REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A 245/2014

In the matter between:

ROSALIA ITA	**APPLICANT**
And	
EZER HOSEA TALA ANGULA N.O.	**1st RESPONDENT**
THE MASTER OF THE HIGH COURT	**2nd RESPONDENT**
THE REGISTRAR OF DEEDS	**3rd RESPONDENT**
NIEL LAKAY	**4th RESPONDENT**

Neutral citation: *Ita v Angula NO* (A 245-2014) [2015] NAHCMD 215 (4 September 2015)

Coram: UEITELE J
Heard: 04 August 2015
Delivered: 04 September 2015

***Flynote*:** Practice - Judgments and orders - Rescission of judgment - Application in terms of Rules 44, 31(2)(b) and common law - Requirements - *'Good cause shown'* in Rule 16 - Reasonable explanation for delay; *bona fide* defence - Defence must be clear on the papers.

ORDER

1 The application to condone Rosalia Iita's failure to timeously file her notice to oppose the first applicant's application is hereby dismissed with costs.

JUDGMENT

UEITELE J,

Introduction and background

[1] On 05 September 2014 Mr. Ezer Hosea Tala Angula (as applicant) in his capacity as the Executor in the Estate of the late Theopilus Nehemia commenced proceedings in this court by way of a Notice of Motion. The respondents in that matter were; Rosalia Iita (as first respondent), The Master of the High Court (as second respondent), the Registrar of Deeds (as the third respondent) and a certain Mr. Niel Lakay (as the fourth respondent). In that application, Mr. Angula (I will refer to Mr. Angula as the first respondent in this judgment) sought the following relief from this court, an order:

'1. Declaring that the signature on the document, a copy whereof attached to the Applicant's affidavit, marked "**B**" dated 2nd July 2010 purporting to be the Last Will and Testament of the late Theopilus Nehemia ("the deceased") who died on 15 March at Windhoek, is not the signature of the deceased and accordingly, the document is not the Last Will and Testament of the deceased.

1. Declaring that the deceased died in testate;

2. Directing the third respondent to cancel the entry in the Deeds Registry indicating that the immovable property situated at Erf No. 2338 belongs to the first respondent;

3. Directing that the deceased's estate be referred back to the Second Respondent and directing the Second Respondent to exercise her power with regard to the administration and distribution of the deceased's estate *de novo*;

4. Declaring that any action taken based on the assumption that the document is the Last Will and Testament of the deceased is null and void and of no legal effect'.

[2] On 17 September 2014 at 17h38 the Notice of Motion together with the supporting affidavit of Mr. Angula and all the annexures to that affidavit were served by Mr. Carlos Freygang the Acting Deputy Sherriff for the District of Windhoek on Ms. Rosalia Iita (I will refer to Rosalia Iita as the applicant in this judgment). In the Notice of Motion Ms. Iita was informed that if she intended to oppose the application she must inform the first respondent's (the then applicant) legal practitioners of her intention to do so by not later than 22 September 2014 and that she must not later than 14 days from the date on which she so signifies her intention to oppose the relief sought by the first respondent file her affidavit in support of her opposition. She was further warned that if she does not signify her intention to oppose the first respondent's application the first respondent will apply to court on 26 September 2014 for an order as set out in the Notice of Motion.

[3] Ms. Iita did not indicate her intention to oppose the application by 22 September 2014 as informed the notice of motion, and the first respondent's application was not set down for hearing on 26 September 2014 as indicated in the Notice of Motion but was set down for hearing on the unopposed motion court roll of 03 October 2014. When the matter was called on that day (i.e. 03 October 2014) there was still no notice to oppose the application nor was there any appearance by or on behalf of any of the four respondents. The court accordingly granted the relief sought by the first respondent.

[4] On 30 October 2014 the applicant then brought an application in terms of which she seeks the following relief from this court.

'1 Dispensing with the requirements of security as envisaged by the rules of this honourable court.

2 Condoning the applicant's non-compliance with the rules of court by not timeously filling a notice of intention to oppose the application.

