

A 172/2000

ABEL P A GUIMARAES vs VICTOR VOLKOV

HOFF. J

HEARD ON: 2001/03/09
DELIVERED ON: 2001/05/21

PRACTICE

SUMMARY JUDGMENT:

Application for condonation of non compliance with Rules -
Late filing of heads of argument, late indexing and pagination.
Explanation not totally satisfactory but cannot be said to be
unreasonable - explanation accepted and condonation
granted. Applicant visited with costs of application.

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ABEL P A GUIMARAES

APPLICANT

versus

VICTOR VOLKOV

RESPONDENT

CORAM: HOFF, J.

Heard on: 2001.03.09

Delivered on: 2001.05.21

JUDGMENT

HOFF, J.: Respondent/Plaintiff instituted an action on 3 July 1997 against applicant/defendant for payment of the sum of US\$60 000 00 which was due and payable in terms of an acknowledgement of debt signed by applicant in favour of respondent.

Default judgment was granted against applicant on 3 February 2000. Applicant having failed to file an replying affidavit enrolled for argument an application for rescission of judgment on 4 December 2000. This application for rescission of judgment was dismissed.

Pursuant to an application on notice of motion this Court on 22 January 2001 made an order which contained *inter alia* the following provisions:

1. the judgment and/or order by default against applicant on 4 December 2000 at the instance of respondent is rescinded and/or set aside.
2. the applicant's failure to have delivered a replying affidavit to the application for rescission of judgment by default granted on 3 February 2000 timeously and/or at all is condoned.
3. applicant is granted leave to deliver his replying affidavit to the application for rescission of judgment by default granted on 3 February 2000 within 30 days from date hereof.

Applicant filed his replying affidavit on 1 March 2001.

The date of hearing of 9 March 2001 was arranged and agreed to between the parties with the registrar in respect of the application for rescission of judgment.

The heads of argument of applicant was filed on 7 March 2001 and the pagination of the record was done on 8 March 2001.

The respondent on 7 March 2001 gave notice of his intention to apply to have certain portions of applicant's founding affidavit struck out.

Applicant gave notice on 8 March 2001 that he would on 9 March 2001 apply for an order in the following terms:

1. condoning the late filing of applicant's heads of argument.
2. condoning the fact that the process of Court and/or documentation pertaining to this application have not been timeously indexed and paginated.

This application for condonation is opposed by respondent.

In support of this application for condonation applicant filed a supporting affidavit of the instructing attorney in which the instructing attorney stated that he had been hospitalised since 28 February 2001.

He does not in his affidavit state when he had been discharged but mentioned that on 2 March 2001, whilst still in hospital he had given certain instructions to his secretary and that instructed counsel only received the brief containing the necessary documentation on 5 March 2001 and heads of argument was then prepared and delivered on 7 March 2001.

He further argued that since this Court granted leave to deliver his replying affidavit within 30 days from the date of such order namely 22 January 2001 he had until 5 March 2001 to deliver his replying affidavit and that heads of argument could not have been drafted prior to the replying affidavit having been delivered.

If applicant had known this why had he agreed to the date of hearing on 9 March 2001? In this regard there is no explanation.

Ms Viviers who appeared on behalf of respondent argued that the instructing attorney was negligent in his duties after his release from hospital on 2 March 2001 and that he did not fully explain the circumstances of his inability to observe the Rules of this Court. In this regard she submitted that an cost order *de bonis propriis* be considered.

She argued in addition that applicant in his application should also have dealt with the prospects of success on the merits of the application action which he failed to do and that this Court can only grant condonation if there is compliance with the requirement that good cause has been shown for non compliance with the rules as well as his prospects of success on the merits of the application.

Mr Mouton who appeared on behalf of the applicant argued that although the prospects of success had not been dealt with in the supporting affidavit of instructing attorney that the prospects of success are being dealt with in other papers before Court.

It is trite law that a Court may on good cause shown condone non-compliance of its rules.

In this regard Tebbutt J said the following in the case of *General Accident Insurance Co South Africa Ltd v Zampelli* 1988 (4) SA CPD 407 on 411 C-D:

"'Good cause shown' has now, it seems, been accepted to mean not only must the applicant seeking the indulgence of condonation for the late filing of the heads of argument in an appeal - for an indulgence it undoubtedly is - give a reasonable and acceptable explanation for his failure to comply with the Rules, but must also show that he has — fair prospects of success in the appeal or — reasonable prospects of success."

I further agree with the remark on p410 I of the Zampelli case that condonation is not a mere formality and that not every circumstance nor every 'cause' will warrant condonation.

See in this regard *S v Zondo* 1966 (2) SA TPD 521

Louw v Louw 1965 (3) SA EPD 852

Zampelli's case supra.

It is in my view expedient that an applicant in his or her application for condonation of non-compliance with a rule of practice, such as the one which requires that heads of argument be filed, also deal with the prospects of success on the merits of the application.

In casu I am of the view that I am not precluded from having regard to the merits of this matter as it appears from other documents filed.

On the papers before me it appears that applicant has reasonable prospects of success on the merits of the claim against him in the sense that the monies which had been paid by applicant to respondent may influence the amount respondent may eventually be awarded in the event of success in his claim against applicant.

I would have preferred the affidavit of instructing attorney to have been in more detail but in my view his explanation for his inability to comply with the rules, although not totally satisfactory, cannot be said to be unreasonable or unacceptable.

This finding together with the view that there is a reasonable prospects of a partially successful defence induce me to exercise my discretion in favour of granting this application for condonation of non-compliance with the rules.

The following order is hereby made:

1. the late filing of applicant's heads of argument is condoned.

2. condoning the fact that documentation pertaining to this application have not been timeously indexed and paginated.
3. applicant to pay the cost of this application.



HOFFE, J.