REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I3301/2011

In the matter between:

SYGRIED NAMHILA **PLAINTIFF**

and

TOBIAS JOHANNES **DEFENDANT**

Neutral citation: *NamhilavJohannes*(I3301/2011) [2013] NAHCMD 50 (28January2013)

Coram: GEIERJ
Heard: **24January 2013**
Delivered: **28January 2013**

Flynote: Sanctions in terms of Rule 37(16) – When to be imposed – After defaulting in various respects with the case management rules and various non-compliances with case management rules court ordering hearing for purposes of determining the lawfulness or not of such non-compliances –

At such hearing and after considering the explanations offered by the defendant's legal practitioner court finding that no 'lawful excuse' for any of the non-compliances had been established – Court then proceeding to consider what sanctions to be imposed –

Court finding that the ultimate issue to be determined was which of the possible sanctions would befit the occasion in the sense that such sanction would also be ‘just’ –

In this process court finding that it was clear that thecourt -in most instances would - as a point of departure -avoid imposing a sanction that would, so- to- speak, shut the doors of the court to a litigant – Court thus departing from this premise– History of matter however showing that a previous punitive costsorder *de bonipropriis* had no deterrent effect given the subsequent ‘serial non-compliances’ with the court’s rules and orders by defendant’s legal practitioner – Punitive costs order thus no longer an option –

Question thus arising whether defendant’s legal practitioner’s remissness in the matter should be attributed to his client or not? – Court findingthat the limit beyond which a litigant cannot escape the results of his legal practitioner's lack of diligence or the insufficiency of the explanations tendered had been reached and that to hold otherwise might have a disastrous effect upon the observance of the rules of this court, the court’s orders and the objects and purpose of the case management process in general –

Court therefore imposing the sanctions contemplated in Rule 37(16)(iii) of the Rules of Court – Court also ordering the defendant’s legal practitioner to bear the resultant costs *de bonispropriis* at the same time referring the conduct of defendant’s legal practitioner to the Law Society of Namibia for investigation -

Summary: See flynote – the facts appear from the judgment

ORDER

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1. The defendant’s rescission and recusal applications are dismissed in terms of Rule 30(16)(iii);

2. The defendant’s legal practitioner Mr T.N. Mbaeva, is to bear the resultant costs de *bonispropriis;*

3. Mr T.N Mbaeva’s conduct in this matter is to be referred to the Law Society of Namibia for investigation.

JUDGMENT

GEIERJ:

[1] ‘The case management rules represent a radical departure from the civil process of old’.[1]

[2] The perimeters of the objectives and the obligations imposed thereby have been in encapsulated by the new rules as follows:

‘Objectives of case management:

1A. (1) The objectives of case management of an action or application in theserules are –

(a) to ensure the speedy disposal of any action or application;

(b) to promote the prompt and economic disposal of any action or application;

(c) to use efficiently the available judicial, legal and administrative resources;

[1]See : *De Waal v De Waal* 2011(2) NR 645 (HC) at page 648 paragraph [6]

(d) to provide for a court control process in litigation;

(e) to identify issues and dispute at an early stage;

(f) to determine the course of the proceedings so that the parties are aware of succeeding events and stages and the likely time and costs involved;

(g) to curtail proceedings;

(h) to reduce the delay and expense of interlocutory process;

(i) to separate the adjudication of interlocutory motions from that of the merits to be heard at the trial;

(j) to provide for the better and more practical and more timely production of evidence by expert Witnesses;

(k) to provide for the production of discovery of documents to a more convenient, practical and earlier time.

(l) to ensure the involvement of the parties before the initial case management conference by the preparation of a case management report; and

(m) to identify as soon as practical firm dates for particular steps as well as for the trial of an action or hearing of an opposed motion.

4. The objectives of case management set out in this rule apply to rules 35 and 36 of the Rules.

Obligations of parties and their Legal Practitioners.

1B. The parties to an action or opposed motion and their legal practitioners, if they are represented, must –

(a) assist the managing judge in curtailing the proceedings;
(b) comply with rule 37 and other rules regarding judicialcase management;
(c) comply with any direction given by the managing judge at any case management conference or status hearing; and

(d) attend all case management conferences, pre-trial conferences and status hearings caused to be arranged by the managing judge.'[2]

[3] It is against this background that the history of this matter leading up to this hearing - directed by myself - for the consideration of the imposition of sanctions, if any, must been seen.