3 Rescinding and setting aside the default judgment granted in favour of the first respondent.

4 Granting leave to the applicant to oppose the application and to allow the applicant to file its answering affidavit within 20 court days from the date on which the order is granted.'

[5] On 04 November 2014 the first respondent indicated that he will oppose the applicant's application and he filed his affidavit in support of his opposition of the applicant's application on 17 November 2014. During May 2015 the matter was docket allocated to me for purposes of case managing it. On 06 May 2015 I called a case planning conference for 10 June 2015. On that day (i.e. the 10 June 2015) I postponed the matter to 01 July 2015 for a status hearing on 01 July 2015. On 01 July 2015 I was informed that all the pleadings have been filed and that the matter was ready to be heard, I accordingly made the following order:

'1 That the applicant must file her heads of arguments on or before 20 July 2015.

2 That the defendant (*sic*) must file their heads of argument on or before 27 July 2015.

3 That the court file must be indexed and paginated on or before 30 July 2015.

4 That the hearing date of 04 August 2015 is hereby confirmed.'

[6] The applicant failed to file her heads of arguments by 20 July 2015 as ordered by the court. The first respondent filed his heads by the 27 July 2015 as ordered by the court. It is the applicant's application that I will now turn to consider.

[7] Before I consider the applicant's application I return to the order that I made on 01 July 2015. As I indicated in above the applicant was ordered to file her heads of arguments on 20 July 2015 and she failed to do so. The applicant's counsel filed heads of argument on Friday 31 July 2015 when the matter was set down for hearing on Monday 04 August 2015. There was no application for condonation. Counsel simply appeared at the hearing. When I directed his attention to the order of 01 July 2015 he enquired whether I wished him to bring an application for condonation. My response to counsel was that he will find the answer to his enquiry in the Rules of Court and in the case of, *Nedbank Ltd v Louw*[1]. Rule 54 of the rules of court provides as follows:

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1 2011 (1) NR 217 (LC).

‘Sanctions for non-compliance in absence of defaulting party obtaining relief, relaxation, extension or condonation

54. (1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for a failure to comply imposed by the rule, practice direction or court order has effect and consequences for such failure and such effect and consequences follow, unless the party in default applies for and is granted relaxation, extension of time or relief from sanction.

(2) Where a rule, practice direction or court order -

(a) requires a party to do something within a specified time; or

(b) specifies the consequences of a failure to comply,

the time for doing the act in question may not be extended by agreement between the parties.

(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.

(4) For the purposes of this rule the days from 16 December to 15 January, both inclusive, are not counted in computing the time allowed for the delivery of any pleading.’

[8] In the *Nedbank Ltd v Louw* matter Henning AJ said the following:

‘The respondent's counsel filed heads of argument one court day prior to the hearing, instead of the prescribed five days. There was no application for condonation. Counsel simply appeared at the hearing. When his attention was directed to rule 15 which for condonation requires an application — notice of motion and affidavit — he conceded the absence of an application. The reason for the lateness, he said, was pressure of work and he apologised. Now although the apology seems to express good manners, it is not a basis for condonation. The pressure of work in the life of a legal practitioner is nothing new. In A Barrister's History of the Bar RG Hamilton quotes a letter which Cicero wrote to his brother in late August of the year 54 BC:

“When you get a letter from me in the hand of one of my secretaries, you can reckon that I didn't have a minute to spare; when you get one in my own, that I did have one

> minute! For let me tell you I have never in my life been more inundated with briefs and trials, and in a heat-wave at that, in the most oppressive time of the year. But I must put up with it."

Hamilton refers to a letter written by a barrister to a friend in 1793. It reads:

> "Lincoln's Inn November 22, 1793
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> Dear Dumont,
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> You would perhaps set some value on this letter, if you knew how many things I have to do at the moment I write it. And what excuses I must make tomorrow to some stupid attorney for having devoted to you the time which 1 ought to employ upon an appeal in Chancery."

