

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

RULING

Case no: HC-NLD-CIV-ACT-CON-2021/00218

In the matter between:

**LEONARD KONDJASHILI SHIHEPO**

**PLAINTIFF**

and

**PROJECT HOPE NAMIBIA**

**DEFENDANT**

**Neutral Citation:** *Shihepo v Project Hope Namibia* (HC-NLD-CIV-ACT-CON-2021/00218 [2022] NAHCNLD 61 (13 June 2022))

**CORAM:** MUNSU AJ

**Heard:** 23 May 2022

**Delivered:** 13 June 2022

**Flynote:** Interlocutory application - condonation for non-compliance with court order – requirements for condonation considered– Rule 32(9) and (10) – whether applicable to applications for condonation – propriety of legal practitioners deposing to affidavits.

**Summary:** Before this court is a condonation application which stems from the defendant's default to comply with a court order. The defendant was directed to file a discovery affidavit of which he omitted to do on the stipulated date. The application is opposed. The defendant's non-compliance was as a result of his failure to properly diarise the dates for filing. He argues that the non-compliance is miniature and not prejudicial to the plaintiff, also that the matter will still proceed as per the timelines set

forth regardless. In setting out the prospects of success, the defendant merely states that such prospects are in existence and that there are several witnesses in support of his case. In opposition the plaintiff contended that the application brought by the defendant is improper because the defendant is *ipso facto* barred and ought to have brought an application for the upliftment of such bar. The plaintiff argues that there is no proper application before this court and that he would shed more light on this aspect in his heads of argument.

*Held:* that a discovery affidavit is not a pleading and as such, an omission to file a discovery affidavit and to timely exchange discovery bundles cannot be subject to barring.

*Held that:* non-compliance with the directions given by this court can never be a minor transgression irrespective of how miniature it may appear to be.

*Held further that:* an affidavit is the backbone of a litigant's case, and in this instance the plaintiff failed to set out his opposition properly in his answering papers.

*Held:* that in applications for condonation, the court must be placed in a position to be able to assess the prospects of success, which requires the applicant to set forth essential information 'briefly' and 'succinctly'.

*Held that:* legal practitioners must desist from deposing to affidavits on behalf of their clients, save for exceptional and compelling reasons. Such reasons are to be disclosed in that very affidavit and must be exceptional.

The court found that the explanation was reasonable and granted the application with costs in favour of the plaintiff.

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**ORDER**

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1. The application for condonation for the late filing of the discovery affidavit is hereby granted.
2. The discovery affidavit filed of record stands as filed.
3. The defendant is ordered to pay the costs of this application which shall be subject to rule 32(11).
4. The matter is postponed to 18 July 2022 for a case management conference.
5. The parties are to file a joint case management report on or before 13 July 2022.

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## RULING

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### **MUNSU AJ:**

#### Introduction

[1] Before this court is an opposed interlocutory application moved by the defendant for condonation of the late filing of the discovery affidavit and bundles as per this court's order dated 22 January 2022. The defendant prays that the discovery affidavit already filed be accepted and form part of the matter.

#### Background

[2] The affidavit in support of the application for condonation is deposed to by the defendant's legal representative of record. The only reason advanced for having been in default of the court order is an administrative oversight on the part of the defendant's counsel. This is that he erroneously diarised the dates for filing to a further date.

[3] In his very brief explanation counsel for the defendant states that his non-compliance is minimal in nature and did not materially prejudice the plaintiff. This is because the discovery affidavit was filed one day late and that the matter will still proceed as intended in terms of the timelines set forth regardless.

[4] In his brief answering affidavit, the plaintiff takes the view that the application for condonation does not meet the required standard. The plaintiff is of the view that there is no application before this court to enable him to answer to the allegations contained in the affidavit as it does not comply with the rules of this court. This position was to a larger extent amplified on in rather detailed heads of argument.

[5] The plaintiff contends that the defendant ought to have brought an application for the upliftment of bar as opposed to a condonation application. The plaintiff argued that the defendant is now barred in terms of rule 54(3), which reads as follows:

[3] Where a party fails to deliver a pleading within the time stated in the case plan order or within any extended time allowed by the managing judge, that party is in default of filing such pleading and is by that very fact barred.'

[6] It is appropriate at this stage to determine whether or not a discovery affidavit is a pleading and whether it is susceptible to the rule relating to barring.

[7] Unfortunately, the rules of court do not define the word "pleading." However, the nature and purpose of pleadings can be discerned simply by reading the requirements under rule 45. In terms of this rule, pleadings must be clear and concise and must state forth the material facts on which a claim or defence is dependent.