THE HISTORY OF THE MATTER LEADING TO THE SANCTIONS HEARING

[4] Summons in this matter was issued during October 2011. The matter was defended and a request for further particulars was filed on 6 December 2011. A Notice of Bar was delivered on 8 December 2011, in response to which the defendant purportedly tried to deliver his plea by fax. Only on the 13th of January 2012 was such plea actually delivered as is required by the rules.

[5] In such circumstances, the plaintiff launched an application for default judgment on 19 January 2012, set down for 27 January 2012. A notice to oppose the default judgment was filed on 20 January 2012. On the 27th of January 2012, the matter was removed from the Motion Court Roll and it was ordered that the matter be assigned to a managing judge.

[6] As a result, Mr Justice Swanepoel, who originally was assigned to manage this case, issued the relevant case management notices on 3 February 2012, setting the matter down on the 20th of March 2012 for an initial case management hearing.

[7] On the 28th of March the matter was called before Damaseb JP, where the defendant appeared in person and Mrs Klein appeared on behalf of the plaintiff.

[8] Mrs Klein duly informed the court on that date, that the defendant had been placed in bar as service of the plea had not been proper in that it was not rule-

[2] *De Waal v De Waal* 2011(2) NR 645 (HC) at pages 647 - 648 paragraph [5]

compliant, that this was communicated as being unacceptable by letter written to inform the defendant of this.The plaintiff as stated above had applied unsuccessfully for default judgment in the interim. She also pointed out to the Learned Judge President that no application for the upliftment of bar had been made.

[9] The court indicated to Mrs Klein that it would afford the defendant, who was unrepresented, an opportunity to uplift the bar.

[10] After explaining the importance of engaging legal representation to the defendant, the defendant indicated to the Judge President that he wanted to go and engage the services of a lawyer.

[11] He was told that the matter would be postponed to 22 May 2012 before another Judge and that he should ensure to be there on the day and that he should inform his lawyer about that date. The defendant indicated that he understood.

[12] On the 22nd of May the matter was called before me for the first time, the file having been allocated to myself in the interim.

[13] Both Mrs Klein and the defendant appeared on that day.

[14] During that hearing I endeavoured to explain to the defendant the meaning and consequences of having been placed in bar. The defendant was advised again that he had to bring an application for the upliftment of the bar and that the court would give him the opportunity to do so,that such application would, however, have to be brought before the following Tuesday, failing which the plaintiff would be allowed to apply for default judgment.

[15] It was again recommended that defendant seek the assistance of a legal practitioner.

[16] The matter was then postponed to the 29th of May 2012 at 08h30 hours on the following terms:

'The matter is postponed to 29 May 2012 at 08:30 hours to enable the plaintiff to apply for judgment by default, alternatively to deal with the defendant's application for the removal of bar'.

[17] When the matter was called on the 29th there was no appearance on behalf of the defendant and after the defendant's name was called out by the court orderly and after Mrs Klein had assured the court that no application for the upliftment of bar had been received by her offices - there was also none on the court file - the court grantedjudgment by default, as claimed.

[18] This judgment prompted the presently pending rescission application, which was launched on 22 June 2012.

[19] This application was opposed. After affidavits had been exchanged between the parties - and on 3 September 2012 - and under the hand of Mbaeva and Associates - a Notice in terms of Rule 37(1)(B) was received by the Registrar requesting the allocation of the matter to a managing judge.

[20] I might pause to add that no formal notice of representation in terms of the Rules of Court was ever filed by Mbaeva and Associates, although simultaneously with the filing of the rescission application a special Power of Attorney authorising Mr Mbaeva to act on defendant's behalf was filed.

[21] In responsecase management notices, in terms of Rule 37(9), for a status hearing, were issued by the court for the 13th of November 2012.

[22] As on the said day there was no appearance on behalf of the defendant or his legal practitioner it was ordered that:

'1. The defendant's legal practitioner is to file an affidavit on or before the close of business of 16 November 2012, explaining his non-compliance with the case management notice dated 12 October 2012 and his non-appearance at today's status hearing and to show cause why, any of the sanctions contemplated by Rule 37(16)(i) to (iv) should not be applied.

