

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING IN TERMS OF PRACTICE DIRECTIVE 61

Case Title: Municipal Council for the Municipality of Swakopmund and Victoria Kandenge Alexander Forbes Namibia Retirement Fund: Municipality of Swakopmund The Government of the Republic of Namibia The Attorney General	Plaintiff 1 st Defendant 2 nd Defendant 3 rd Defendant 4 th Defendant	Case No: HC-MD-CIV-ACT-DEL-2017/04722 Division of Court: Main Division Heard on: 23 March 2023
Heard before: Honourable Mr Justice Usiku J	Delivered on: 17 April 2023	
Neutral citation: <i>Municipal Council for the Municipality of Swakopmund v Kandenge</i> (HC-MD-CIV-ACT-DEL-2017/04722) [2023] NAHCMD 195 (17 April 2023)		
Order: <ol style="list-style-type: none">1. The plaintiff's application for condonation is hereby granted.2. There is no order as to costs.3. The matter is postponed to 17 May 2023 at 15h15 for additional case management conference.4. The parties shall file a joint additional case management report on or before 10 May		

2023.

Reasons for order:

USIKU J:

Introduction

[1] This is an application by the plaintiff for an order condoning its non-compliance with the court orders dated 23 February 2022 and 13 June 2022 (ie failure to file its additional discovery affidavit by 18 May 2022 and failure to file its witness statements by 22 July 2022).

Background

[2] In December 2017, the plaintiff instituted an action against the first defendant, claiming payment of various amounts, on account of first defendant's alleged misappropriation, dishonesty or misconduct in the execution of her employment duties. In claims 1 to 88, the plaintiff claims payment in the total amount of N\$281 791.90 representing 88 alleged instances of misappropriation or damages suffered by the plaintiff. Claim 89 is for payment of N\$330 648 being costs incurred by the plaintiff towards professional auditor's fees to have the aforesaid claim investigated and quantified. In claim 90, the plaintiff seeks an order in terms of s 37D of the Pension Fund Act 24 of 1956 ("the Act") directing the second defendant to deduct from the pension benefits payable to the defendant, an amount equal to the sum amount the court shall find as due to the plaintiff on account of first defendant's misappropriation or misconduct, together with interest thereon and costs.

[3] The first defendant defends the action and has filed a plea and a counterclaim. In her plea, the first defendant denies liability to the plaintiff. In her counterclaim, she claims payment of her pension benefits and attacks the constitutionality of s 37D of the Act, as well as of the rules of the second defendant, giving effect thereto.

[4] On 23 February 2022, the court directed the parties to, among other things file supplementary affidavits, if any, on or before 18 May 2022. On 13 June 2022, the court directed the plaintiff to file its witness statements on or before 22 July 2022.

[5] The plaintiff did not comply with the abovementioned directions. However, the plaintiff filed its witness statements on 14 October 2022 and its supplementary discovery affidavit on 17 October 2022. The plaintiff now applies for condonation of the late filing of the supplementary affidavit and the witness statements. The application for condonation is opposed by the first defendant.

The condonation application

[6] Mr Petrus Jacobus Burger, the legal practitioner for the plaintiff, deposed to the affidavit in support of the application for condonation. He asserts that the plaintiff has filed 21 witness statements concerning claims 1 to 88. He singles out the witness statement of Sandra Beyer, which he says is long and complex and took time and effort to put together. That statement alone is 73 pages long and has about 270 pages of annexures in support thereof.

[7] Mr Burger detailed the difficulty he and his staff experienced in tracing the witnesses, as the potential witnesses were spread over Namibia, South Africa, Botswana, Zambia, Germany and elsewhere in the world. Generally, the potential witnesses were willing to provide information but not keen to assist in providing a witness statement for purposes of the trial. Many of them expressed the view that they had no direct interest in the outcome of the litigation. According to Mr Burger, it took motivation and effort to secure their co-operation. Under those circumstances, Mr Burger asserts, it was not possible to secure the witness statements within the time that was allowed.

[8] According to Mr Burger, by the time the plaintiff requested for an extension of time for the filing of witness statements on 9 June 2022, it had secured information from about 35 individuals and prepared confirmed statements of about 12 witnesses. The rest followed since then.

[9] On the aspect of the plaintiff's prospects of success, Mr Burger submits that the plaintiff is likely to succeed in proving its claims. According to him, all witnesses indicated in their witness statements that the duplicate receipts found in the plaintiff's receipt book and the manner the first defendant accounted and processed the payments, did not record the actual amounts they paid or would have paid, and were processed in understated amounts. He submits that unless explained in evidence, those facts describe the misappropriation of the plaintiff's funds.