The art of legal practice is, in the words of Cicero, to put up with pressure, and to perform within the rules, not to ignore them. It seems to have become a fashion to disregard procedural stipulations and to rely on condonation as an entitlement, even worse, to equate an apology with condonation. If legal practitioners are so driven by professional egoism and/or financial rapacity that they neglect briefs, such practitioners and their clients will incur misfortune. In the circumstances the appearance of counsel for the respondent is held to be irregular. '

[9] In the matter of *Indigo Sky Gems (Pty) Ltd, v Johnston*[2] Gibson J struck from the roll a matter because the counsel failed to timeously file heads of argument when striking the matter she said the following:

> 'The crux of the matter is that there appears to have been a flagrant breach of the Rules of Court. Given that course of conduct, my attitude is that the Court can only ignore such attitude at its peril and to its own prejudice in the running and administration of the Court's business. Thus my view is that such failure cannot be overlooked in the circumstances of this case because to do so would be to encourage laxity in the preparation of Court pleadings. The orderly arrangement of Court proceedings as presently known, will be a thing of the past. If rules are only to be followed when a legal practitioner sees fit to do so, then the Rules may as well be torn up.'[3]

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2 1997 NR 239 (HC).

3 Also see the matter of *Van Zyl and Another // Smit and Another* 2007 (1) NR 314 (HC) at page317.

[10] The misfortune alluded to by Henning AJ in the matter of *Nedbank v Louw* is the misfortune which visited the applicant in this matter. I regarded the participation of applicant's counsel at the hearing to be irregular and I accordingly did not hear him. I now return to consider the applicant's application. I will briefly set out the legal principles that govern condonation applications or a rescission application.

The applicable Legal Principles

[11] The procedure for an application to rescind a default judgment/order is governed by Rule 16 of this court's Rules. Rule 16 reads as follows:

'**Rescission of default judgment**

16. (1) A defendant may, within 20 days after he or she has knowledge of the judgment referred to in rule 15(3) and on notice to the plaintiff, apply to the court to set aside that judgment.

(2) The court may, ***on good cause shown*** and on the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of the application in the amount of N$5 000, set aside the default judgment on such terms as to it seems reasonable and fair, except that -

(a) the party in whose favour default judgment has been granted may, by consent in writing lodged with the registrar, waive compliance with the requirement for security; or

(b) in the absence of the written consent referred to in paragraph (a), the court may on good cause shown dispense with the requirement for security.

(3) A person who applies for rescission of a default judgment as contemplated in subrule (1) must –

(a) make application for such rescission by notice of motion, supported by affidavit as to the facts on which the applicant relies for relief, including the grounds, if any, for dispensing with the requirement for security;

(b) give notice to all parties whose interests may be affected by the rescission sought; and

(c) make the application within 20 days after becoming aware of the default judgment.

(4) Rule 65 applies with necessary modification required by the context to an application brought under this rule.'

[12] The procedure to be followed when applying for condonation for the failure to comply with a rule of court or a court order is set out in Rule 55. Rule 55 of this court's rules provides as follows:

'Upliftment of bar, extension of time, relaxation or condonation

55 (1) The court or the managing judge may, on application on notice to every party and ***on good cause shown***, make an order extending or shortening a time prescribed by these rules or by an order of court for doing an act or taking a step in connection with proceedings of any nature whatsoever, on such terms as the court or managing judge considers suitable or appropriate.

(2) An extension of time may be ordered although the application is made before the expiry of the time prescribed or fixed and the managing judge ordering the extension may make any order he or she considers suitable or appropriate as to the recalling, varying or cancelling of the consequences of default, whether such consequences flow from the terms of any order or from these rules.'

[13] It will be realised that in both Rules 16 and 55 the phrase *'on good cause shown'* occurs. In the matter of *Cairns' Executors v Gaarn*[4], the court was considering a condonation application in respect of an appeal which was not enrolled within the time frame contemplated in the rules of that court (i.e. the Appeal Court). The applicant for condonation relied on a court rule which read that: *'The Court may for sufficient cause shown, excuse the parties from compliance with any of the foregoing Rules'*. Innes JA (as he then was) stated as follows:

'It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive, and which it is highly desirable not to abridge. All that can be said is that the applicant must show, in the

4 1912 AD 181 at p 186.

words of COTTON, L.J. (*In re Manchester Economic Building Society*, 24 Ch.D. 488 at p. 498), 'something which entitles him to ask for the indulgence of the Court'. What that something is must be decided upon the circumstances of each particular application'.