2. The matter is postponed to 20 November 2012 at 08h30 to determine the imposition of sanctions, if any.

3. The wasted costs of today stand over until such date.'

[23] Mr Mbaeva duly filed the requested affidavit explaining that he did not have a copy of the court roll, and that he had actually come to court to see in which court the matter would be heard – he however had left his gown and files at the office and apparently only wore a waist coat. As time was "ticking away" he phoned his messenger to bring his gown and files. At one point he even entered the court room only dressed in his waist coat, but exited again. After receiving his gown he appeared in another matter. He then learnt that his other case, the present one, had already been called and had been disposed of already.

[24] It needs to be pointed out that this affidavit of the 16th of November 2012 - which Mr Mbaeva had filed with the court, in response to the court's order of 30 November - had, however, not been served on the plaintiff's legal practitioners.In such circumstances, the court then issued the following order on 20 November 2012:

'1. The defendant's legal practitioner is directed to serve the affidavit which he filed in compliance with the case management order of 13 November 2012 on the plaintiff's legal practitioner as soon as possible.

2. The defendant's legal practitioner is to file a further affidavit on or before the close of business of 23 November 2012, explaining his non-appearance at today's case management hearing and to show cause why, any of the sanctions contemplated by Rule 37(16)(i) to (iv) should not be applied.

3. The matter is postponed to 27 November 2012 at 08h30 to determine the imposition of sanctions, if any.

4. The issue of wasted costs of 13 November 2013 also continues to stand over for determination on that date.

5. The Defendant is to pay the wasted costs occasioned by today's postponement.'

[25] In non-compliance with the court's order Mr Mbaeva filed the second requested affidavit not on the 23rd of November 2012 as directed but only on the 26th.

[26] Again he failed to appear in court on the 27th of November 2012.

[27] At the request of Mrs Klein the matter was then postponed to the 4th of December 2012 for a case management hearing and the court issued the following order for that date:

'1. The matter is postponed to 4 December 2012 at 08h30 for a case management hearing.

2. The rescission application is postponed to 16 January 2013 at 10h00 for hearing.

3. The parties are to file their heads of argument in accordance with the applicable Practice Directives.

4. The defendant's legal practitioner Mr Mbaeva is to pay the plaintiff's wasted cost occasioned by the late appearances on the 30th of October 2012, 20th and 27th of November 2012,*de bonispropriis*.'

[28] On the 4th of December 2012 Mr Mbaeva for the first time graced the court with his presence. He indicated then that he also intended to bring a recusal application on behalf of his client.

[29] In such circumstances and because of the nature of the intended application the following further case management order was made:

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'1. The rescission application continues to be set down on 16 January 2013 at 10h00 for hearing.

2. The defendant is granted leave to file his application for the recusal of the presiding judge on or before the close of business of 11 December 2012.

3. The defendant is to set down such application also for hearing on 16 January 2013 at 10h00.

4. Any failure to comply with the obligations imposed on the parties by this order will entitle the other to seek sanctions as contemplated in Rule 37(16) (i)-(iv).

5. In any event, any failure to comply with any of the above directions will *ipso facto* make the party in default liable for sanctions, at the instance of the other party or the court acting on its own motion, unless it seeks condonation thereof not less than 5 court days before the next scheduled hearing, by notice to the opposing party.'

[30] When the matter was called on the 16th of January 2013 it appeared that the defendant's legal practitioner Mr Mbaeva had failed:

a) to paginate, index and bind the court file;
b) to file heads of argument within the prescribed time periods - he delivered his heads of argument only on the morning of the hearing;
c) to file an application for the condonation of the late filing of the defendant's heads of argument and his failure to index the court file;
d) to deliver the rescission application on or before the date as directed by the court order of 4 December 2012;
e) to seekcondonation for such late filing in accordance with paragraph 5 of the order of 4 December 2012.

[31] In such circumstances, both the recusal and rescission applications were struck from the roll.

[32] The following further orders were also made on that day:

'2. Counsel for the applicant/defendant is to file an affidavit on or before the close of business of 18 January 2013, explaining why applicant/defendant failed:

2.1 To participate in the creation of the case management report.

2.2 To meaningfully participate in the case management process.

2.3 To paginate, index and bind the court file in accordance with the applicable practice directive.

2.4 To file his heads of argument within the prescribed time period as per the applicable practice directive.

2.5 To file an application for condonation for the late filing of his heads of argument.

2.6 To seek condonation for the non-compliance with the case management orders dated 27 November 2012 and 4 December 2012, in accordance with paragraph 5 of the case management order of 4 December 2012.

3. The matter is postponed to the 24th of January 2013 at 08h30 to determine the imposition of sanctions in terms of Rule 37(16) (i) – (iv) of the Rules of the High Court, if any.

