is a reasonable explanation. In that regard, the defendant has not fully explained the entire reason for the delay. The explanation is necessary for the court to determine whether the delay was reasonable in the circumstances.²⁴

[52] Rule 55 of the High Court rules makes provision for a party to approach the managing judge on application on notice to every party and on good cause shown for an order extending or shortening a time prescribed by the rules or by an order of court. Yet, with this at his disposal the defendant's legal representative failed to utilise the provisions of Rule 55 once he realised he will not be meeting the timelines as set by the Court Order due to the unavailability of the defendant.

²³ See para 2 at p. 3 of the plaintiffs heads of argument.

²⁴ *Autovermietung Savanna CC v Nangolo* (HC-MD-CIV-ACT-DEL- 2017/03952) [2018] NAHCMD 351 (16 October 2018).

[53] In light of the above I am of the opinion that the explanation put forward by the defendant for his non-compliance with the court order dated 22 March 2020 is not an acceptable explanation. The court therefore declines to accept the explanation advanced.

[54] In the matter of *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others*²⁵ Langa AJA stipulated the principles applicable to applications for condonation even under the new rules. In dealing with prospects of success in condonation applications, the learned Judge of Appeal Court stated the following:²⁶

'I have borne in mind that prospects of success are often an element, sometimes an important factor that could influence a decision whether or not to grant condonation in a proper case. It is however also true that, in the jurisprudence of both South Africa and Namibia, although prospects of success would normally be a factor in considering whether or not condonation should be granted, this is not always the case when non-compliance of the Rules is flagrant and there is glaring and inexplicable disregard of the processes of the court.'

[55] On the prospects of success, the defendant in his heads of arguments simply says that he failed to address the court on the prospects of success and that the court should consider the particulars of claim regarding the same. The defendant failed to meet the requirements for a successful application for condonation case in that he failed to allege prospects of success, in the founding affidavit.²⁷ Regrettably, the disregard of the simple procedures draws a fatal blow to the defendant's case.

[56] The defendant makes no factual allegations whatsoever or whether he has any defence to the plaintiff's claim. In the absence of such facts the court cannot exercise her discretion in favour of the defendant.

²⁵ *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others* (SA 10-2006) [2010] NASC 14 (5 November 2010).

²⁶ Para 20 of the judgment.

²⁷ Paragraph 38 of the Plaintiff's heads of arguments.

[57] Therefore, in the absence of the facts and evidence relevant to the prospects of success and any defences, the condonation application is fatally defective and stands to be dismissed.

[58] Before I conclude on the issue of condonation, I need to point out that apart from the explanation that the defendant was not reachable due to the challenges listed and the fact that the defendant did not file a confirmatory affidavit to support his explanation, the counsel begged the court not to attach any blameworthiness on the defendant, but on him as the legal practitioner.

[59] Damaseb DCJ in the matter of *Katjiamo v Katjiamo and Others*²⁸ 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*²⁹ 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.”(Underling my emphasis)

[60] It need to be understood that it is not the intent of this court to punish parties for the neglect or disregard of their legal practitioners to comply with court directives, but it cannot be avoided under the current circumstances. As officers of this court, legal practitioners are expected to ensure that court orders are complied with as ordered, in order to ensure the smooth operation of justice and ensuring that their client's case is executed as per instructions. Failure thereof can and will have dire consequences, as those evident in this matter. To refuse the application for

²⁸ *Katjiamo v Katjiamo and Others* 2015 (2) NR 340 (SC).

²⁹ *Salojee and Another NNO v Minister of Community Development* 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.

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.

Conclusion

[61] With the above discussion in mind, I am inclined to agree with the submissions made by the plaintiff in that the defendant failed to meet the requirements for the relief sought.

[62] My order is therefore as follows:

- (a) The application for condoning the defendant's failure to comply with court order dated 22 March 2022 is refused with costs.
- (b) Cost of this application is awarded to the defendant, of which costs are limited in terms of the provisions of Rule 32(11).
- (c) The case is postponed to **09 November 2022 at 14:15** for Status hearing: Application for cost hearing (Reason: Assign Hearing Dates).

P CHRISTIAAN
Judge, Acting

APPEARANCE

PLAINTIFF:

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DEFENDANT:

H Awaseb

Of Awaseb Law Chambers, Windhoek