[14] In the matter of *Leweis v Sampoio*[5] the Supreme Court per Strydom CJ stated that:

> 'Although the Courts have studiously refrained from attempting an exhaustive definition of the words 'good cause' they have laid down what an applicant should do to comply with such requirement. In this regard it was stated that an applicant:
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> (a) must give a reasonable explanation for his default;
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> (b) the application must be made bona fide; and
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> (c) the applicant must show that he has a bona fide defence to the plaintiff's claim.'

The learned Chief Justice furthermore stated that:

> 'An application for rescission is never simply an enquiry whether or not to penalize a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it willful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not *bona fide.*'

[15] In the recent matter of *Standic v Kessels*[6] I referred to the matter of *Telecom Namibia Limited v Mitchell Nangolo & 34 Others* where 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.[7] The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.[8]

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5 2000 NR 186 (SC)
6 *Standic BV // Kessels* (A 289/2012)N[2015] NAHCMD 197 (24 August 2015).
7 *Beukes and Another v Swabou and Others* [2010] NASC 14 (5 November 2010), para 12.
8 *Father Gert Dominic Petrus v Roman Catholic Archdiocese* , SA 32/2009, delivered on 09 June 2011, para 9.

2 There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.[9]

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.[10]

4 The degree of delay is a relevant consideration;[11]

5 The entire period during which the delay had occurred and continued must be fully explained;[12]

6 There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented.[13] (Legal practitioners are expected to familiarize themselves with the rules of court).[14]

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.[15]

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*[16], 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.

[16] The requirement that an applicant's case must not patently be unfounded suggests that something must be put on record from which the Court can estimate the soundness of

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9 *Beukes and Another v Swabou and Others* [2010] NASC 14(5 November 2010), para 13.
10 *Ondjava Construction CC v HAW Retailers* 2010 (1) NR 286(SC) at 288B, para 5.
11 *Pitersen-Diergaardt v Fischer* 2008(1) NR 307C-D(HC).
12 *Unitrans Fuel and Chemical (Pty) Ltd v Gove –Co carriers CC* 2010 (5) SA 340, para 28.
13 *Salojee and Another NNO v Minister of Community Development* 1965 (2) SA 135(A) at 141B*; Moraliswani v Mamili* 1989(4) SA 1 (AD) at p.10; *Maia v Total Namibia (Pty) Ltd* 1998 NR 303 (HC) at 304; *Ark Trading v Meredien Financial Services Namibia (Pty) Ltd* 1999 NR 230 at 238D-I.
14 *Swanepoel, supra* at 3C; *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432(SC) at 445, para 47.
15 *Swanepoel, supra* at 5A-C; Vaatz: *In re Schweiger v Gamikub (Pty) Ltd* 2006 (Pty) Ltd 2006 (1) NR 161 (HC), para; *Father Gert Dominic Petrus v Roman Catholic Diocese,* case No. SA 32/2009, delivered on 9 June 2011, page 5 at paragraph 10.
16 1985 (4) SA 773 (A).

the applicant's case. In the matter of *Uitenhage Transitional Local Council v South African Revenue Service*[17] Heher JA stated that:

> '…condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

[17] In the matter of *Silverthorne v Simon*[18], Salomon JA said the following

> 'Whenever therefore, there is any satisfactory explanation of the delay on the part of defendant, if the Court comes to the conclusion that defendant's application is *bona fide*, that he is really anxious to contest the case and believes he has a good defence to the action, and if in these circumstances, the order can be made without any damage or injury to the plaintiff other than can be remedied by an order as to payment of costs, I think when these conditions are present in any application, the Court should as far as possible assist the defendant and allow him to file a plea in the action'.