4. Today's wasted costs and the scale thereof stands over for determination on such date.

5. Any failure to comply with the obligations imposed on the parties by this order will entitle the other to seek sanctions as contemplated in Rule 37(16)(i)-(iv).

6. In any event, any failure to comply with any of the above directions will *ipso facto* make the party in default liable for sanctions, at the instance of the other party or if the court acting on its own motion, unless it seeks condonation thereof before the next scheduled hearing by notice to the opposing party.'

[33] Before dealing with the further affidavit, hereinafter referred to as the ‘sanctions affidavit’, which Mr Mbaeva had been ordered to file, I pause to point out that even at this stage, such affidavit was not filed by the close of business of 18 January 2013, as directed, but only on 21 January 2012.

THE GENERAL DEFENCES RAISED

[34] In the sanctions affidavit Mr Mbaeva pointed out at the outset that ‘of late’ he has been overburdened by his workload, which cannot be delegated to other legal personnel. He also made the point that he has been subjected to some form of ‘double jeopardy’ in respect of the sanctions already imposed on him.

[35] Before dealing with the explanations offered by Mr Mbaeva point by point, in regard to the various non-compliances as listed in the court order of 16 January 2013, it is however, convenient to dispose of the first two points raised by Mr Mbaeva.

[36] It should also be noted that the plaintiff had filed an answering affidavit in opposition to Mr Mbaeva’ssanctions affidavit in which,inter alia, the point was made that it constitutes unprofessional conduct on the part of a legal practitioner, to take on more work than he or she can handle and thereby to cause prejudice to his client. The point was also crisply made that an over-heavy work load should never be allowed as a lawful excuse for any legal practitioner’s culpable remissness.I agree.[3]

[37] The second point made by Mr Mbaeva can also speedily be disposed of with reference to the above set out case history.

[38] The only sanction imposed on Mr Mbaeva up to now - unless one considers the orders to file affidavits and explanation for the various non-compliances as a sanction - was the punitive cost order granted against Mr Mbaeva on a scale *de bonispropriis* on 27 November 2012.

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[3]ee for instance : ‘Legal Ethics’ by the learned author Lewis on page 74 paragraph 70 and page 120 at paragraph 23.

[39] It appears immediately that no such sanctions in terms of the case management rules for any of Mr Mbaeva's subsequent non-compliances were imposed.

[40] On the contrary, the court order of 16 January 2013 expressly set out in respect of which non-compliances the imposition of 'further' sanctions, if any, would now be considered.

[41] All the listed failures, save maybe for the overlapping request to explain the overall failure to meaningful participate in the case management process, occurred subsequent to the 27th of November 2012. It becomes clear in such circumstances that the so called 'double jeopardy' defence cannot succeed.

[42] Before dealing with the other grounds on which Mr Mbaeva sought to ward-off sanctions, I should also mention that, in argument, Mr Mbaeva initially had no submissions to make and that he solely relied on the content of the sanctions affidavit and also a further affidavit which he had filed in explanation of the late filing of the sanctions affidavit.

[43] Mr Jones who appeared on behalf of the plaintiff generally submitted that Mr Mbaeva had made himself liable to the sanctions contemplated by Rule 37(16) (i)-(iv) on his own admission and submitted that the 'new rules' had been on operation for some time and that, therefore, 'the honeymoon was over' and that in that regard the time for leniency had passed, as'the business end', for compliance with the rules, had arrived.

[44] Given the remissness of the defendant's legal practitioner, the dismissal of the applications and a cost order *de bonispropriis*was warranted.

[45] He referred the Court to the case of *Windhoek Truck &Bakkie cc v Green Square Investments 106 CC*2011(1) NR 150 (HC) which made it clear thatthere was a clear duty on alegal practitioner to comply with the court's rules[4].

[46] In this regard he also relied on the decision of *Nedbank Ltd v Louw[5],*a Labour Court decision were Henning AJ stated

"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."[6]

[47] In reply Mr Mbaeva submitted that it would not be fair to strike the defendant's applications. His client's defence had been set out in the plea, which had been filed and he urged the court to get to the substance of the case rather than to become entangled in interlocutory matters, and that the doors of the court should not be shut on his client.

[48] When questioned by the court as to what type of order should be made in the circumstances - and after it was pointed out that the court file was still in a mess as it still had not been paginated, indexed and bound - Mr Mbaeva requested that he should now be given the opportunity to do this by a said date,that a hearing date for the recusal and the rescission applications should be set and that the costs of the day should be awarded on an ordinary scale.