[8] The learned authors Herbstein and Van Winsen<sup>1</sup> make it clear that:

'The term 'pleading' is used in civil cases 'to denote a document in which a party to proceedings in a court of first instance is required by law to formulate in writing his case or part of his case in preparation for the hearing.

[9] The authors further states that:

'In South Africa the term "pleading" is used in a more restricted sense and does not include documents such as petitions, notices of motion, affidavits, simple summonses, provisional sentence summonses or writs of arrest.'<sup>2</sup>

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<sup>1</sup> *The Civil Practice of the High Courts of South Africa*, 5<sup>th</sup> edition, Vol I, page 558.

<sup>2</sup> *Ibid.*

[10] At page 559, the learned authors posit that among its other functions, a pleading serves to define the issues upon which the court will be called upon to adjudicate; to enable the parties to prepare for trial on the issues as defined; to serve as a record of the respective parties' claims, counterclaims, admissions and defences which may be relevant in any other future litigation between the parties; to set the parameters within which the proceedings will be conducted and evidence admitted or excluded; and to determine the burden of the onus of adducing evidence and the right (or duty) to begin.

[11] In the context of the above, I am of the considered view that a discovery affidavit cannot be regarded as a pleading. For this reason, it seems to me that the omission to file a discovery affidavit and to timely exchange discovery bundles cannot be subject to barring.<sup>3</sup> Thus, I find that the provisions of rule 54(3) do not apply.

[12] I now turn to deal with the issue of condonation.

[13] The law regarding condonation applications is trite. In *Minister of Health and Social Services v Amakali Matheus*<sup>4</sup> the Supreme Court set out the requirements for condonation as follows:

'He or she must provide a reasonable, acceptable and bona fide explanation for non-compliance with the rules. The application must be lodged without delay, and must provide a full, detailed and accurate explanation for the entire period of the delay, including the timing of the application for condonation.<sup>5</sup> Lastly, the applicant must satisfy the court that there are reasonable prospects of success on appeal.'<sup>6</sup>

[14] The reason for non-compliance as mentioned in the preceding paragraphs was due to a failure on the part of the defendant's legal representative to properly diarise the matter. The defendant's legal representative placed emphasis on the fact that the non-compliance in the matter is nominal. He said the following:

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<sup>3</sup> This is not to say that there are no consequences for such failure as there are provisions on sanctions.

<sup>4</sup> *Minister of Health and Social Services v Amakali Matheus* Case no: (SA-2017/4) [2018] NASC 413 (06 December 2018).

<sup>5</sup> See *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5; *Primedia Outdoor Namibia (Pty) Ltd v Kauluma* (LCA 95-2011) [2014] NALCMD 41 (17 October 2014).

<sup>6</sup> See also *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC), p 640 para 10; *Minister of Health and Social Services v Amakali* 2019 (1) NR 262 (SC) p 267 para 17 – 19. *Balzer v Vries* 2015 (2) NR 547 (SC) at 551J-552F and *Jossop v The State* (SA 44/2016) NASC (30 August 2017).

[6]...I further submit that the non-compliance is minimal in nature and that the Plaintiff is not materially prejudiced by this unfortunate oversight...[7] I further respectfully submit that this is the first instance of non-compliance in this matter and that it is minor in nature.'

[15] Non-compliance with the directions given by this court can never be a minor transgression irrespective of how miniature it may appear to be.

[16] On the other hand, the plaintiff did not explicitly set out his case in his answering affidavit. He explains as follows:

'I am advised by my legal practitioner of record that there is no application before this Honourable Court from the defendants to enable me to answer to the allegations contained in the Condonation Affidavit as the said affidavit does not comply with the rules of this honourable Court for an application to be considered.

...

I further state that I shall address these allegations further in my heads of argument to be filed in accordance with the order of this Honourable Court dated 28 March 2022.'

[17] This is the only detailed ground of opposition in the answering affidavit by the plaintiff. Interestingly, in his heads of argument, the plaintiff went on to set out numerous points in *limine* which are not intimated in his answering affidavit as the basis upon which his opposition is premised. Suffice it to say that in applications, affidavits are the backbone of litigant's respective cases. It is my view that the plaintiff failed to make out a proper opposition in this matter and I do not find it necessary to deal with the points raised in the heads of argument.

[18] In determining whether the application for condonation should be granted, I take into account the extent of the non-compliance, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits, the prejudice suffered by the plaintiff as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.<sup>7</sup>

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<sup>7</sup> See *Minister of Health and Social Services v Amakali Matheus* supra.

