

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Lalapanzi Body Corporate and Nesa Event Management CC	Case No: HC-MD-CIV-ACT-CON-2022/00870
Applicant	Division of Court: Main Division
Respondent	Heard on: 05 December 2022
Heard before: Honourable Lady Justice Rakow	Order: 18 January 2023
	Reasons: 20 January 2023
Neutral citation: <i>Lalapanzi Body Corporate v Nesa Event Management CC</i> (HC-MD-CIV-ACT-CON-2022/00870) [2023] NAHCMD 4 (20 January 2023)	
Order:	
<ol style="list-style-type: none">1. The application for condonation is herewith granted.2. The application for summary judgement is dismissed with costs.3. The matter is postponed for a case planning conference to 21/2/2023.4. The parties to file a joint draft case plan on or before 16/2/2023.	
Reasons for order:	
RAKOW J <u>Introduction</u>	
[1] The plaintiff is Lalapanzi Body Corporate, a juristic entity with limited liability, established	

in terms of Section 38 of the Sectional Titles Act 2 of 2009, with Development Scheme No. 03/1988 and its agent's physical address at EON Property Services (Pty) Ltd, situated at No. 16 Wagner Street, Windhoek-West, Windhoek, Republic of Namibia. The defendant is Nesa Event Management CC, a close corporation duly registered in terms of the applicable laws of the Republic of Namibia with chosen *domicillium citandi et executandi* situated at Unit 27, Lalapanzi Flats, Kuiseb Street, Windhoek, Republic of Namibia(hereinafter "the Property"), and wherefore further particulars are to the Plaintiff unknown. The defendant owns a property within the Lalapanzi Body Corporate scheme.

[2] It is alleged that the defendant is in arrears with the payment of the costs and body corporate levies and are thus in breach of its statutory duty in terms of the Act to pay the costs and monthly Body Corporate levies of N\$1,692.27 in respect of the Property, which arrears amounts to N\$147,690.34 and the plaintiff wish to recover the said by way of a summary judgement application. The current owner of the Closed Corporation is Ms Desery Noemy Freygang has not opposed the application for summary judgement on behalf of the defendant.

[3] The application for summary judgement is however opposed by Maxwell Maunganidze and Yolanda Ndinhamba who were joined after they brought an application for joinder. Mr. Maunganidze who use to be the sole member of the defendant (although this forms the dispute of another matter before my brother Mwanyangapo) and Ms Ndinhamba who is the current occupier of the said property. She bound herself as surety *in solidum* together with Mr Maungndize who is the principal debtor and responsible for the repayment of monies owned to First National Bank, who is the mortgagor for debts held under the defendant. They therefore have a substantial interest in the matter.

Condonation application

[4] The second and third defendants applied to the court to condone the late filing of their answering affidavits. The second and third defendants communicated with their legal practitioners of record via email and due to some misunderstanding the answering affidavit of the second defendant and confirmatory affidavit of the third defendant was only filed on the 27th of September 2022 instead of the 26th of September 2022. They submitted that the plaintiff was not prejudiced by the filing of the affidavit one day late and that there was good prospects of success on their side in the current matter. This application was opposed by the plaintiff.

[5] In the matter of *Telecom Namibia Limited v Mitchell Nangolo & 34 Others*¹, Damaseb JP identified the following as principles guiding applications for condonation:

1. It is not a mere formality and will not be had for the asking. The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.
2. There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.
3. It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.
4. The degree of delay is a relevant consideration;
5. The entire period during which the delay had occurred and continued must be fully explained;
6. There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented. (Legal practitioners are expected to familiarize themselves with the rules of court).
7. The applicant for condonation must demonstrate good prospects of success on the merits. But where the non-compliance with the rules of Court is flagrant and gross, prospects of success are not decisive.
8. The applicant's prospect of success is in general an important though not a decisive consideration. In the case of *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*, Hoexter JA pointed out at 789I-J that the factor of prospects of success on appeal in an application for condonation for the late notice of appeal can never, standing alone, be conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with the rules, should be considered.
9. If there are no prospects of success, there is no point in granting condonation.'

Summary judgement application

[6] The summary judgement application is supported by an affidavit of Eugen William Fourie, who is an employee of EON Property Services (Pty) Ltd who is the appointed management agent of the applicant in terms of rule 44 of the Rules of Sectional Titles made in terms of the Sectional Titles Act 2 of 2009. He states that the defendant is liable in the amount of N\$147 690,34 for costs and outstanding levies as well as interest of 20% from date of summons until date of final payment. He also indicated that the defendant is further liable for levies in the sum of N\$1 692.27 per month as from 1 April 2022. He filed a second affidavit naming the current member to the closed corporation and attached to this application an annexure "E4" which sets out the account as from 27/2/2017 indicating an opening balance of N\$17 806.06. It then proceeds and lists a number of entries for levies, water, payments received, electricity supply, recovery of costs and expenses, financial charges and legal costs.