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[4]At p 155 paras [11] – [12] were Botes AJ remarked :'[11] In this court's experience it seems that there are a growing number of legal practitioners that do not comply with the rules of court. Such failure undermines the practice and administration of justice and as such it is incumbent on the courts to sound a stern warning that any practitioner whose conduct falls short of the normal required practice may incur the displeasure of the courts and may attract an exemplary costs order.
[12] It has been stated that it is of the utmost importance that the rules and practice of the courts must be observed to facilitate due and proper compliance, since non-compliance merely encourages casual, easy-going and slipshod practice which often leads to compromising the highest standards of practice which the courts require of practitioners…'.

[5]2011 (1) NR 217 (LC)

[6]At p219 para [2]

[49] I now turn to consider Mr Mbaeva's explanations as offered in the sanctions affidavit.

THE EXPLANATION OFFERED AD PARAGRAPH 2.1 OF THE ORDEROF 16 JANUARY 2013

[50] In this regard Mr Mbaevastated :

'I wish to record that I did not entirely fail to participate in the creation of the Case Management report as I only came on record on the 28th of May 2012.**Refer to my notice of representation filed of record**.

I can only confirm that Plaintiff served their initial Individual Case Management Report on the 29th of November 2012.

I do not also know why the said report was served on me as a similar report dated 14th March 2012 was already served on the defendant himself long before I came on record.

I further submit I did not fail to participate in the creation of the Case Management Report specifically on the 29th of May 2012 as that date is the genesis of the Rescission Application.

Further to the above, I wish to add that sanctions were already imposed on me in relation to the 30th of October 20th and 27th of November 2012.'

[51] With respect, it appears immediately that this response is totally misplaced. While it is correct that there was a previous case management report filed long before Mr Mbaeva started to act for the defendant, the circumstances then beingtotally different to those that became of relevance during November/December 2012, he had now clearly become obliged, by the order of the 27th of November 2012, to participate in the creation of a further case management report for purposes of dealing with the launched rescission application, as was required by Rules 6(5A)(b) and (c) of the Rules of Court.

[52] Any reference to further sanctions could not relate to the punitive costsorder already imposed by then as the obligations on Mr Mbaeva to participate in the generation of a further jointcase management report only arose after the hearing of

the 22nd of November 2012. The explanations preferred in this regard are thus without merit.

THE EXPLANATION OFFERED AD PARAGRAPH 2.2 OF THE ORDER OF 16 JANUARY 2013

[53] Again I quote from Mr Mbaeva sanctions affidavit were he states :

‘I do not understand what is meant by meaningful participation in the Case Management process.

I further do not know what benchmark or yardstick is used in determining the level of participation.

In the premises, I am unable to explain myself on this point.

I wish to record here that I am willing to explain myself but unable to do so due to the unclarity of this paragraph’.

[54] This explanation surely is one which cannot be accepted from a legal practitioner who has been in practice for some time.

[55] Mr Jones rebutted these submissions with reference to the clear obligations imposed upon the parties and as set out in the case management rules with particular reference to Rule 6(5A). He submitted further that the particular rule sets out in detail what ‘meaningful participation’ in the case management process regarding applications entails.

[56] I can only but agree. Any reference to what is set out in the referred to rule will reveal what obligations are imposed on legal practitioners and the parties in this regard. This rule, therefore, also sets the yardstick of participation and the level of participation which is required. Mr Mbaeva simply had to look and have reference to the applicable Rules of Court in order to meaningfully respond and explain his non-participation in the case management process throughout.

THE EXPLANATION OFFERED AD PARAGRAPH 2.3 OF THE ORDEROF 16 JANUARY 2013

[57] I quote,

‘I wish to record that this paragraph is vague and embarrassing as it does not specify which part of the court file is referred to.

In any event, Plaintiff bore the bulk of obligation to paginate and to index the court file.

If it was the intention of the Honourable Managing Judge to draw my attention to the part of the court file in which the defendant is *dominuslitis*, then I deeply regret my non-compliance and undertake to oblige before the 24th of January instant.’

[58] This response is astounding. Mr Mbaeva is not a novice. On his own version he is inundated with work. Instead of coming clean and admitting his remissness, he claims in his defence that the court’s request to explain why he failed to paginate, index and bind the court file is vague and embarrassing.