[19] Counsel for the defendant explains that he became aware of the default on the day the parties were supposed to file their discovery affidavits (as per the court order) when he received the plaintiff's discovery affidavit. Immediately, he consulted the defendant and the next day he attended to file the defendant's discovery bundle together with this application. Although not without fault, I find the explanation tendered by the defendant to be reasonable.<sup>8</sup> The non-compliance was rectified immediately, thereby reducing the likelihood of prejudice.

[20] However, what is not properly explained is the second leg to the application of this nature, being the prospects of success that the party in default enjoys. In respect to this, the defendant says the following:

[7] I submit that the defendant enjoys reasonable prospects of success in terms of defending the matter and that there are several witnesses that shall be brought to court in support thereof.'

[21] The law requires the applicant to satisfy the court that he enjoys reasonable prospects of success on the merits. Thus, the court must be placed in a position to be able to assess the prospects of success. This requires the applicant to set forth essential information 'briefly' and 'succinctly' i.e. without verbosity or argument.<sup>9</sup> This, the defendant failed to do. However, it can be gleaned from the defendant's plea that he has an arguable case.

[22] I have observed that the defendant's legal representative deposed to the affidavit in support of this application. It is necessary to emphasise that the practice of legal practitioners deposing to affidavits in matters in which they appear is not advisable and is strongly discouraged.<sup>10</sup>

[23] In *Prosecutor-General v Paulo and Another*,<sup>11</sup> Angula DJP said the following:

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<sup>8</sup> See *The Zambezi Communal Land Board v Simataa* (HC-MD-CIV-ACT-CON-2019/03818) [2021] NAHCMD 10 (22 January 2021).

<sup>9</sup> See *RS Brick Factory Close Corporation v Radial Truss Industries (Pty) Ltd* (HC-MD-CIV-ACT-CON-2019/00728 [2020] NAHCMD 601 (23 December 2020).

<sup>10</sup> See *RS Brick Factory Close Corporation v Radial Truss Industries (Pty) Ltd* *ibid* para 18.

<sup>11</sup> *Prosecutor-General v Paulo and Another* 2017 (1) NR 178 (HC), at p.184, para 16.

'I feel obliged to make an observation here that this practice by legal practitioners of filing an affidavit on behalf of a client should be discouraged and desisted from. It should only be resorted to in exceptional circumstances for instance where the party to the proceedings is for compelling reasons unable to depose to an affidavit. Such reason must be disclosed in the affidavit deposed to by the legal practitioner. . . In the event of disputes of facts in affidavits arising which cannot be resolved by the approach to resolving disputes in motion proceedings commonly referred to as the *Plascon-Evans* rule and the matter has to be referred to oral evidence, in such event the legal practitioner will have to become a witness. Such a scenario would be undesirable. It is further undesirable for a legal practitioner to depose to an affidavit on behalf of a client dealing with factual issues. A legal practitioner cannot be astride two horses at the same time, namely be a witness and also a legal practitioner subject to ethical rules of conduct.'

[24] Counsel for the defendant argued that the failure to properly diarise the matter was an error on his part, hence the need for him to depose to the affidavit. Considering the *Paulo* matter above, it is abundantly clear that the reason that made it necessary for counsel to depose to an affidavit must be disclosed in that very affidavit and such reason must be exceptional and compelling. There is no reason disclosed in the affidavit. Also, I find that the explanation tendered in arguments is equally not exceptional.

### Conclusion

[25] Having considered the papers as well as the arguments presented on behalf of the parties, I grudgingly grant the application for condonation.

### Costs

[26] It is common cause that a party that petitions the court for condonation is, in essence, pleading for the court's indulgence. After considering the entire circumstances attendant to this matter, I have come to the conclusion that the opposition raised by the plaintiff was not unwarranted. In light of this, the defendant is to pay the costs of this application, pursuant to the terms of rule 32(11).



Order

[27] In view of the considerations recorded above, the following order is appropriate in the circumstances:

1. The application for condonation for the late filing of the discovery affidavit is hereby granted.
2. The discovery affidavit filed of record stands as filed.
3. The defendant is ordered to pay the costs of this application which shall be subject to rule 32(11).
4. The matter is postponed to 18 July 2022 for a case management conference.
5. The parties are to file a joint case management report on or before 13 July 2022.

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D. C. MUNSU  
ACTING JUDGE

## APPEARANCES:

## PLAINTIFFS

G. Mugaviri  
Of Mugaviri Attorneys, Oshakati

## DEFENDANTS

J. L. Matheus  
Of Slogan Matheus & Associates, Ongwediva