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[18] In the matter of *Namibia Security Supplies CC v Schidlowski*[19] I said the following:

> 'In view of our current Constitutional dispensation which guarantees every person the right to have his or her dispute determined by an independent and competent Court or Tribunal I endorse the views expressed in the cases I have quoted above. I am therefore of the opinion that the present Rule, i.e. Rule 55 (1) and (2), should, be interpreted to say, that it requires a defendant who is in default *to say on oath that he has a good defence*, and requires him further to set out sufficient information to enable the Court to come to the conclusion that the defence is *bona fide* and not put up merely for the purpose of delaying satisfaction of the plaintiff's claim. The defendant does not, as a rule of law, necessarily have to make out a *prima facie* defence in his affidavit.

[19] Having set out the legal principles what is left for me to enquire is, whether the applicant has satisfactorily explained the delay on her side, whether her application is made *bona fide* and not put up merely for the purpose of delaying satisfaction of the respondent's

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17 2004 (1) SA 292 (SCA) at 297.

18 1907 T.S. 123.

19 An unreported judgment of this court Case No (I 4113/2011) [2013] NAHCMD 282 (delivered on 01 October 2014).

claim and whether she has, in the affidavit, set out a *prima facie* defence to the respondent's claim. I will start that enquiry by setting out the applicant's case.

Applicant's case

[20] The applicant admits that she was served with the Notice of Motion during the period between 12 September 2014 and 20 September 2014 but alleges that when the deputy sheriff served her with the application, he did not explain to her what the matter was about. She further explains that when she attempted to read the application, although she could make out that the application had to do with her late boyfriend's estate; she could not see the date on which the hearing of the matter was set down. She proceeds and state that she asked her son (who is self-employed) to assist her with the papers, after he went through, he advised her that she needed to enlist the services of a legal practitioner which is when her son started to search for a legal practitioner for her. She states that during the week leading to the end of September 2014 she made three calls to her son to establish what the status of the search for a legal practitioner was. It was only during the week of 29 September 2014 that he confirmed to her that he has acquired a legal representative for her and that he has paid a deposit for their services as required by the legal practitioners and that the consultation was arranged for 03 October 2014.

[21] The applicant then submitted that her failure to file the notice to oppose the respondent's claim was not due to willful disregard of the rules of court but it is 'owing' to the fact that she did not have nor does she has the money to engage the services of a legal representative for purposes of advising her on the matter before court. She proceeded and said:

> '…my delay in filing a notice of intention to oppose the application was owing to my inability to raise funds on time but that I have made concerted effort and the default judgment would not be granted in favour of the applicant [the current respondent] should I or my legal representative have known that the matter was subsequently set down for hearing on the date on which the notice was filed.'

[22] The applicant raise issues with the fact that the main application especially the point taken by a handwriting expert that the signature of the deceased in the document purported to be the Last Will and Testament of the deceased could not possibly be that of the deceased. Applicant further argued that the second respondent (in the main application)

accepted the Will which meant that the document was valid and given the chance she would seek the services of an independent expert to study the materials and compile an independent report.

[23] As regards the question of security as required by Rule 16 (2) the applicant states the following:

> 'I submit that I have not paid the security envisaged by on the basis that I am not in the position to pay same as I am unemployed. My legal representatives have advised me that in terms of the rules of this honourable, the court may order that the requirement of security be dispensed with. In view of the explanation that I have tendered and the further compliance with the rules of court, I seek the court's indulgence to condone my belated filling of the notice setting out my intent to oppose the application.'

The first respondent's case

[24] The respondent attacked the applicant's material non-disclosure of a monthly pension being "75% of the spouse's pension" from the deceased's pension fund. He submits that had the court known about the monthly pension, it would have been in a position to determine whether the "furnishing of security for costs should be dispensed with or not" – which applicant only later dealt with in her replying affidavit. As regards the delay to file the notice to oppose the application by the respondent opposition – he states that the applicant had ample time to file her notice to oppose the main application.