[59] The question arises why an experienced legal practitioner would feign ignorance of the applicable Practice Directive 31 and why he would try and shift the blame for the messy state of the court file onto his opponent.

[60] The answer to this question must be that he has either failed to acquaint himself with the duties imposed on alegal practitioner by the Practice Directives or that he has simply not complied with them and has contrived an excuse. It becomes clear that this explanation also has no merit.

<u>THE EXPLANATION OFFERED AD PARAGRAPHS 2.4 and 2.5 OF THE ORDEROF 16 JANUARY 2013</u>

[61] In this regard Mr Mbaeva states, and I quote from the sanctions affidavit :

‘As submitted in court on the 16th of January 2013, I only found the Respondent’s Heads of Argument on my table in January upon my return from the December holidays.

I only concentrated on making sure that my Heads of Argument were ready before trial and overlook the fact that I also had to ask for condonation for the late filing of Heads.

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I have to admit in honesty though that I was perhaps under pressure of work and just failed and or forgot that I was supposed to file my Heads of Argument before the Respondent.

I submit, however, that striking the Heads will not be in the interest of both parties.

I further submit that it will unjust and unfair for the applicant/defendant to indirectly bear the effects of any of the sanctions envisaged by 3 Rule 37(16) (i)-(iv)'.

[62] What Mr Mbaeva fails to mention is that the respondent's heads of argument were hand delivered and received by his office already on the 17th of December 2012. The respondent only had to file such heads by the 2nd of January 2013. The delivery of such heads some four daysbefore the applicant/defendant had to deliver his heads demonstrates that he simply ignored the documentation delivered to his offices, if one were to believe that he only found the respondent's heads on his desk, on his return – one month later - on 16 January 2013 when he came back from his holidays.

[63] Again the explanation that he overlooked the requirement to file an explanation, as required by the Practice Directives, is an explanation that cannot be accepted from a legal practitioner who frequently appears in the courts and who should thus be acutely aware of what is required of him or her.

[64] It is even more astounding that Mr Mbaeva attempts to persuade the court to accept that it was perhaps the pressure of work that made him fail to appreciate that he was supposed to file the applicant's heads of argument before the respondent. This explanation just has to be heard to be rejected!

[65] I will return to the remainder of the submissions made in this paragraph in the course of dealing with the imposition of the sanctions.

THE EXPLANATION OFFERED AD PARAGRAPH 2.6 OF THE ORDEROF 16 JANUARY 2013

[66] I quote again from the sanctions affidavit. : Here Mr Mbaevastates :

'I repeatedly read paragraph 5 of the order of 4 December 2012 but could not understand its effect.

In my view, this paragraph relates to paragraphs 1, 2, 3, and 4 of the order of the 4th of December 2012 with which I fully complied.

I, therefore submit that I do not need to make any application for condonation in terms of paragraph 2.6 of the orders of the 4th of December 2012 and paragraph 1, 2 and 4 of the order of the 27th of November 2012.

As for the late filing of the application for recusal, I am informed by my office clerk Jessica Tjiuongua that she could not file said application on the 11th of December 2012 because she was prevented by the security official (policeman on duty) to enter the Registrar's Office as it was already after 15h00'.

[67] Again Mr Mbaeva simply feigns his non- understanding of the court orders.

[68] It appears clearly from both the referred to orders of 27 November and 4 December 2012 what obligations the court imposed on the parties and their legal practitioners.

[69] The order of the 27th of November 2012 postponed the case to the 4th of December 2012 expressly for a case management hearing.

[70] That should have signalled to Mr Mbaeva, who is deemed to know the rules of court, that it was incumbent on him to participate in the generation of a joint case management report. It should be kept in mind that the lis between the parties at the time was the rescission application launched by the defendant in response to the default judgment granted against defendant on 29 May 2012.

[71] In this regard the requirements of Rule 6(5A) had to be met.

[72] It appears that Mr Mbaeva failed to participate in this process on behalf of his client.

[73] In such circumstances, the plaintiff's legal practitioners duly filed unilaterally, what they styled an 'individual case management report', in terms of Rule 6(5A) (c) and (d).

[74] The non-participation in the generation of a jointcase management report constitutes a material non-compliance with the case management rules and such inaction goes directly against the grain of the case management process and its obligations.

[75] On 4 December 2012 the defendant was also directed, by order, to file his intended recusal application on or before the close of business of 11 December 2012. In non-compliance with also this order, the said recusal application was only delivered on 12 December 2012.