[10] The plaintiff submits that the time it has taken to bring the witness statements to court is reasonable in the circumstances and prays that the court grants it the condonation it seeks.

The opposition

[11] The first defendant attacks the explanation given by the plaintiff for the delay, as falling short of the requirements for condonation. She submits that the plaintiff's explanation does not:

- (a) cover the period of delay,
- (b) show when the specific witnesses were contacted,
- (c) provide information on when the plaintiff worked on which witness statements and the period during which that was done and that it does not,
- (d) provide information on why the 12 witness statements which it claimed were finalised by 9 June 2022 were not filed by then.

[12] The first defendant avers that she is prejudiced by the withholding of her pension benefits, while the plaintiff unduly delays the prosecution of this matter. She submits that, given the delay by the plaintiff in prosecuting its case, the plaintiff's case should be dismissed, alternatively, she requests that the interdict granted by this court on 27 March 2020 relating to the pay-out of her pension fund benefits, be discharged. In the further alternative, the first defendant asks that the constitutionality of s 37D of the Act be determined immediately before the trial of the main matter.

Analysis

[13] An applicant for condonation is required to:

- (a) satisfy the court that he has a reasonable and acceptable explanation for the default, and
- (b) show that he has reasonable prospects of success on the merits of the case.

[14] As for the requirement of the explanation of the default, it is settled law that condonation is not to be had for the asking. A full and detailed explanation for the default must be furnished to enable the court to understand the reasons for the default.

[15] As regards the prospects of success, it is settled principle that if the prospects of success are shown, they may mitigate the fault on the part of the applicant. A court may exercise its discretion in favour of the applicant despite a poor explanation for the default.¹

[16] In the present matter, the first defendant does not challenge the veracity of the explanation put forth by the plaintiff for the default. However, the first defendant attacks the explanation given that it does not amount to an acceptable explanation.

[17] I am of the view that the plaintiff's affidavit could have dealt with the delay in a more comprehensive manner, setting out, among other things, time-lines when the specific witness statements were prepared and finalized. Although the explanation given is short on details, to the extent that it does not paint a fuller picture as would have been desirable, I am satisfied that the explanation is adequate in the circumstances. From the explanation given, the court is able to determine, in broad terms, the reasons for the delay, namely the sheer number of witnesses that the plaintiff intends to call coupled with the number of statements that needed to be prepared and the difficulties encountered in contacting and securing such witnesses' co-operation in providing the statements for the purposes of trial. I am, therefore, of the opinion that the plaintiff has put forward a reasonable and acceptable explanation for the delay.

[18] As regards the issue of prospects of success, the plaintiff has set out facts relating to the *modus operandi*, allegedly employed by the first defendant in this matter, which the intended witnesses will testify to. I am of the view that the plaintiff has established reasonable prospects of success on the merits of the case.

[19] In the circumstances, I am satisfied that the plaintiff has made out a proper case for granting condonation.

[20] Having arrived at the foregoing conclusion, the submissions made by the defendant that specific sanctions be imposed on the plaintiff, cannot be entertained. In addition to the above, I am of the opinion that there are no facts presented before court justifying the court to discharge the interim interdict order dated 27 March 2020. Furthermore, there are no facts presented by the first defendant justifying the court to order that the constitutional challenge be determined separately from the main action. The court has already ordered on 1 February 2022 that issues raised in the plaintiff's claim(s) and in the first defendant's counterclaim(s) be adjudicated together at one hearing. I see no grounds put forward justifying the rescission of the foregoing

¹ *Sun Square Hotel (Pty) Ltd v Southern Sun Africa*, Case No. SA 26/2018 para 13.

orders.

[21] In its application for condonation, the plaintiff also prayed for the costs of the application. It is common cause that the first defendant has been granted legal aid in the present matter. It is trite law that ordering the first respondent to pay costs, in such circumstances, would amount to ordering the State to pay the costs so ordered.² In the circumstances, I shall not make any order as to costs.

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

1. The plaintiff's application for condonation is hereby granted.
2. There is no order as to costs.
3. The matter is postponed to 17 May 2023 at 15h15 for additional case management conference.
4. The parties shall file a joint additional case management report on or before 10 May 2023.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	First Defendant:
PJ Burger Of Engling, Stritter & Partners Windhoek	N Marcus Of Nixon Marcus Public Law Office Windhoek

² *Mentoor v Usebiu* SA 24/2015 delivered on 19 April 2017 para 21 and *Minister of Safety and Security v Mahupelo* SA 7/2017 delivered on 28 February 2019, para 100.