Discussion

[25] Based on the authorities that I have cited in this judgment, I must, in order to consider whether to dispense with the provision of security contemplated in Rule 16, grant the condonation sought and rescind the order granted in the absence of the applicant, be satisfied that the applicant (Ms. Rosalia Iita) has in her affidavit set out the grounds, if any, for dispensing with the requirement for security. The applicant in her affidavit simply states that she has not paid the security contemplated in the rules because she is not in the position to pay same as she is unemployed. She further states that her legal representatives have advised her that in terms of the rules of this court, the court may order that the requirement of security be dispensed with.

[26] The statement that condonation of a default is not a mere formality and will not be had for the asking applies with equal force to the question whether or not a court will dispense with the requirement for security, it will not be had for the mere asking. The statement that the applicant is unemployed and that she is not in the position to pay the security required by the rules is not sufficient to enable me to exercise my discretion. One would, as the first respondent pointed out in his opposing affidavit, have expected the applicant to make a detailed disclosure of her financial position. The applicant has in my view failed to set out the grounds on which I must exercise my discretion to dispense with the security required in Rule 16(1).

[27] What I gathered from the applicant's affidavit is that the applicant's son secured a legal practitioner for her on 29 September 2014 and that he paid a deposit for the legal practitioner on that day. I presume that the legal practitioners referred to by the applicant are the legal practitioners of record of the applicant. My presumption is based on the confirmatory affidavit deposed to by Mr. Elago deposed who confirms the correctness of the allegations in so far a as they relate to him. What the legal practitioners do not tell the court is significant: The court is not told who the applicant's son saw on 29 September 2014 and what documents were handed over to the person seen by the applicant's son on that date at the legal practitioners firm. The legal practitioners fail to tell the court whether they were presented with the Notice of Motion on 29 September 2014. The legal practitioners do not tell the court what they did, from the date (i.e. 29 September 2014) that they were approached by the applicant's son to the date (i.e. 03 October 2014) that they consulted with the applicant, to establish what the status of the application is. It appears therefore that no-one in the firm brought their professional mind to bear on the matter. Had they done so, they would have noticed that the matter was the subject of deadlines and that it would have been set down for hearing on 26 September 2014.

[28] In the light of what I have said in the preceding paragraph I am of the view that the applicant did not set out any acceptable (in the sense of being satisfactory) or reasonable explanation for the failure to timeously file a notice of intention to oppose the first respondent's application. There is equally no explanation at all, either by the applicant or her legal practitioner, why the application for condonation was only brought as late as 24 October 2014 when the order granted in the absence of the applicant came to her legal practitioner's attention on 07 October 2014. The law as I have shown is settled that the application for condonation must be brought as soon as the delay has become apparent and to the extent it was not so brought, there must be an acceptable, full and accurate

explanation for the delay in the bringing of the application for condonation. The application is singularly and demonstrably lacking in that regard too.

[29] I now turn to the question of prospects of success. While it is true that the applicant in an application such as the present one need not deal fully with the merits of the case and produce evidence that the probabilities are in her favour it would, nonetheless, be reasonable to expect of her to set out sufficient information to enable the court to come to the conclusion that her defence is *bona fide*. The applicant has not done so. I say so for the following reasons the applicant is not in position to dispute the expert evidence produce by the first respondent that the signature on the disputed Last Will and Testament is not that of the deceased. She wants to be given time to seek the services of an expert to contradict that finding. She says the following in her affidavit:

> 'I am not able to determine the accuracy of the report attached to the founding affidavit but I do deem it appropriate that I too be afforded an opportunity to engage an independent expert to study the materials and have an independent report.'

[30] I now turn to the question of costs. The issues of costs is within the discretion of the court and the general rule is that costs follow the course nothing has been placed before me to persuade me to depart from that general rule. I therefore make the following order:

30.1. The application to condone Rosalia Iita's failure to timeously file her notice to oppose the first applicant's application is hereby dismissed with costs.

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Judge

APPEARANCES:

APPLICANT:	**MR PS ELAGO** APPEARING FOR TJOMBE-ELAGO LAW FIRM INC.
RESPONDENTS:	**MS B. HAIPINGE** APPEARING FOR LORENTZANGULA INC.