[76] The court'sorder, however, directed further, that 'any failure to comply with the obligations imposed on the parties by this order will entitle the other to seek sanctions as contemplated in Rule 37(16) (i)-(iv). In any event, any failure to comply with any of the above directions will *ipso facto* make the party in default liable for sanctions at the instance of the other party or the court acting on its motion, unless it seeks condonation thereof not less than five court days before the next scheduled hearing by notice to the opposing party'.

[77] It becomes clear immediately that the court's order throws a'lifeline' to a litigant who, for some or other reason, has failed to comply with the court's directive, and who, by furnishing an explanation, which if accepted, would be able to escapefrom the sanctions regime provided for in Rules 37(16) (i)-(iv).

[78] The order and its effect, in my view, is clear. Yet Mr Mbaeva once again pleads ignorance. Clearly and despite his protestations to the contrary, he has not complied with Case Management Rule 6 (5A) and paragraph 2 of the order of 4 December 2012. He has also not complied with the order of the 4th of December by filing the required condonationaffidavit - on five days' notice - through which the

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Court and his adversary would have been placed in the position to consider the nature and degree of the non-compliance and to understand how it came about and to enable and formulate a meaningful response thereto.

[79] Mr Mbaeva's submission that he need not make any application for condonation can accordingly not be upheld.

[80] As regards the affidavit of his office clerk, Mrs Tjiuongua, it can only be stated that there was nothing untoward by the security personnel on duty at the court to prevent her from filing the application, as this was after 15h00 and thus at a time that the Registrar's office is no longer open for the filing of court process.

[81] Also this must have been within Mr Mbaeva's knowledge and he should have planned the filing of the contemplated application accordingly. The explanation offered on this count can thus also not be accepted.

DO THE EXPLANATIONS OFFERED AMOUNT TO A 'LAWFUL EXCUSE'

[82] The cardinal question that arises in the circumstances where the matter was postponed for the consideration of the imposition of sanctions in terms of Rule 37(16), if any, is whether the explanations offered by Mr Mbaeva amount to a 'lawful excuse'[7].

[83] It appears from what has been set out above that each and every explanation preferred was considered and was found to be without merit.

[84] In such circumstances the conclusion that the various non-compliances with the case management rules and orders were without acceptable excuse and thus unlawful is inescapable.

THE QUESTION OF SANCTIONS

[7] *Loubser v De Beers Marine Namibia (Pty) Ltd* (I 341/2008) [2012] NAHCMD 68 (30 October 2012) at paras [3] – [4] reported on the SAFLII website at : http://www.saflii.org/na/cases/NAHC/2012/308.html

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[85] What remains to be determined is what would amount to a just sanction? Although the sanctions catalogue set by Rules 37(16) (i)-(iv) is not limited to thethere spelt out sanctions, it appears immediately that the sanctions set out and sub-rules (i) to (iii) are fairly dramatic in the sense that they will impact on a party's ability to support or oppose claims or defences or from introducing evidence in support of designated issues. The court may even strike out pleadings or parts thereof including a defence, exception or special plea. It may even dismiss a claim and enter final judgment.

[86] By that same token, although not expressly stated, such sanctions would clearly also include the power to strike or dismiss the defendant's applications for rescission and recusal, as in this instance. This would also include the power to refuse to allow the defendant from - as the non-complying party - to bring said applications.

[87] The ultimate issue to be determined is which of the possible sanctions would befit the occasion in the sense that such sanction would also be 'just'?

[88] It is clear that a court in most instances would, as a point of departure, avoid imposing a sanction that would, so- to- speak, shut the doors of the court to a litigant.

[89] Departing thus from this premise - and keeping in mind that also Mr Mbaeva urged the court not to penalise his client 'for his sins' - the costs sanctions contemplated in Rule 37(16)(iv) come to the fore.

[90] I would have been inclined to impose a punitive costsorder on the defendant or rather his legal practitioner if it were not for the punitive costs order already imposed on the defendant's legal practitioner on 27 November 2012 were Mr Mbaeva was already ordered to pay the plaintiff's wasted costs, as occasioned by his late appearances on the 30th of October and 20th and 27th of November 2012 *de bonispropriis*.

[91] It appears immediately that even the ultimate of costsorders against the defendant’s legal practitioner had absolutely no deterrent effect given all the subsequent ‘serial non-compliances’ sketched above.