¹ *Telcom Namibia Limited v Nangolo and Others* (LC 33 of 2009) [2012] NALC 15 (28 May 2012).

[7] Further attached to this affidavit, is a judgement received from this court on 5 February 2020 in the amount of N\$ 56 123.64 against the second defendant in the current matter personally. The interest on the amount is set to run from January 2019, it is therefore assumed that the claim was for the outstanding amount at that time. There is however currently a recession application pending against this judgement. In its heads of argument the plaintiff explained that the amount of N\$77 219.07 was actually the proceeds of the sale of the first defendant but it is not clear from the affidavit of Mr. Fourie

[8] In his affidavit setting out the reasons for opposing the matter, the second defendant indicates that the amount of this judgement forms part of the current amount outstanding and claimed by the plaintiff. There was one amount of N\$ 77 219.07 deducted in January 2022 but there is no indication as to where this amount came from or what it was for. The second and third defendants are therefore disputing the quantum of the claim. The default judgement granted in this court was further granted against the second defendant in his personal capacity and as such cannot form part of the payment of the debt of the first defendant for outstanding levies.

Legal considerations

[9] The remarks in *FirstRand Bank Limited v Beyer*² by Ebersohn AJ should be applicable. He said the following:

'It seems to me, from the many similarly worded affidavits filed in support of applications for summary judgment which come before this motion court, that plaintiffs nowadays apparently are of the opinion that an affidavit deposed to by anybody in the employ of a plaintiff firm, who mechanically goes through the motions and make an affidavit "verifying" the cause of action and amount owing, would suffice to obtain summary judgment

[9] An analysis and consideration of Rule 32(2) clearly shows that the court must, from the facts set out in the affidavit itself, before it can grant summary judgment, be able to make a factual finding that the person who deposed to the affidavit, was able to swear positively to the facts alleged in the summons and annexures thereto and be able to verify the cause of action and the amount claimed, if any, and was able to form the opinion that there was no bona fide defence available to the defendant and that the notice of intention to defend was given solely for the purpose of delay.'

[10] In *Air Liquide Namibia (Pty) Ltd v Afrinam Investments (Pty) Ltd*³ Ueitele J, said the

² *FirstRand Bank Limited v Beyer* 2011 (1) SA 196 (GNP) (29 September 2010).

following:

‘The enquiry, where a plaintiff has applied for summary judgment is thus not, as the Court in the *Ongwediva Town Council v Kavili and Others* held, whether ‘a dispute of facts has arisen which cannot be resolved on papers’ but whether the defendant has, in his or her affidavit opposing the application for summary judgment, “fully” disclosed the nature and grounds of his or her defence and the material facts upon which it is founded, and

(b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law.’

[11] The principle in *Maharaj v Barclays National Bank Ltd*⁴ is applicable where Corbett JA states as follows :

‘The principle is that in deciding whether or not to grant summary judgement, the Court looks at the matter “at the end of the day” on all the documents that are properly before it.’

[12] Rule 73 of the Rules for Sectional Titles published under GN 224 in GG 5604 of 31 October 2014, deals with payment of legal costs and reads as follows:

‘An owner of a section is liable for and must pay all legal costs, including costs between attorney and client and collection commission, expenses and charges incurred by a body corporate in obtaining compliance with any of the owner[']s obligations in terms of the Act, these rules or any house rules.’

Conclusion

[13] The court was satisfied that the second and third defendants showed that they have an interest in the matter and joined them as such. It is also important to note that if they are successful in their recession application, which is a real possibility that the sale of the first defendant might be set aside.

[14] For the court to grant a summary judgement, it must be satisfied that the amount claimed in the judgement is indeed the correct and due amount. In this instance the court is not satisfied that the amount is indeed due and payable as the court is not satisfied with the calculation of the outstanding amount and would like the plaintiff to provide evidence as to how it arrived at the

³ *Air Liquide Namibia (Pty) Ltd v Afrinam Investments (Pty) Ltd* (HC-MD-CIV-ACT-CON-2017/03356) [2018] NAHCMD 123 (11 May 2018).

⁴ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (AD) at 423 H and 424.

outstanding amount. It is further not clear in terms of what provision the defendant is liable for financial charges and the recovery of costs and expenses and what exactly these costs are that form part of the amount outstanding according to the statement although legal costs are payable by the owner of the property in terms of rule 73 of the Rules for Sectional Titles. For that reason, the summary judgement application is dismissed. As it stands, costs are to follow the event and therefore costs are granted to the second and third defendant but capped in terms of rule 32(11).

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

1. The application for condonation is herewith granted.
2. The application for summary judgement is dismissed with costs.
3. The matter is postponed for a case planning conference to 21/2/2023
4. The parties to file a joint draft case plan on or before 16/2/2023

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Applicant:	Defendant:
Phillip Swanepoel Of Philip Swanepoel Legal Practitioners	Mr Mutorwa Of Anne Shilengudwa Incorporated