[92] I have already found that Mr Mbaeva’s explanations do not amount to lawful excuses as required by the Rule. It is also clear that the ‘serial non-compliances’ are not to be attributed to the defendant. It is the defendant that has been ‘short-changed’.

[93] Initially he tried to resist the plaintiff’s claims with the assistance of the African Labour and Human Rights Centre. When it was pointed out to him that Mr August Maletzky, whom the defendant regarded as hislawyer, was not an admitted legal practitioner and that he should therefore engage the services of an admitted legal practitioner, the defendant entrusted Mr Mbaeva with his case. This choice proved unfortunate, as the history of Mr Mbaeva’s involvement shows.

[94] Should Mr Mbaeva’s remissness in this matter, therefore be attributed to his client or not?

[95] In this regardthe Appellate Division in *Moraliswani v Mamili*[8], per Grosskopf JA, cited with approval[9] what was said by Steyn CJ in *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C:

> 'There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court.'[10]

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[8] 1989 (4) SA 1 (A)

[9] At p 10 at A - C

[10] See also *Immelman v Loubser en 'n Ander* 1974 (3) SA 816 (A) 824A - B and *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799F

[96] In my view that limit has been reached. The business of this court has come to a halt or at least has been severely hampered by MrMbaeva's flouting of thecase management rules and the case management orders issued in this matter.

[97] Damaseb J P has stated in no uncertain terms that:

'The salutary rationale behind the new case management system is to ensure that the court's time and resources are deployed more productively.'[11]

[98] I respectfully associate myself also with what the Learned Judge President has stated further in this regard and I quote :

'As this court said although in a different context, but in terms that bear resonance in the present case :

in my view, the proper management of the roll of the court so as to afford as many litigants as possible, the opportunity to have their matters heard by the court is an important consideration to be placed in the scale in the court's exercise of the discretion, whether or not to grant an indulgence. The time taken up by wasteful litigation which could more productively and equitably have been deployed to entertain other matters must, in my view, be an equally important consideration in determining whether or not to condone the failure to comply with the Rules of Court and orders of the court.It is a notorious fact that the roll of the High Court is overcrowded.Many matters deserving of placement on the roll do not receive court time, because of that litigants and their legal advisors must therefore realise that it is important to take every measure reasonably possible and expedient to curtail the costs and length of litigation and to bring them to finality in a way that is least burdensome to the court.

In the interest of litigants and the public as a whole, not just the particular ones before court at any given time, the time has come for tightercourt control of litigation and stricter adherence to timetables and court directions'…[12].

[99] Finally, I take into account that legal practitioners and the parties that they represent have been put on notice, that the courts will no longer countenance the unlawful failure of parties and/or theirlegal practitioners to comply with case

[11]See *Hübner v Krieger* 2012 (1) NR 191 (HC) at 192C at [1]
[12]*übner v Krieger*op citat page 192 at para [2]

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management rules and case management orders and that the failure to adhere thereto will attract sanctions.

[100] This emerges from what was stated in *De Waal v De Waal*2011(2) NR 645 HC - also by the Learned Judge President - where the Court made it clear in no uncertain terms that:

> Litigation is now no longer left to the parties alone. The resolution of disputes is now as much the business of the judges of this court as it is of the parties. Courts exist to serve the public as a whole and not merely the parties to a particular dispute before court at a given time. That is not possible if case management directives issued by the court are not respected. Parties and their legal practitioners must realise that the courts are going to impose the sanctions contemplated in subrule (16).[13]

[101] Also in this case I am satisfied that sanctions are warranted. I have already indicated above that the history of this matter has shown that the punitive costsorder already imposed did not achieve the desired result and that the stage has been reached where the defendant cannot escape the results of his attorney's misconduct.

[102] I am accordingly constrained to make the following orders:

a) The defendant's rescission and recusal applications are dismissed in terms of Rule 30(16)(iii);

b) As Mr Mbaeva has shown a reckless disregard for his clients interests and for the proper standard of work that can be expected from a member of the legal profession, I also order that he bear the resultant costs de *bonispropriis;*

c) His conduct in this matter will be referred to the Law Society of Namibia for investigation.

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[13] At p 648 para [6]

HGEIER

Judge

APPEARANCES

APPLICANT/DEFENDANT:	T N Mbaeva Mbaeva& Associates,Windhoek.
RESPONDENT/PLAINTIFF:	Adv JPRJones Instructed by GF Köpplinger Legal Practitioners, Windhoek